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COMPEL PRESIDENT'S TESTIMONY - RESEARCH

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ATTORNEY WORK PRODUCT

COMPEL - PRESIDENT'S TESTIMONY
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**Memorandum** **Office of the Independent Counsel**

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To : K. W. Starr
B. E. Lerman

Date 6/22/95

From : E. H. Jaso

Subject: Legal and political precedents for requesting or compelling President's testimony

INTRODUCTION/SUMMARY

This memorandum seeks to compile and summarize the legal and historical precedents for requesting and/or compelling a sitting President to testify in an investigation or trial. The precedent is well- and long-established that the President, like any other citizen, may be compelled by a court to testify in a court proceeding or produce documents in his possession. However, the occasions for such testimony are rare, and the courts have closely scrutinized subpoenas and motions to compel out of respect for the institution of the Presidency. Generally, courts require the requested testimony or evidence to be demonstrably relevant to the ongoing trial or investigation, unavailable elsewhere, and devoid of information which, if revealed, would be harmful to national interests or security. The Courts have also endeavored to tailor judicial proceedings so as to permit compliance which does not demand excessive amounts of the President's time or otherwise unduly compromise the President's execution of his duties.

The "Watergate Tapes" cases established that the President has no blanket right to refuse to testify or produce

documents; even where so-called "executive privilege" is invoked, the privilege must be shown with particularity, and the evidence in question reviewed (if necessary) by the court in camera. Although research reveals no cases where the requested testimony involves events occurring prior to (and independent of) the President's having taken office, the fact that such testimony may be (and has been) compelled regarding events taking place in office dictates that, a fortiori, a witness's testimony regarding events preceding his becoming President is properly obtainable, and that executive privilege simply does not extend to such events. The only feasible "executive privilege" objection would be that the President's duties do not permit personal attendance to testify; however, such logistical difficulties have generally been remedied by obtaining the President's testimony on videotape, by deposition, or the like.

## SUMMARY OF LEADING CASES[1]

United States v. Burr

United States v. Burr, 25 Fed. Cas. 30 (No. 14,692D) (Cir. Va. 1807)[2], remains the seminal case regarding the duty of the President to participate in, and subject himself to,

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[1] As this memorandum seeks to give an overview of historical and legal precedent in addition to an analysis and conclusion, the key cases and historical precedents are described in the first part; an analysis follows.

[2] The Burr case comprises several opinions and records of proceedings over more than two hundred pages of West's Federal Cases compilation. Marshall's written opinions on the subpoenas of Jefferson are interspersed within the trial records.

the judicial process. In Burr, Chief Justice Marshall addressed the propriety of compelling a sitting President's testimony by court order. Marshall concluded that "in being summoned to give his personal appearance to testify, the law does not discriminate between the president and a private citizen." Id. at 34. Marshall also sanctioned issuing a subpoena duces tecum to the President. Nevertheless, Marshall recognized that special consideration was due the President in subjecting him to judicial process: "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." 25 F. Cas. at 192. The President could properly object to testifying as inconvenient and incompatible with his properly discharging his duties as Chief Executive, 25 F. Cas. at 34, or object to producing documents containing government secrets or confidential Presidential communications where disclosure would be harmful to the nation's interests. 25 F. Cas. at 191-92. It was the duty of the court to guard against "vexatious and unnecessary subpoenas directed to the President, but there was no general immunity from court process for the Chief Executive." Id. at 34.

1. Assertion of "Executive Privilege"

Aaron Burr, the former Vice President and Army colonel, was on trial for treason in Virginia, accused of leading an unauthorized military expedition down the Mississippi into Spanish territory. Burr identified as critical to his defense a letter from General Wilkinson to President Thomas Jefferson dated



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October 21, 1806, which the President had mentioned in a message to Congress on January 22, 1807. 25 F. Cas. at 31. Burr requested that the court issue a subpoena to the President requiring him to produce the letter. Counsel for the Government, District U.S. Attorney Hay, argued that the letter should not be produced since it was a "private letter" that "probably contained confidential communications, which the president ought not and could not be compelled to disclose"; Hay also contended that the possible disclosure of "state secrets" in the letter would threaten "the national safety." Id. Burr disputed the existence of a general executive privilege against disclosure of any "confidential communications" involving the President, although he conceded that the President had the right to indicate the specific presence of confidential or secret information in the letter, and suggested that such parts deemed sensitive to disclosure need not be read in court. Id. Burr declined to accept production of a copy of the letter, on the ground of authenticity. Id. at 31-32.

Chief Justice Marshall, presiding over the trial with a district judge, held that the President is subject to judicial process to procure his attendance to testify or production of documents in his possession. District U.S. Attorney Hay had conceded in argument that "a general subpoena [ad testificandum] might issue to the president; but not a subpoena duces tecum." 25 F. Cas. at 34. Holding that the President is subject to either type of subpoena, Marshall took



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the opportunity to expound upon the rule that, since a defendant has a constitutional "right to the compulsory process of the court," the obligations of such process is general, "and it would seem that no person could claim an exemption from them." Id. The English rule that "it is incompatible with [the King]'s dignity to appear under the process of the court" is founded upon the "principle of the English constitution that the king can do no wrong"; since the United States Constitution provides for the impeachment and removal of the President from office, no such presumption of infallibility, and of exemption from the judicial process, obtains. Id. While recognizing that the President might defensibly decline to comply with a particular subpoena "because his duties as chief magistrate demand his whole time for national objects", Marshall observed that "it is apparent that this demand is not unremitting"; this objection could only be put forth in response to a subpoena, and could not serve to generally prohibit such orders ab initio.[3] The court has the duty to "protect" the President "from being harassed by vexatious and unnecessary subpoenas," but such intervention, Marshall held, ought properly to come after the issuance of a subpoena, not before. Marshall thus approved the issuance of the subpoena duces tecum et ad testificandum to Jefferson.

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[3] Marshall also noted that English cabinet ministers were subject to judicial process even though their executive duties were equally as "arduous and unremitting" as those borne by the American chief executive. 25 F. Cas. at 34.

Jefferson had sent the Wilkinson letter,[4] along with other documents, to Richmond with Hay, and instructed Hay to produce documents only after redacting "such parts thereof as are, in [Hay's] opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." United States v. Burr, 25 F. Cas. at 190. Hay offered to submit the entirety of the original letter to the court to verify "the accuracy" of his proposed redactions. Id. Burr continued to insist upon production of the entire letter. Id. Marshall allowed that certain documents in the President's possession could be withheld "because of the manifest inconvenience[5] of its exposure"; and that this might extend to "private letters" which may "be written to him in consequence of his public character, and may relate to public concerns." The party seeking such a sensitive document could nonetheless obtain it, but "[t]he occasion for demanding it

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[4] When Burr again demanded production of the October 12, 1806 Wilkinson letter, Hay declared that he had lost the original, but had a copy. 25 F. Cas. at 189. Burr insisted upon the original, and Marshall agreed that a copy only would be admissible if the original were proven to be in fact lost. Id. Burr then obtained a subpoena for production of another letter from Wilkinson to Jefferson he thought (correctly) to be in Hay's possession, this one dated November 12, 1806. The November 12 letter Hay offered to produce in a redacted form, giving rise to the further commentary regarding Jefferson's orders to Hay described here; Marshall did not make distinctions between the two letters in his opinion on this issue.

[5] Marshall plainly employed the (now) archaic definition of "inconvenient", i.e., "not fitting or proper; inappropriate". See American Heritage Dictionary (Second College Ed. 1985) (definition of "convenient" (archaic)).

ought, in such a case, to be very strong, and to be fully shown to the court before production could be insisted upon."[6]

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[6] Whether dicta in Burr recognizes a general "executive privilege" against disclosure of "confidential communications" within the Executive Branch has been much debated over the years, and culminated in the so-called "Nixon Tapes" cases, where the D.C. Circuit (and subsequently the Supreme Court) rejected the President's assertion, based in part on Burr, of a generalized executive privilege, not subject to judicial verification or review, covering all presidential communications. In Burr, Marshall seemed to reject Hay's original offer to submit his redactions for judicial review, instead insisting that the President himself must make the call, describing this as the President's ability to "declin[e] to produce" sufficiently sensitive documents. "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 F. Cas. at 192. This language suggests neither full disclosure in camera for the court to review the "privileged" documents, nor an absence of judicial review, but instead (perhaps) the submission by the President of a description of each withheld document and an explanation of the grounds upon which each is considered sensitive, much like a modern-day "Vaughn log", a type of privilege log which the Government may submit to a court for review in response to a FOIA request in lieu of the actual documents. The teaching of Burr remained disputed by the judges in Nixon, who cited (selectively) the same passages from Marshall's opinion both in support of, and against, executive privilege. Compare 487 F.2d at 710 (per curiam opinion) with id. at 786 (Wilkey, J. dissenting). Ultimately, Marshall did not (in this writer's view) make clear what role, if any, the courts are to have in reviewing the President's decision. Note that in his letter to Hay (read to the Court) responding to the subpoena Marshall had authorized, Jefferson "reserv[ed] the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated." 25 F. Cas. at 64. Marshall did not respond to this letter, perhaps because Burr did not continue to seek either of the Wilkinson letters. For a detailed argument that Burr does not recognize (let alone establish) executive privilege, see Berger, Executive Privilege at 361 (Harvard University Press 1974). The Burr dispute ultimately was rendered academic by the Supreme Court in Nixon, which simply declared executive privilege claims subject to judicial review. See infra n.8.

The Chief Justice then went on to express disapproval of the President's delegating the task of redaction to a subordinate; "[o]f the weight of the reasons for and against producing it, he is himself the judge." Id. at 192. The proper procedure, Marshall explained, would have been for the President, "when he transmitted [the letter], subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them. . . ." Id. at 192. In that circumstance, "all proper respect would have been paid to it." Id. Finding that Jefferson thus did not object to the letter's production, Marshall ordered it produced, but not made generally public. The President subsequently sent the court a "certificate" indicating which parts of the Wilkinson letter should not be made public. Id. at 193.[7]

2. Jefferson's Personal Testimony

In his letter to the court responding to the subpoena ad testificandum, Jefferson stated his objection to the request for personal attendance and testimony, but largely on the ground that the necessary travel and time would unduly interfere with his duties:

> I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would

[7] Neither Wilkinson letter was ultimately produced, and Burr was acquitted for both treason and a related misdemeanor charge without further insisting on their production.



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> should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any coordinate authority.

25 F. Cas. at 69. Jefferson did nonetheless offer to give testimony by deposition in Washington. Id. Burr did not move to compel the President's attendance, and the court did not comment on this response.

Watergate

The "Nixon Tapes Cases" represented efforts by the Watergate Special Prosecutors (first Archibald Cox and later his replacement, Leon Jaworski) to obtain tapes of conversations which occurred in the White House offices of the President and his staff, including telephone conversations, which the Prosecutor's Office had reason to believe pertained to the break-in of the Watergate Hotel offices of the 1972 Democratic Presidential Campaign perpetrated by members of President Nixon's campaign staff and persons hired by Nixon staffers, and detailed the subsequent efforts within the White House to "cover up" high level involvement in the burglary. The Special Prosecutor issued

subpoenas duces tecum to the President for the tapes, of which the President had taken personal custody.

1. Assertion of "Executive Privilege"

The President had made public statements that he believed all personal communications between him and his aides were covered by a blanket "executive privilege" of which he was the sole judge. This absolute privilege exists, Nixon stated, and his lawyers later argued in efforts to quash the subpoenas, first, to preserve the necessary candor between President and staff in making Executive decisions, and second, because the separation of powers would be violated by the very exercise of judicial review of the President's decision to exert the privilege.

The Supreme Court in United States v. Nixon, 418 U.S. 683 (1974),[8] rejected outright the asserted blanket privilege as inconsistent with Burr as well as other cases.

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[8] With considerable debate among the judges over the history and meaning of Burr, the Court of Appeals, in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (per curiam), had upheld Special Prosecutor Cox's initial subpoena of the tapes. The President ordered the Justice Department not to appeal, but then offered to produce transcripts of those parts of the tapes he deemed relevant and not privileged. Cox's continued efforts to obtain the actual tapes eventually led to his dismissal, and the appointment of Jaworski, who then renewed the efforts to obtain the tapes. The later subpoenas gave rise to the Supreme Court case. The Supreme Court used reasoning similar to that used by the Court of Appeals majority but with less reliance on Burr. Instead of engaging in the protracted parsing of Marshall's opinions and Jefferson's correspondence which characterized the Court of Appeals' opinions, the Supreme Court cited Marbury v. Madison, 1 Cranch 137 (1803) in rejecting Nixon's argument (based in large part on Jefferson's actions and communications in Burr) that no court was authorized to review a Presidential assertion of privilege. See 418 U.S. at 703.



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While recognizing "[t]he President's need for complete candor and objectivity from advisers" and noting that this concern "calls for great deference from the courts," 418 U.S. at 706, the Court asserted its role as the ultimate arbiter of whether and to what extent any such privilege would apply. "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." Id. at 707. The Court stressed that the President had asserted not a specific "claim of need to protect military, diplomatic or sensitive national security secrets", but an "absolute, unqualified . . . privilege of immunity from judicial process under all circumstances." Id. at 706. The Court concluded that the President's "generalized interest in confidentiality" was outweighed by "the demonstrated, specific need for evidence in a pending criminal trial." Id. at 713.

The Supreme Court did, however, recognize a "presumptive privilege for Presidential communications . . . fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708. The reviewing court is to weigh this privilege against "[t]he need to develop all relevant facts in the adversary system" and the necessity that "compulsory process be available for the production of evidence needed either by the prosecution or by the defense." Id. at 709. With regard to



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specific assertions of executive privilege, the proper course is for the reviewing court to "treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was 'essential to the justice of the (pending criminal) case.'" Id. (quoting Burr, 25 F. Cas. at 192). Where certain materials or portions thereof are found to be privileged, "[s]tatements that meet the test of admissibility and relevance must be isolated; all other material must be excised." Id.

United States v. Fromme

In 1975, Lynette "Squeaky" Fromme, a follower of Charles Manson, approached President Ford in a crowd of people in California, pointed a .45 caliber revolver at him from about two feet away, and pulled the trigger to no effect; the gun apparently misfired. In her trial, Fromme sought to compel Ford's personal testimony in her own defense. United States v. Fromme, 405 F. Supp. 578 (1975). She believed he would testify that he neither heard the hammer of the gun deploy nor heard Fromme say anything immediately thereafter. Id. at 581. Fromme convinced the court that the President's testimony regarding these matters was relevant to showing her lack of intent to kill Ford (she argued that she merely displayed the gun to draw attention to herself to publicize environmental causes). Id.

> [T]he testimony of the President would have a rather high probative value as he was perhaps the most percipient of all witnesses to the alleged crime. For example, the President, in addition to the

> testimony indicated above, could likely testify as to the facial expression and demeanor of the accused at the critical moment.

405 F. Supp. at 581. The Government argued that, since the President had already given a statement that he heard neither a "click" nor any words uttered by Fromme, the testimony would merely be cumulative. Rejecting this argument, the court determined, on the basis of in camera review of other witnesses' testimony, that the President's "unique" testimony was nonetheless required. Id. at 581-82.

The President had not asserted executive privilege. Following Burr and United States v. Nixon, the court stressed that, particularly in the absence of an invocation of privilege, "in appropriate judicial proceedings, documents and other tangible evidence within the very office of the President may be obtained for use in those judicial proceedings." 405 F. Supp. at 582. The court continued: "[W]here the President himself is a percipient witness to an alleged criminal act, the President must be amenable to subpoena as any other person would be." Id.

The court, in light of the burdens upon the President to testify, elected to "'bring' the court to the President" by means of videotaped deposition at which both Government and defense attorneys would be present, as well as a district judge. 405 F. Supp. at 583. The court observed that the videotaped format would permit cross-examination and preserve the President's responses and demeanor for the jury. Id. The



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trial was to commence on November 4, 1975; the court, rendering its opinion on October 24, ordered that the deposition be taken "before October 31, 1975." Id.

Iran-Contra

1. Narrowing the Scope of Subpoenas--Procedure

In litigation arising from the "Iran-Contra" investigation during the Reagan presidency, the courts once again affirmed the President's duty to participate in, and be subject to, the judicial process. John M. Poindexter, charged by Independent Counsel Lawrence Walsh with false statements to and obstruction of Congress, sought by subpoena duces tecum the diaries and notes of then former President Reagan. United States v. Poindexter, 727 F. Supp. 1501, 1502-03 (D.D.C. 1989). Reagan moved to quash the subpoenas, as did the Justice Department on behalf of incumbent President Bush and the Archivist of the United States. Id. at 1503. As was the case in Fromme, neither Bush nor Reagan had formally invoked executive privilege; Poindexter argued that in the absence of such formal assertion, the subpoenas were entitled to no special treatment. Bush and Reagan argued that the court should present them with "the narrowest possible process," reviewing the breadth and relevance of the subpoena before requiring the assertion of executive privilege.

In holding that it would undertake to "narrow" the subpoena to the greatest extent possible without first requiring the formal assertion of executive privilege, the court followed



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the Nixon Court's rule that the courts must be "particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied" when a subpoena is directed to the President. 727 F. Supp. at 1504-05. The court also recognized that the "presumpti[ve] privilege" of executive documents, the "deference and restraint" with which the courts have traditionally approach the imposition of process upon the Chief Executive, the importance of executive privilege to the operation of government, and the sensitivity of the requested materials all militated in favor of having the court first narrow the scope of the subpoena on "nonconstitutional" Rule 17(c) grounds. Id. at 1505. This "bifurcated" procedure, the court reasoned, would avoid unnecessary constitutional litigation regarding the proper extent of the executive privilege, and permit the President and former President to either waive executive privilege, thus mooting any privilege questions, or assert the privilege only with regard to those issues already deemed relevant and appropriate by the court. Id. at 1505-06.

The District Court quashed much of the subpoena on grounds of mootness (documents had already been transmitted to the Archivist and produced therefrom to the Independent Counsel), redundancy, overbreadth and oppressiveness, and lack of specificity. 727 F. Supp. at 1508-10. President Reagan was ordered to produce those materials specified in the surviving portions of the subpoena for in camera inspection by the court. Id. at 1510. The court also permitted the former and incumbent



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Presidents to submit specific objections to production for the court to consider in making its in camera review.[9] Following the review and any subsequent additional quashings, the court indicated that it would require production of the relevant documents at that time, to which Reagan could then assert executive privilege via a renewed motion to quash if he saw fit. At that point, Reagan and Bush would be entitled to defendant's proffer of his anticipated defenses, following the procedure established in Nixon. Id. at 1511.

2. Subpoenas for Testimony

Both Oliver North and John Poindexter, defendants in related Iran-Contra prosecutions, sought the personal testimony of Ronald Reagan in their defense, albeit after Reagan had left office. In North's case, the court determined rather summarily that defendant had not made a sufficient showing that Reagan's testimony was not "necessary to assure Lt. Col. North a fair trial." United States v. North, 713 F. Supp. 1448. 1450 (D.D.C. 1989). The court noted that Reagan had "cooperated with Independent Counsel's investigation to an unusual extent and over a considerable period," and recited numerous evidentiary sources already available to the defendant; the availability of these sources belied defendant's assertion that information on certain

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[9] The court declared its intention to undertake its in camera review without the participation of the parties, rejecting inter alia the Justice Department's suggestion that it would be more appropriate for Reagan to submit a Vaughn-type index than to produce actual documents for in camera review. See 727 F. Supp. at 1506.



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matters was available "only" from Reagan. Id. at 1450. As to North's specific assertion that Reagan had authorized his allegedly criminal actions, the court observed that no evidence already available suggested that he had received such authorization, and that "authorization is not established by atmosphere, surmise or inference," and that Presidential authorization would not, in any case, be a defense. Id.

Poindexter prevailed in his effort to obtain Reagan's testimony in his case, but the court ruled that the former President could testify via videotaped deposition. United States v. Poindexter, 732 F. Supp. 142 (D.D.C. 1990). After reviewing in detail the history of presidential participation in judicial proceedings, the court reaffirmed "the power of a court to require a President to testify." Id. at 146 (citing Nixon, 418 U.S. at 713 and Marbury v. Madison, 1 Cranch 137 (1803)). However, the court noted that the courts "have also sought to exercise this power in a way that would be least damaging to the Presidency or onerous to the particular individual occupying the Office, to the extent that this was possible and consistent with the rights of the litigant who was in need of such testimony." Id.[10]

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[10] The former and incumbent Presidents argued that Poindexter was not entitled to "direct" testimonial evidence of Reagan's involvement where such testimony, albeit in the form of written answers to interrogatories as well as testimony from other top advisers had already been made available. Interestingly, the court responded that while the extent to which President Reagan had willingly cooperated with the investigation did not amount to a waiver of executive privilege, it "surely demonstrate[d] a diminished expectation of confidentiality." 732

As with the demand for documents, former President Reagan had not asserted executive privilege against the subpoena ad testificandum. 732 F. Supp. at 146. Nonetheless, the court rejected Poindexter's argument that, in the absence of any such assertion, a subpoena for the former President's testimony commanded no special treatment. Restating the rule that, with regard to reviewing evidentiary demands made of Presidents, the court must be "meticulous" in enforcing Rule 17(c), id. at 147, the court required that the defense establish, on a prima facie basis, id. at 153, that the requested testimony must be "necessary" to the defense "in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested," id. at 147.

The court had required Poindexter to submit a list of specific questions he intended to ask the President at trial, and to serve the list on the President and the DOJ "so as to afford them the opportunity to litigate whether the defendant's showing is adequate."[11] Reviewing those questions, the court found them to all be generally material to the defense, and noted that many of them related to "one-on-one" conversations between

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F. Supp. at 154.

[11] Defendant did not have to produce a list of the anticipated answers, as the Presidents' counsel had suggested; the court deemed this a threat to defendant's due process rights.

Poindexter and Reagan.[12] However, as with the subpoena for documents, the court narrowed the scope, striking many of the proposed questions for irrelevance, overbreadth, and the like. 732 F. Supp. at 150.

Having decided that Poindexter was entitled to Reagan's personal testimony, the court then considered what the appropriate method of obtaining the testimony should be. Reagan and Bush argued that the testimony could appropriately be had by written answers to interrogatories, a suggestion the court rejected. 732 F. Supp. at 155. Stressing the defendant's Sixth Amendment right to compel and offer testimony, the court noted that this right necessarily entails the presence of witness so that, during testimony, the jury may "observe their demeanor" and the defendant may "forc[e] them to respond spontaneously to questions." The court added that "face-to-face confrontation encourages truthfulness," id. (citing Coy v. Iowa, 487 U.S. 1012 (1988)); "[t]he utility of, and hence the necessity for, the give-and-take of oral testimony is obviously even greater in a criminal case where the liberty of the accused is at stake," id.

The court settled upon videotaped deposition as an appropriate vehicle for Reagan's testimony, rejecting both

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[12] While the court stressed the importance to the defense of obtaining evidence regarding "one-on-one" conversations, the court rejected Reagan's argument that where other persons "might" have been present during a conversation, the President's testimony was not "necessary". 732 F. Supp. at n.29 and accompanying text, 152-53. This conclusion remains in tension with North, where the court emphasized the lack of evidentiary "proof" that Reagan had authorized North's alleged violations of law. 713 F. Supp. at 1450.



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Presidents' contention that it would harm the Nation's international standing for foreign leaders to see a former President testify on television, as well as rejecting Poindexter's insistence that there is no substitute for live testimony. 732 F. Supp. at 155-156. The court noted that Fed. R. Crim. P. 15 permitted the preservation of a witness's testimony in "exceptional circumstances," and observed that the President's situation was much like that of an "unavailable" witness under that Rule and under Rule 804(a). The "extraordinary circumstance" of compelling a President to testify in court[13] justified the "departure from normal criminal procedure." Id. at 157. "[J]udges from John Marshall to John Sirica . . . exhibited a sensitivity for the play in the joints in our tripartite system of government." Id. Further, the likely need for the former President to take frequent pauses in testimony to consult with his counsel (and with "representatives of the incumbent President) regarding assertions of executive privilege made videotaped testimony a more efficient and less disruptive medium for the courtroom proceedings. Id. The court concluded:

> [A] videotaped deposition of the former President, properly conducted, will adequately protect defendant's rights. Most significantly, testimony by way of a deposition will preserve the spontaneity of courtroom testimony.

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[13] Indeed, the court noted, there has never been an occasion where a former or incumbent President has been compelled to testify in a courtroom. 732 F. Supp. at 157.

> The attorneys will be able to examine and cross-examine in their accustomed fashion, and the witness will have to answer immediately, on his own, and in accordance with the usual and customary procedural and evidentiary rules. As the deposition testimony will be videotaped, the witness' demeanor will be fully apparent to the ultimate trier of facts, in some sense in magnified form.

732 F. Supp. at 158-59 (note omitted).

Other Occasions of Presidential Testimony

The following represent historical instances where an incumbent or former President's testimony was sought in connection with a criminal investigation or judicial proceeding.[14] The cases discussed above are not repeated here.

1. United States v. Cooper, 25 F. Cas. 631 (Cir. Pa.) (1800), a seditious libel prosecution brought against defendant for public statements denouncing President Adams, records that the defendant sought a subpoena for the President's testimony. Justice Chase, presiding as circuit justice, refused the request. Chase did, however, permit subpoenas ad testificandum to be issued to members of Congress. Judge MacKinnon cited this in Nixon as "recogni[tion of] the strength of assertions of

[14] Congressional requests for testimony or documents have been omitted for lack of immediate relevance, although it has been argued that the same concerns regarding Judicial compulsion of the Chief Executive's testimony arise with regard to Legislative compulsion, see, e.g., Nixon, 487 F.2d at 729-62 (MacKinnon, J., concurring in part and dissenting in part) (surveying Congressional demands for Executive testimony).



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privilege by Presidents and cabinet officers." 487 F.2d at 748 n.80 (concurring/dissenting opinion). However, nothing in the Cooper opinion suggests that Adams asserted any executive privilege, or whether considerations of Executive independence entered into Chase's decision.

2. James Monroe: In 1818, President Monroe was served with a subpoena to testify at a criminal trial, but based on his attorney general's advice, he declined, saying his presidential duties were paramount. He agreed to submit to a deposition, but the court instead permitted the submission of interrogatories, which the President answered. See Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, March 31, 1989 (hereinafter "Zabarenko"); Ronald D. Rotunda, Presidents and Ex-Presidents as Witnesses--A Brief Historical Footnote, 1975 U. Ill. L. Forum 1 (hereinafter "Rotunda"). Rotunda reports that U.S. Attorney General Wirt prepared an opinion which concluded that a subpoena ad testificandum could issue to the President, citing Burr. Rotunda at 5.[15] Wirt nonetheless advised the President to make a return of the subpoena explaining that "his official duties would not admit of his absence from the seat of government, but that he would hold himself ready, at all times, to state, in the form of a deposition, and [sic] facts, relevant to the prosecution, which were within his knowledge, and which might be called for by the

[15] The majority panel of the D.C. Circuit cited Wirt's conclusion in support of its holding in Nixon, 487 F.2d at 710 n.42.



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court or the party." Rotunda notes that the poor transportation system of the time would likely have been of paramount concern to the President and recognized by the court; he cites Hartranft's Appeal, 85 Pa. 433 (1877), where a Pennsylvania court excused the Governor from appearing before a grand jury, partly because "the court was reluctant to force him to leave the seat of government."[16]

3. U.S. Grant: President Grant, eager to aid a friend, General Orville E. Babcock, who was caught up in a criminal case, offered to testify at his trial, being held in St. Louis, in 1875. Dissuaded from this plan, the President gave a deposition attended by the Chief Justice, the Attorney General, and the Secretary of the Treasury. The testimony was used at trial and Babcock was acquitted. Rotunda at 3; Zabarenko.

4. Jimmy Carter: President Carter in 1980 offered to testify by videotape in the context of a grand jury investigation of Robert Vesco, a fugitive financier. See David Johnston, Judge

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[16] This state case represents perhaps the sole successful assertion of "absolute" executive privilege on the basis of the separation of powers. See 85 Pa. at 444-45 ("Where does the Court . . . get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief . . .?") Note as well that the majority stated that the prevailing contemporary legal authority permitted executive officers, including the Federal President and the state governors, to withhold papers and information "in a judicial inquiry when, in their own judgment, the disclosure would, on public grounds, be inexpedient." Id. at 447. The dissent strongly disagreed with the majority's assessment, citing Burr. Id. at 459-60 (Agnew, C.J., dissenting).



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Won't Order Reagan Testimony, N.Y. Times, April 1, 1989 at A1 (hereinafter Johnston).

President Carter gave voluntary videotaped testimony as a government witness in the perjury and gambling trial of a Georgia state senator. See North Tactic Revives an Old Debate: Can a President be Forced to Testify?, Assoc. Press, Jan. 4, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent, Wash. Post, Jan. 1, 1989 at A7.

A circuit court judge refused to subpoena President Carter in the prosecution of a businesswoman charged with attempting to bribe an Illinois lawmaker's vote for the Equal Rights Amendment. See Deborah Singer, Judge in EPA Bribery Case Refuses to Subpoena Carter, Assoc. Press, Aug. 1, 1980.

5. Richard Nixon: In 1980, Nixon voluntarily appeared as a witness in the trial of two former FBI officials who had been accused of conducting illegal break-ins. Johnston.

ANALYSIS

1. The President May be Compelled to Testify

These precedents firmly ratify the current endeavor to summon the incumbent President to testify in person before the Grand Jury. In some senses, Jefferson's District U.S. Attorney, Hay, gave away the farm when he conceded in argument that "a general subpoena might issue to the president," a declaration which Chief Justice Marshall noted "terminated the argument on that part of the question." Burr, 25 F. Cas. at 34.



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Marshall, of course, expanded the duty, distinguishing the prerogatives of the American chief executive from those of the English King, id., and concluded broadly that "the law does not discriminate between the president and a private citizen," id. The maxim that "the public has a right to every man's evidence" thus applies to the President, even while in office, see Nixon, 418 U.S. at 709 (quoting Branzburg v. Hayes, 408 U.S. 665, 668 (1972)), and applies with equal force in the context of a grand jury investigation, see Nixon, 487 F.2d at 712-13 and n.54; see also id. at 717. Any doubt surrounding the amenability of the President to judicial process to procure his testimony existing prior to the Watergate cases did not survive them. See, e.g., Fromme, 405 F. Supp. at 582 ("[t]hese cases hold that no person, even a President, is above the law and that in appropriate judicial proceedings, documents and other tangible evidence within the very office of the President may be obtained for use in those judicial proceedings"); accord Poindexter, 732 F. Supp. at 146 ("any question as to the power of a court to require a President to testify was laid to rest in United States v. Nixon").

The request now contemplated is for testimony regarding suspected criminal activity occurring several years before the incumbent President was elected to his current Office. While none of the extant cases present similar facts, the rationale underlying the doctrine of executive privilege

precludes the assertion of that privilege with regard to events occurring prior to taking office.

Questions concerning the doctrine of executive privilege, and the proper extent of the concomitant judicial deference to the duties and dignity of the President, have dominated much of the litigation as well as characterizing the less formal means of obtaining Presidents' testimony. However, the varying degrees of judicial recognition of executive privilege have hinged exclusively on the relationship between the evidence or testimony sought and the exercise of the President's duties as Chief Executive within the constitutional framework. In other words, every person (including the person who happens to be the President) may be subpoenaed for evidence or testimony and is subject to judicial compulsion; however, whoever is President has the right to assert executive privilege to protect the Presidency, but not otherwise. The idea of American presidency as being institutional, not personal, was central to Marshall's opinion on the subject in Burr, and his contrasting the Republic and the Monarchy: "the president is elected from the mass of the people, and, on expiration of the time for which he is elected; returns to the mass of people again." 25 F. Cas. at 34.

Even advocates of "absolute" executive privilege have recognized that the privilege protects only those communications of the President quo President. Judge MacKinnon, dissenting in part in Nixon v. Sirica, stated that he "would recognize an absolute privilege for confidential Presidential



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communications. . .grounded upon an historically consistent interpretation of the constitutional structure of our government," but would strictly confine the scope: "Since the privilege is designed to enhance a President's ability to perform the duties of his office, it only protects presidential communications related to the performance of Article II duties." 487 F.2d at 730.

Among the cases, President Ford's testimony regarding his own attempted assassination perhaps in substance had the least to do with his "performance of [his] Article II duties," and the court broadly suggested accordingly that executive privilege (which had not been invoked) would not "enter[] the equation": "[W]here the President himself is a percipient witness to an alleged criminal act, the President must be amenable to subpoena as any other person would be." Fromme, 405 F. Supp. at 582. The rest of the cases, Burr, Nixon, North, and Poindexter all concern personal communications of the President, occurring in the conduct of his office; nonetheless, the courts have in each case held (and in North, at least recognized) that the proper administration of justice generally trumps presidential claims of confidentiality. A fortiori, an ongoing criminal investigation undertaken by a grand jury which is entitled to "every man's evidence" may compel testimony regarding events preceding, and having no conceivable relation to, the witness' duties as President.

2. Scope of the Request



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The Nixon cases established the court's duty to review subpoenas to the president "meticulous[ly]," employing "a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought." 418 U.S. at 702, 714. The in camera inspections of the tapes in Nixon and of documents and proposed deposition questions in Poindexter illustrate the procedures for judicial review adopted for the court to accommodate the President's right to confidentiality, avoid "the possibility of conflict between the branches," and "exercise deference and restraint" in light of "the dignity and stature of the presidency." Poindexter, 727 F. Supp. at 1505.

Of course, these procedures have only been undertaken to avoid disclosure of matters demonstrably protected by executive privilege, of which there is a presumption with regard to all presidential communications. See Nixon, 418 U.S. at 708; Poindexter, 727 F. Supp. at 1505. Hence, one could argue that demand for testimony regarding events occurring prior to taking office warrants neither a particularized showing of necessity nor deferential, "meticulous" review because the requested information is not arguably subject to executive privilege. Another tack would be to point out that Fed. R. Crim. P. 6 forbids disclosure of grand jury proceedings and thus concerns regarding public disclosure are far less warranted than in the context of a public trial. However, the courts since Burr

have taken pains to assure the President that his status alone commands deferential, specialized treatment; again, the court is not "required to proceed against the president as against an ordinary individual." Burr, 25 F. Supp. at 192. The advisable course, given the existing precedent, is to make a "particularized showing of the grand jury's need" for the testimony sought, Nixon, 487 F.2d at 705, demonstrating that the testimony is "directly relevant to the grand jury's task," id. at 706.

3. Logistics of Obtaining the Testimony

No President has ever testified before a grand jury,[17] much less as a subject of an ongoing investigation. In recent times, however, the courts have endorsed the use of videotaped testimony in lieu of live courtroom attendance. See Poindexter, 732 F. Supp. at 155-59; Fromme, 405 F. Supp. at 583. As the court observed in Poindexter, the rules of criminal procedure permit preservation of testimony in "exceptional circumstances" such as where the witness is unavailable. 732 F. Supp. at 156. More importantly, courts have "not, ultimately insist[ed] upon Presidential testimony in a courtroom," thus "exhibit[ing] a sensitivity for the play in the joints of our tripartite system of government." Id. Videotaped testimony, then, is recognized as an acceptable substitute for live testimony, one which "preserve[s]" the spontaneity of courtroom

[17] It does not appear that President Carter's testimony in the Vesco investigation constituted a "grand jury appearance" under Fed. R. Crim. P. 6.



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testimony," requires the witness "to answer immediately, on his own," with "the witness' demeanor . . . fully apparent" to the viewers. Id. at 158-59.

Prof. Dash has suggested that the best course would be to inform the Grand Jury of the Government's intention to submit the President's videotaped interrogation to the Grand Jury, obtain the jurors' permission to so proceed, and present the proposal to the court for ratification. The proposal would detail how the Government intends to preserve the secrecy of the videotaped proceeding under Fed. R. Crim. P. 6(e), for example, by certifying the number of camera and sound operators that will be required to be present during the interview.[18] The authority of the supervising court permits it "within limits, [to] formulate procedural rules not specifically required by the Constitution or Congress." United States v. Hasting, 461 U.S. 499, 505 (1983), quoted in Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988).

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[18] It would appear that such technicians qualify as "operator[s]" of a recording device" under Fed. R. Crim. P. 6(d), which specifies persons who may be present in the grand jury. See United States v. Echols, 542 F.2d 948, 952 (5th Cir.), cert. denied, 431 U.S. 904 (1976) ("Logic dictates that, when it is necessary for the grand jury to examine evidence which can only be presented through the use of complicated machinery, Rule 6(d) must encompass those persons with the requisite skills to operate such machines and to give testimony concerning their operations.")



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PRESIDENTIAL TESTIMONY Research
ERIC JASO

Courts are req'd to make special arrangements to obtain testimony of president.



UNITED STATES of America
v.
John M. POINDEXTER.

Crim. No. 88-0080-01.
Misc. No. 90-0045 (HHG).

United States District Court,
District of Columbia.

Feb. 15, 1990.

News media sought access to videotaped deposition of former President in prosecution of former National Security Advisor. The District Court, Harold H. Greene, J., held that media had no right to attend deposition.

Application for attendance denied, and application for videotape granted.

[1] CONSTITUTIONAL LAW ⚿ 90.1(3)
92k90.1(3)
First Amendment right of access to pretrial proceedings in criminal case is only qualified. U.S.C.A. Const.Amend. 1.

[2] CONSTITUTIONAL LAW ⚿ 90.1(3)
92k90.1(3)
Even if there is tradition of access in criminal case and access would serve public interest, First Amendment right of access may be overcome by showing that closure is essential to preserve higher values and merely tailored to serve that interest. U.S.C.A. Const.Amend. 1.

[3] CONSTITUTIONAL LAW ⚿ 90.1(3)
92k90.1(3)
News media had no First Amendment right to attend pretrial deposition of former President to record testimony for use at criminal trial of former National Security Advisor and to determine admissibility of evidence consistently with demands of classification and secrecy; top secret and other extremely sensitive information would pervade deposition; no one could predict when classified information would be disclosed; and asking press to leave when particular line of questioning was likely to disclose sensitive, classified information would harm continuity of questioning. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 1.

[3] CRIMINAL LAW ⚿ 635
110k635
News media had no First Amendment right to attend pretrial deposition of former President to record testimony for use at criminal trial of former National Security Advisor and to determine admissibility of evidence consistently with demands of classification and secrecy; top secret and other extremely sensitive information would pervade deposition; no one could predict when classified information would be disclosed; and asking press to leave when particular line of questioning was likely to disclose sensitive, classified information would harm continuity of questioning. Classified Information Procedures Act, § 1 et seq., 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 1.

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Theodore B. Olson, John A. Mintz, Michael B. Rappaport and Julia A. Dahlberg, Gibson, Dunn & Crutcher, Washington, D.C., for former President Ronald W. Reagan.

David Anderson, James S. Reynolds, Thomas Millet and Douglas Letter, U.S. Dept. of Justice, Washington, D.C., for the U.S. and the Archivist of the U.S.

Timothy B. Dyk and Patrick J. Carome, Wilmer, Cutler & Pickering, Washington, D.C., for applicants.

MEMORANDUM AND ORDER

HAROLD H. GREENE, District Judge.

Seven news organizations have applied for access to the videotaped deposition of President Reagan, to be held February 16, 1990 at the United States Courthouse in Los Angeles. [FN1] The request implicates in varying degrees rights of the news

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organizations, the former President, the defendant, the prosecution, and the public. The Court has carefully considered all these interests.

FN1. The application was filed on February 12, 1990 by Cable News Network, Inc., Capital Cities/ ABC, Inc., CBS, Inc., National Broadcasting Co., Inc., The New York Times Company, The Times Mirror Company, and The Washington Post. On February 13, 1990, these parties were joined by the Associated Press, Dow Jones & Co., National Public Radio, USA Today, and Gannett News Services, Inc.

I

On February 5, 1990, the Court ordered that former **President Reagan testify** by **videotaped** deposition at the defendant's trial. The Order declared that the Court would preside over the taking of the deposition to hear argument and rule, inter alia, on assertions of executive privilege by the former President or by President Bush as well as on issues arising under the Classified Information Procedures Act (CIPA). [FN2]

FN2. 18 U.S.C.App. IV.

The Court had then and it has now a deep concern about the risk of public disclosure in the course of President Reagan's testimony of sensitive national security and foreign policy information. Mr. Reagan was, of course, privy to the nation's most closely-guarded secrets until a little more than a year ago, and the issues in the instant case are infused with classified information. Indeed, it was in substantial part in order to avoid the unnecessary public revelation of such information that the Court directed that the former President's evidence be taken by non-public videotaping rather than during the trial itself. Opinion of February 5, 1990 at 46-49.

On February 12, 1990, as indicated, a number of news organizations submitted an application to the Court seeking "to attend the direct and cross-examination of former President Reagan." Application at 2. Cited in support of the application are the First Amendment, Local Rule 307, [FN3] and the common-law right of access to judicial ***167** records. [FN4] In the alternative, applicants request access to copies of the videotape of the deposition as soon as the classified information has been redacted. The Court has considered the application, as well as supporting and opposing memoranda, and it has heard oral argument from counsel for the news organizations and others. The Court now holds that because top secret and other extremely sensitive information will pervade the deposition, it will be held in camera. However, once the classified information has been edited from the videotape, the Court will order its public release.

FN3. The claim to access under Local Rule 307 must fail since the rule does not apply to "matters normally handled in camera." Rule 307(a).

FN4. See note 8, infra. On February 13, 1990, defendant supported the media position by an assertion of his Sixth Amendment right to a public trial. In its February 5, 1990 Opinion, the Court discussed in detail the reasons why, upon an appropriate consideration of defendant's rights as well as of the rights of the former President and of the Presidency, the taking of Mr. Reagan's testimony by way of deposition effected an appropriate balance. Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984), upon which defendant presently relies, recognizes that prejudice to other interests may be considered by the Court in this connection.

II

[1, 2] Viewed in one way, the deposition of former President Reagan is nothing more than a pretrial proceeding. Although the First Amendment normally guarantees to the public and the press the right to attend criminal trials, [FN5] the right of access to pretrial proceedings is only a qualified one. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13, 106 S.Ct. 2735, 2742, 92 L.Ed.2d 1 (1985). [FN6] In deciding whether such access is mandated, the courts have looked to two factors: historical tradition and the public purpose to be served by public access. [FN7] See Press-Enterprise, 478 U.S. at 6-13, 106 S.Ct. at 2739-2743; In Re Washington Post Co., 807 F.2d 383, 389 (4th Cir.1986).

FN5. Such right of attendance may be curtailed if that is required to "protect defendant's superior right to a fair trial or that some other overriding consideration requires closure." Richmond

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Newspapers v. Virginia, 448 U.S. 555, 564, 100 S.Ct. 2814, 2821, 65 L.Ed.2d 973 (1980) (Burger, C.J., joined by White and Steven, JJ.).

FN6. It is clear, for example, that there is no right of public access to **grand jury** proceedings. Press-Enterprise, 478 U.S. at 9, 106 S.Ct. at 2740.

FN7. Even if there is a tradition of access and access would serve a public interest, the right may be overcome by a showing that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Press-Enterprise, 478 U.S. at 13-14, 106 S.Ct. at 2742-2743.

[3] It could hardly be argued that there is a tradition of public access to the type of pretrial proceeding involved here for, as the Court has previously explained, the provision of evidence by former or sitting Presidents of the United States has been extremely rare, and in each such instance the court having jurisdiction has had to fashion procedures tailored to the particular situation. Moreover, there has never been an instance of public testimony by a former President in a pretrial hearing, much less in a hearing that involves the President's knowledge of sensitive activities. [FN8] Perhaps of equal, if not more, importance is the fact that Congress has expressly mandated by its enactment of CIPA that pretrial proceedings involving classified information, as this one certainly will, shall be held in camera. [FN9] See also, Fed.R.Crim.P. 16(d)(1).

FN8. On this basis, it cannot be said that there is a common law right of access here.

FN9. While CIPA obviously cannot override a constitutional right of access, it is indicative of a tradition and common usage in a situation involving sensitive information.

Similarly, the public interest could well be injured by the attendance of press representatives at the deposition. As discussed below, it is impractical to screen out in advance all the sensitive security information that could be revealed in the course of the former President's examination and cross-examination. The strong likelihood is therefore present that information damaging to national security will be revealed. For these reasons, the news media are not entitled to attend this deposition if it is to be considered as a pretrial proceeding to ***168** which only a qualified right of access attaches.

III

Viewed in the light most favorable to the position of the media applicants, the February 16 proceeding will have two aspects: (1) a CIPA-type hearing [FN10] to determine the testimony and other evidence that may be admitted into evidence consistently with the demands of classification and necessary secrecy, and (2) the recording of testimony for use at the trial. Clearly, the press and the public are not entitled to attendance during the CIPA aspects of the hearing.

FN10. The Court uses that terminology not necessarily in its technical sense but to denote a hearing at which highly sensitive classified materials are being discussed.

Disclosure of sensitive information is likely to occur in the normal course of the Reagan deposition, both during questioning and responses, and as colloquies are had between Court, counsel, and the witness with respect to the admission or rejection of particular questioning and particular testimony, as well as the need for substitutions pursuant to CIPA. For these reasons, the Court does not understand the media applicants to argue that they have a right to be present while national security information is disclosed or discussed. [FN11]

FN11. The Court has previously recognized that these risks cannot be eliminated by the procedures and hearings held under CIPA prior to the deposition. Opinion at 47-48. The media applicants' assertion that arguments of counsel regarding admissibility, proper scope of testimony, and the like will not be sensitive, Reply Memorandum at 7 n. 9, may be expected to prove completely erroneous.

Instead, these applicants suggest that part of the hearing be open and part of it closed, and that the press representatives be asked to leave when a particular line of questioning is likely to elicit sensitive, classified information. Assuming that, somehow, the less highly classified of the initial or primary questions could be asked separately from the more sensitive ones--at a great cost in the continuity of questioning that counsel is entitled to

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maintain for effectiveness--little, if anything, would be gained by such a process. No one can know at this point what President Reagan's answers will be to these questions or the extent to which these answers will reveal classified, sensitive matters of state. That problem is magnified by the fact that, beyond the primary questions approved by the Court in its decision of February 5, 1990, counsel are entitled to ask follow-up questions dealing with the same general subject matter, and that the prosecution will conduct cross-examination. With respect to both these areas, the emergence of sensitive national security subjects is entirely unforeseeable.

In short, national security concerns may be expected to permeate the questioning, and the unforeseeability of their specific emergence at any point means that an attempt to have press representatives present at some parts of the examination but not at others, as the media applicants suggest, is not subject to reasonable implementation. [FN12] These difficulties are further exacerbated by the substantial possibility that, inasmuch as the relationship between the sensitive and the non-sensitive segments of the anticipated testimony is extremely close, information may be revealed inadvertently that should properly remain secret. [FN13]

FN12. The unavailability of reasonable alternatives is perhaps best documented by defendant's suggestion that if "classified information does inadvertently seep out, the Court may be able to strike the information from the public record and to preclude publication of that information." Defendant's Response at 3. It is frivolous to suggest that the Court could enjoin the assembled press corps not to publish what they have just seen and heard.

FN13. The applicants' argument that the former President has a great deal of experience speaking in the public spotlight, and that he is therefore unlikely to make inadvertent disclosures, Reply Memorandum at 8, misses the point. The dividing line between the sensitive and the non-sensitive information that will be at issue at the deposition is such that even lawyers who study the relevant papers at length frequently have difficulty separating one from the other. An instantaneous separation in the course of testimony under counsel interrogation can hardly be expected of a witness, whatever his public speaking experience.

***169** The closed hearing is designed to permit the Reagan testimonial purposes and the CIPA-type purposes to be accomplished in one proceeding. [FN14] That obviously could not be done if the proceeding were opened to the public and the press. [FN15] For these reasons, the Court will reject the request for attendance of the representatives of the media at the deposition itself. See Press-Enterprise, 478 U.S. at 13-14, 106 S.Ct. at 2742-2743. However, as discussed below, access of the public and the press to the non-sensitive information resulting from the deposition can be achieved by alternate means.

FN14. As the Court pointed out in its February 5, 1990 Opinion, the Court has an obligation, consistent with the history of Presidential testimony, and the admonitions of the Supreme Court and of the Court of Appeals, to keep judicial imposition on the head of a coordinate branch of government to a minimum. Respect for the constitutional prerogatives of the Chief Executive must therefore be considered in conjunction with the First Amendment rights of the press. In any event, even if more than one proceeding involving President Reagan were held, there is no assurance that the problem of disclosure of sensitive information could thereby be resolved.

FN15. It must also be considered that the former President may in the course of the deposition need to consult with his own counsel, as well as with counsel for the incumbent President, concerning the assertion of executive privilege regarding some of the questions. As the Department of Justice correctly notes, "[s]urely, the Court did not intend that such sensitive consultations and decisions ... woul occur in the context of a live news broadcast." Opposition at 3. Discussions regarding privilege, including such traditional privileges as those between husband and wife and physician and patient, are appropriately held in camera. United States v. Cianfrani, 448 F.Supp. 1102, 1108 (E.D.Pa.1978), rev'd on other grounds, 573 F.2d 835 (3rd Cir.1978).

## IV

It is important to keep in mind that the issue here is not whether, but rather when, the press will have

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access to President Reagan's testimony.

After the deposition of President Reagan has been concluded, the Court and the parties will meet to edit out of the videotape those portions which contain the sensitive material. As so edited, the tape will, of course, be available to the press and the public when it is played to the jury as part of the defendant's case.

Beyond that, it was initially the Court's view that release of the tape in advance of the trial itself should be mandated only if it appeared that such release would not be capable of invading defendant's rights, including his right to reveal his evidence at a time of his own choosing; his right to be free from possibly prejudicial pretrial publicity; and the possible juxtaposition by the media of the Reagan tape with tapes of defendant's testimony in Congress and the resulting Kastigar taint. However, it now appears that defendant supports broad access of the press to the testimony of President Reagan. Defendant's Response to Application for Access, filed February 13, 1990. [FN16] In view of that position by the defendant, [FN17] there would appear to be no ***170** legitimate legal obstacle to early access of the public to the videotaped testimony. The Court will therefore order the release of the tape to the public and the press as soon as the editing process has been completed. [FN18]

FN16. Inasmuch as the Court raised the issue of possible injury to defendant's interests at the February 12, 1990 hearing, it may be assumed that defendant has knowingly considered these consequences. The Court may be called upon to decide at a future time whether defendant's position taken in that Response amounts to a waiver of his right to complain about any taint resulting from the pretrial release of the edited videotape.

FN17. In his Response to the application of the media filed February 13, 1990, defendant requests in regard to the possibility of pretrial publicity that the Court reschedule the deposition until after the government presents its case-in-chief. Not only has defendant never advanced this proposal before, despite numerous and more suitable opportunities to do so, but he has, in the past, sharply criticized this very plan as unworkable. Defendant's Memorandum of January 8, 1990 at 29-30. It was on the basis of defendant's arguments that the Court rejected requests for a deferral of the Presidential testimony until after the prosecution had completed its case-in-chief. Opinion of February 5, 1990 at 32 n. 44. The Court and the Independent Counsel have proceeded on the basis of that decision and, as the Court was advised by counsel, President Reagan has so arranged his schedule as to be available for the deposition on February 16, 1990. Defendant's eleventh hour conversion to the position he opposed earlier comes too late. In any event, the factor of prejudicial publicity is not such that it would justify acceptance of defendant's change of position.

FN18. The Court expects that, in the absence of extraordinary disputes between the parties regarding classified materials, this process will not consume more than two or three working days.

The Supreme Court noted in Press-Enterprise, 478 U.S. at 9, 106 S.Ct. at 2740, that "openness in criminal trials, ... enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." One of the reasons for this conclusion is that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Id. at 13, 106 S.Ct. at 2742. Immediate post-editing disclosure of the videotape will give assurances of fairness to both the public and the accused, as open criminal proceedings are properly designed to do, but it will do so without jeopardizing sensitive national security information.

Accordingly, it is this 15th day of February, 1990

ORDERED that the application of the news media for attendance at the deposition of former President Reagan be and it is hereby denied; and it is further

ORDERED that the application of the news media for access to the former President's videotaped deposition be and it is hereby granted, such access to be effected as soon as the editing of the tape has been completed.

END OF DOCUMENT

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July 11, 1995

VIA HAND DELIVERY

CONFIDENTIAL

Honorable Kenneth W. Starr
Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Starr:

Thank you for your letter dated July 6, 1995, which Judge Mikva and I have carefully considered. We are sensitive both to the needs of your investigation and to what you have properly described in your letter as "the dignity of the Office of the Presidency . . . [,] the demands upon the Chief Executive's schedule and the privileges appurtenant to his Office."

We appreciate the approach your office has taken, and we believe that we have on our part extended unprecedented cooperation to your investigation in providing documents, waiving privileges, furnishing information, and making available the President and the First Lady on multiple occasions for sworn testimony. Our clients have sought to accommodate your investigation's scheduling concerns, as expressed by Messrs.

Tuohey, Ewing, Lerner, and Bates at our meeting on June 23, 1995, by making themselves available during the week of July 18, as you requested. To facilitate your investigation, we also suggested that the President and Mrs. Clinton be examined on that occasion with regard to follow-up questions you might have from the so-called "Washington phase" of this matter. We will continue to work with you to assure that this investigation may be completed as fairly and speedily as possible.

We remain of the view, however, as expressed in my June 29 letter to Mr. Tuohey, that the procedures we have mutually agreed upon for the first two interviews, with both your office and Mr. Fiske's, continue to be a satisfactory and appropriate accommodation of, on the one hand, the institutional interests of the Presidency, and, on the other, your need for my clients' sworn testimony.

At my June 23 meeting with Mr. Tuohey et al., I explained the significant practical prejudice that would result from changing these procedures midway in the investigation, and we perceive no justification for doing so even after our lengthy discussions at that meeting.

It is true that there appear to be three occasions on which a President or an ex-President has given videotaped testimony for a court proceeding (in the Fromme, Poindexter, and Kidd/Lingold cases). These cases are plainly distinguishable

from the present situation because they involved criminal trials, with a specific liberty interest of a particular defendant at stake and with attendant constitutional guarantees of confrontation, compulsory process, and due process. Nor is the fact that President Carter might once have given videotaped testimony for the grand jury in the Vesco matter persuasive precedent, if in fact he did. That circumstance would have been very different from this one. Here, the proposed testimony is not an isolated event, different rules have applied from the start, and a change in procedure would be deeply prejudicial.

In any event, quite different rules apply to grand jury proceedings. The evidentiary rules of a criminal trial do not, for example, apply in a grand jury setting, and a grand jury may consider even hearsay evidence. Costello v. United States, 350 U.S. 359 (1956). By following the mutually agreed upon procedures for the first two interviews, the grand jury will have the benefit of the President's sworn testimony on questions you deem relevant. Moreover, as in the past interviews, you and your colleagues who are present will have a full opportunity to observe demeanor and responsiveness and to make such credibility judgments as you deem appropriate.

We sincerely believe that the procedures we have followed for the first two interviews continue to be an appropriate reconciliation of our respective interests.

As I stated in my June 29 letter to Mr. Tuohey, we believe that your agreement to read to the grand jury the interviews of the President and Mrs. Clinton accommodates any concerns about Federal Rule of Criminal Procedure 6(e). However, we certainly share your desire that the interviews be accorded full protection under this Rule.

Sincerely,

David E. Kendall

# TELECOPY COVER SHEET

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UNITED STATES
v.
BURR. [FN1]

FN1 For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.

Circuit Court, D. Virginia.

June 13, 1807.

At law. Motion for a subpoena duces tecum directed to the president of the United States.

Tuesday, June 9, 1807. The grand jury were adjourned to the following Thursday.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

1. Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

2. A subpoena may issue to the president of the United States to compel his attendance as a witness, and an accused person is entitled to it of course.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

3. A subpoena duces tecum may issue to the president of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

4. In Virginia, a motion for a subpoena duces tecum is to the discretion of the court; and as a legal means of obtaining testimony it cannot be regularly opposed by the opposite party in his character as such.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

5. A motion to the discretion of a court is a motion not to its inclination, but to its judgment, which is to be guided by sound legal principles.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

6. The court has no right to refuse its aid to motions for papers to which the accused by be entitled, and which may be material to his defense.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

7. An accused person has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct written by the person who is declared to be the essential witness against him.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

8. And in such case he is entitled to the production of the original letter, a copy not being sufficient.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

9. Where it does not affirmatively appear that letters and executive orders in the hands of the president of the United States which may be material to the defense of an accused contain any matter which it would be imprudent to disclose, a subpoena duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear on the return.

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***30** Mr. Burr then addressed the court. There was a proposition which he wished to submit to them. In the president's communication to congress, he speaks of a letter and other papers which he had received from Mr. Wilkinson, under date of 21st of October. Circumstances had now rendered it material that the whole of this letter should be produced in court; and further, it has already appeared to the court, in the course of different examinations, that the government have attempted to infer certain intentions on my part from certain transactions. It becomes necessary, therefore, that these transactions should be accurately stated. It was, therefore material to show in what circumstances I was placed in the Mississippi territory; and of course, to obtain certain orders of the army and the navy which were issued respecting me. I have seen the order of the navy in print; and one of the officers of the navy had assured me that this transcript was correct. The instructions in this order were, to destroy my person and my property in descending the Mississippi. Now I wish, if possible, to authenticate this statement; and it was for this purpose, when I passed through Washington lately, that I addressed myself to Mr. Robert Smith. That gentleman seemed to admit the propriety of my application, but objected to my course. He informed me that if I would apply to him through one of my counsel, there could be no difficulty in granting the object of my application. I have since applied in this manner to Mr. Smith, but without success. Hence I feel it necessary to resort to the authority of this court to call upon them to issue a subpoena to the president of the United States, with a clause, requiring him to produce certain papers; or, in other words, to issue the subpoena duces tecum. The attorney for the United States will, however, save the time of this court, if he will consent to produce the letter of the 21st October, with the accompanying papers, and also authentic orders of the navy and war departments.

Mr. Hay declared that he knew not for what this information could be wanted; to what purpose such evidence could relate; and whether it was to be used on the motion for commitment or on the trial in chief.

Mr. Burr, Mr. Wickham, and Mr. Martin ***31** observed that perhaps it would be used on both, according as circumstances might require.

Mr. Hay declared that all delay was unnecessary; but he pledged himself, if possible, to obtain the papers which were wanted; and not only those, but every paper which might be necessary to the elucidation of the case.

After considerable of conversation between counsel as to the objects of applying for the subpoena, and the probability of obtaining the papers without it, Mr. Wickham remarked that as to the order from the navy department, a copy might be sufficient, but as to Wilkinson's letter, 'We wish to see itself here; and surely it may be trusted in the hands of the attorney for the United States.'

Mr. Hay then said: It seems, then, that copies of papers from the government of the United States will not be received! After such an observation, sir, I retract everything that I have promised; let gentlemen, sir, take their own course.

Mr. Wickham explained, disavowing any insinuation against the fairness of the conduct of the government. But he wanted the highest possible degree of evidence, and to confront General Wilkinson with his own letter.

Mr. Hay was satisfied with the explanation, and renewed his promise to apply for the papers if the court deemed them material.

After some further conversation which did not result in any arrangement satisfactory to Mr. Burr's counsel----

The CHIEF JUSTICE said: If the attorney for the United States is satisfied that the court has a right to issue the subpoena duces tecum, I will grant the motion.

Mr. Hay. I am not, sir.

CHIEF JUSTICE. I am not prepared to give an opinion on this point, and therefore I must call for argument.

After some further conversation, the court adjourned.

Wednesday, June 10, 1807.

The court met according to adjournment. The

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subject of the subpoena duces tecum was resumed.

The following affidavit, drawn up and sworn to by Mr. Burr, was read in support of the motion for the subpoena.

'Aaron Burr maketh oath, that he hath great reason to believe that a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or of any one by his authority, to the said letter, may be material in his defence, in the prosecution against him. And further, that he hath reason to believe the military and naval orders given by the president of the United States, through the departments of war and of the navy, to the officers of the army and navy, at or near the New Orleans stations, touching or concerning the said Burr, or his property, will also be material in his defence.

'Aaron Burr.

'Sworn to in open court, 10th June, 1807.'

Upon this motion a protracted debate arose, occupying two entire days, and extending into the third, in which the motion was supported by Messrs. Wickham, Botts, Randolph, Martin, and Burr, and opposed by Messrs. Hay, MacRae, and Wirt. Much ability and eloquence were displayed on both sides. But few points of law were contested in the argument, and these are all clearly stated in the opinion of the court, which is here given in full. The arguments turned more upon the propriety of granting the motion, than upon any strictly legal question; although the right of the accused to apply to the court for process to obtain any testimony whatever, at this stage of the case, was denied by the counsel for the United States. The discussion took a wide range, and the course of the government towards Col. Burr, and the conduct of Gen. Wilkinson in respect to him, were animadverted upon with much severity by counsel for the defence, and zealously defended by the counsel for the United States.

On the part of the prosecution it was insisted that the subpoena was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defence, and objected that the affidavit did not even state, in positive terms, that they would be material.

On the part of the defence it was denied that any affidavit whatever was necessary to support the motion. The proposition that the president could withhold a paper material to the defence, merely because it contained confidential communications, was denied, and pronounced wholly untenable in law. If the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena; but it was not to be assumed until he did say so. Or, if the letter contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court. A copy of the letter, it was said, would not answer the purposes of the defence. Gen. Wilkinson was admitted to be the witness upon whom the prosecution mainly depended. His relation to the prosecution ***32** was such, that he had the strongest possible motive for bolstering it up; and if he failed in it, he would himself sink into irreparable disgrace. When he should come upon the stand to sustain a prosecution in which he had so much at stake, it might be of the utmost importance to confront him with his letter in his own handwriting. A copy would not do, because he might deny it; and no confidence was reposed by the defence in his integrity. The contents of the letter were only known to the defence in so far as they had been divulged by the president in a communication to congress. In that communication the president had stated that he had received a letter from Gen. Wilkinson in relation to the transactions of Mr. Burr, 'of whose guilt,' he says, 'there can be no doubt.' The president was severely censured (by Mr. Randolph) for thus assuming the functions of a judge, and pronouncing judgment against Mr. Burr in transacting his executive duties. The president

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had stated in said communication that Gen. Wilkinson had written at large to him respecting Mr. Burr. The defence wanted this letter, and had no doubt that in some of those things which Gen. Wilkinson had stated to the president, they would be able to trip him up.

As to the orders of the war and navy departments, it was said that certified copies would answer. But the secretary of the navy had already refused to furnish copies to one of Mr. Burr's counsel, on an application to him therefor, and they could not run the risk of another refusal. One of these orders (or what purported to be one) had been published in the Natchez Gazette, and it amounted to an order calling forth a military force to attack Mr. Burr and his associates, and destroy their property. It was contended that the president had no legal or constitutional power to issue such an order as this was represented to be; if an unconstitutional and illegal order had been issued to destroy and man and his property, that man was justified in resisting it. Authenticated copies of these orders, therefore, might be necessary to defend Mr. Burr against any attempt to prove that he had resisted, or made any preparation to resist, the military forces called forth against him. If no orders had been issued calling forth a military force to attack him, then he had a right to resist any such force as being a mere unauthorized mob. On these grounds it was of the utmost importance to the defence to know exactly what orders had been issued in relation to Col. Burr.

At the close of the discussion Mr. Hay said he had in his possession a copy of the very paper which had been so denounced by the counsel for cruelty and severity; the order issued by the secretary of the navy, which he proposed to read in order to show that there was no such thing in it. The opposite counsel desired to look at the paper, to ascertain whether it was the same they had seen in the Natchez Gazette; but Mr. Hay refused to let them take it. He finally put it up again, declaring that he believed it to be the same, but gentlemen did not want it to be read.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice.

The object of the motion now to be decided is to obtain copies of certain orders, understood to have been issued to the land and naval officers of the United States for the apprehension of the accused, and an original letter from General Wilkinson to the president in relation to the accused, with the answer of the president to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpoena duces tecum, to be directed to the president of the United States. In opposition to this motion, a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas nor to the aid of the court to obtain his testimony. It will not be said that this opinion is now, for the first time, advanced in the United States; but certainly it is now, for the first time, advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. That would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by the grand jury. The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted that a person who appears before a court under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance will be brought before the court. In the first event, he has the right, and it is perhaps his duty, to prepare for his defence at the trial. In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case it would seem reasonable that he should be entitled to the process of the court to procure the attendance of his witnesses. The genius and character of our ***33** laws and usages are friendly, not to condemnation at all

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events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner, who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the first term, it would have been in some measure uncertain whether there would have been a trial at this, and still more uncertain on what day that trial would take place; yet subpoenas would have issued returnable to the first day of the term; and if after its commencement other subpoenas had been required, they would have issued, returnable as the court might direct. In fact, all process to which the law has affixed no certain return day is made returnable at the discretion of the court. General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the constitution gives to the accused, 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.' The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court. This observation derives additional force from a consideration of the manner in which this subject has been contemplated by congress. It is obviously the intention of the national legislature, that in all capital cases the accused shall be entitled to process before indictment found. The words of the law are, 'and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offence,) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them.' This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit are of doubtful construction; and in this case the words 'accused or indicted' may construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word 'or' may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense is furnished by the section itself. It commences with declaring that any person who shall be accused and indicted of treason shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are, 'accused and indicted.' So with respect to the subsequent clause, which authorizes a party to make his defence, and directs the court, on his application, to assign him counsel. The words relate to any person accused and indicted. But, when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are, 'and every such person or persons accused or indicted,' &c., thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked, too, that the person so accused or indicted is to have 'the like process to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against him.' The fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted. This act of congress, it is true, applies only to capital cases; but persons charged with offences not capital have a constitutional and a legal right to examine their testimony; and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

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Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it. The process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpoena is made returnable; so that it becomes incumbent ***34** on the accused to be ready for his trial at that term.

This point being disposed of, it remains to inquire whether a subpoena duces tecum can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpoena could issue, in any case, to the chief magistrate of the nation; and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening, the attorney for the United States avowed his opinion that a general subpoena might issue to the president; but not a subpoena duces tecum. This terminated the argument on that part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion, that such a subpoena may issue. In the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the king. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum. 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.

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute of reason for not obeying the process of the court than a reason against its being issued. In point of fact it cannot be doubted that the people of England have the same interest in the service of the executive government, that is, of the cabinet counsel, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alleged, that a subpoena might not be directed to them. It cannot be denied that to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case. If, then, as is admitted by the counsel for the United

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States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued. If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to being any paper of which the party praying it has a right to avail ***35** himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper. When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate, and some doubt also concerning the propriety of directing any paper in his possession not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than of its issuing, was then strong on the mind of the judges; but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process. This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. A subpoena duces tecum varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. In this state it issues, not absolutely of course, but with leave of the court. No case, however, exists as is believed, in which the motion has been founded on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpoena duces tecum than in the awarding an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena; but he can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiae, to prevent the court from making an improper order, or from burthening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpoena be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if, in the other, he is not a judge, absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means to exercise his privileges not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its

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aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised. If it be apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpoena duces tecum would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? The counsel for the United States takes a very different view of the subject, and insist that a motion for process to obtain testimony should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion, which would delay public justice, which would arrest the ordinary course of proceeding, or would in any other manner affect the rights of the opposite party. In favor of this position has been urged the opinion of one, whose loss as a friend and as a judge I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinions were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed; but I perceive no such opposition.

In the trials of Smith and Ogden [U. S. v. Smith, Case No. 16,342], the court in which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance and for an attachment against witnesses who had been subpoenaed and who had failed to attend. Had this requisition of a special affidavit been made as well a foundation for an attachment as for a continuance, the cases would not have been parallel, because the attachment was considered by the counsel for the prosecution merely as a means of punishing ***36** the contempt, and a court might certainly require stronger testimony to induce them to punish a contempt, than would be required to lend its aid to a party in order to procure evidence in a cause. But the proof furnished by the case is most conclusive that the special statements of the affidavit were required solely on account of the continuance. Although the counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. The continuance was to arrest the ordinary course of justice; and, therefore, the court required a special affidavit, showing the materiality of the testimony before this continuance could be granted. Prima facie the evidence could not apply to the case; and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance. Colden proceeded: 'The present application is to put off the cause on account of the absence of witnesses, whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify. If the court cannot or will not issue compulsory process to bring in the witnesses who are the object of this application, then the cause will not be postponed. Or, if it appears to the court, that the matter disclosed by the affidavit might not be given in evidence, if the witness were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear, and of whose voluntary attendance there is too much reason to despair; or, on account of the absence of witnesses who, if they were before the court, could not be heard on the trial.' See the trials of Smith and Ogden [supra]. This argument states, unequivocally, the purpose for which a special affidavit was required.

The counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably possess any material information, Mr. Standford said: 'It was decided by the court yesterday that it was incumbent on the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit, in common form, would not be sufficient for this purpose, but that the particular facts expected from the witnesses must be disclosed in order that the court might, upon those facts, judge of the propriety of granting the

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postponement.'

The court frequently treated the subject so as to show the opinion that the special affidavit was required only on account of the continuance; but what is conclusive on this point is, that after deciding the testimony of the witnesses to be such as could not be offered to the jury. Judge Patterson was of opinion that a rule, to show cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witness to be shown on a motion, the success of which did not, in his opinion, in any degree depend on that materiality; and which he granted after deciding the testimony to be such as the jury ought not to hear. It is, then, most apparent that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the court. That principle will therefore be applied to the present motion.

The first paper required is the letter of General Wilkinson, which was referred on in the message of the president to congress. The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witnesses against him. The order for producing this letter is opposed:

First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial. It is with some surprise an argument was heard from the bar, insinuating that the award of a subpoena on this ground gave the countenance of the court to suspicions affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description, the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor if, in this case, the accused should produce a witness completely exclupating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had ***37** said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicion in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed.

The second objection is, that the letter contains matter which ought not to be disclosed. That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defence, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances present a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country. At present it need only be said that the question does not occur at this time. There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena.

Thirdly, it has been alleged that a copy may be received instead of the original, and the act of congress has been cited in support of this proposition. This argument presupposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the

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president are most usually retained by himself. They do not belong to any of the departments. But, were the facts otherwise, a copy might not answer the purpose. The copy would not be superior to the original, and the original itself would not be admitted, if denied, without proof that it was in the handwriting of the witness. Suppose the case put at the bar of an indictment on this letter for a libel, and on its production it should appear not to be in the handwriting of the person indicted. Would its being deposited in the department of state make it his writing, or subject him to the consequence of having written it? Certainly not. For the purpose, then, of showing the letter to have been written by a particular person, the original must be produced, and a copy could not be admitted. On the confidential nature of this letter much has been said at the bar and authorities have been produced which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made could not have excused himself from detailing them, so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity; the only difference produced by the circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties. To go beyond these would exhibit a conduct which would deserve some other appellation than the term respect. It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defence, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter is more questionable. It is alleged that it most probably communicates orders showing the situation of this country with Spain, which will be important on the misdemeanor. If it contain matter not essential to the defence, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited. It is said they cannot be material, because they cannot justify any unlawful resistance which ***38** may have been employed or meditated by the accused. Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material; because they might tend to weaken the endeavor to connect such over act with any over act of which this court may take cognizance. The court, however, is rather inclined to the opinion that the subpoena in such case ought to be directed to the head of the department in whose custody the orders are. The court must suppose that the letter of the secretary of the navy, which has been stated by the attorney for the United States, to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted. It is only because the subpoena is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purposes of defence, and not for such as this court will forever discountenance.

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END OF DOCUMENT

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**Ohio.** Ohio R Crim P 6(A).
**New Mexico.** NM Stat Ann § 31-6-1.
**West Virginia.** W Va Code § 52-2-43; W Va R Crim Pro 6(g).

## § 5:11. Model Oath for Grand Jurors.

The form of the oath taken by grand jurors in the feder system, which is similar to the oath prescribed by statute or ru in most states, reads as follows:

"Do you, and each of you, solemnly swear that you sh diligently inquire into and make true presentment or indictme of all such matters and things as shall be given you in charge otherwise come to your knowledge, touching your grand ju service; to keep secret the counsel of the United States, yo fellows and yourselves; not to present or indict any perso through hatred, malice or ill will; nor leave any person unpre sented or unindicted through fear, favor, or affection, nor fo any reward, or hope or promise thereof; but in all you presentments and indictments to present the truth, the whol truth, and nothing but the truth, to the best of your skill and understanding? If so, answer 'I do.'"

## § 5:12. Model Charge to Grand Jury.

The charge that is recommended for federal courts to use a the time of empanelling a grand jury is as follows:

"Ladies and gentlemen of the grand jury, you have no been empanelled and sworn as a grand jury. The duties wit which you are charged are of the highest importance to the proper administration of justice. In serving as grand jurors you will be performing an important civic duty and fulfilling an important obligation of citizenship.

"It is the court's responsibility to instruct you at this time as to the law which should govern your actions and your deliberations as grand jurors.

"The grand jury existed in England long before it was brought over to the American colonies. There was a conflict between the powers of the English kings and the rights of the citizen, and the grand jury often stood as a barrier against political and religious persecution. The grand jury developed as an entity independent of the king, so that the king could not charge a subject with a crime without first submitting the





evidence to a grand jury which could decide whether to return an indictment against the accused. The resolute independence of the grand jury came about only after considerable blood was shed and punishment meted out to our forbears.

"The framers of our federal Constitution deemed the grand jury so important an instrumentality in the administration of justice that they included it in the Bill of Rights. The Fifth Amendment to the United States Constitution provides in part that 'No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . .' An infamous crime is a serious crime which may be punished by imprisonment for more than one year.

"We have two kinds of juries in the federal courts. First, there is the trial jury, sometimes known as the petit jury. The trial jury, consisting of 12 members, determines whether a person accused of a crime is guilty or not guilty of the crime charged. Federal jury trials take place in the courtroom, in the presence of the judge, the jury, the attorneys, and the public, where the accused may confront the witnesses against him and may be convicted only when each juror is convinced beyond a reasonable doubt.

"The other type of jury is the grand jury. Its function is equally important but entirely different. It consists of from 16 to 23 persons whose functions are conducted in secrecy. The grand jury has the responsibility to investigate charges of crime committed against the laws of the United States and, if the result of the investigation so warrants, to make an accusation against a person by returning an indictment against him. The decision to indict is normally made solely on the basis of the government's evidence without the accused person's having the opportunity to present his side of the case.

"An indictment is the formal written accusation charging the accused person or persons with one or more crimes. In the event that an indictment is returned against an accused person, he becomes a defendant, and in due course he will be given the opportunity to plead not guilty or guilty to the indictment. If he pleads not guilty, he will be required to stand trial in open court before a trial jury. In short, the grand jury decides whether a person should be formally charged with a crime and brought to trial; it is the trial jury which then decides whether the accused



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person is guilty or not guilty of the crime charged in
indictment.

"Thus, the purpose of the grand jury is to determi
whether there is sufficient evidence to justify a formal accus
tion against a person. If law enforcement officials were not fi
required to submit to an impartial grand jury proof of guilt as
a proposed charge against a person suspected of having comm
ted such crime, they would be free to arrest the suspect, an
bring him to trial no matter how little evidence existed
support the charge.

"As members of the grand jury, you, in a very real sen
stand between the government and the accused. A federal gra
jury shall never be made an instrument of private prejudic
vengeance or malice. It is your duty to see to it that indictmen
are returned against those who you find probable cause t
believe are guilty and not against the innocent. It is further you
duty to see to it that the innocent are not compelled to go t
trial before a trial jury. Only when you are satisfied that there
probable cause to believe that a crime has been committed by
specified person should you return an indictment against suc
person.

"In addition to the protection of life, liberty and th
property of the people, another important function of govern
ment is the administration of justice. The performance of these
functions requires the vigorous, fearless and impartial enforce
ment of the criminal law, with due regard for the constitutiona
rights of the accused. The grand jury is one of the most forceful
and effective agencies through which the government perform
these functions and duties.

"As set forth in the oath which you have taken, it is now
the duty of each of you to inquire diligently, fully and
impartially into all of the offenses which come to your knowl
edge and of which this court has cognizance. You have solemnly
promised that you will charge no one from fear, favor, affection
reward or hope of reward. You are to keep secret the proceedings
before the grand jury and also the views expressed by the United
States Attorney, your fellow grand jurors, and your own. You are
to perform all the duties imposed upon you as grand jurors to
the best of your ability.





"The grand jury is no place to shield or reward one's friends, nor to punish one's enemies. A member of the grand jury who finds himself or herself in a biased state of mind as to a person under investigation should not participate in that investigation or in the return of the indictment.

"Now this does not mean that, if you have an opinion, you should not participate in the investigation; but it does mean that if you form a fixed opinion before the matter comes up, that is before you hear any evidence, on a basis of friendship or hatred or some other similar motivation, you should not participate in that investigation and in the return or failure to return an indictment.

"It is a characteristic of our system of government to establish some checks against the unreasonable exercise of power. Your powers are extensive in many respects, but your powers are also limited in several important respects.

"You are empowered to investigate conduct which violates federal law. Criminal activity of a local nature is punished by state law. This latter type of criminal conduct falls outside your inquiry. The federal courts deal only with those matters over which they have authority under the Constitution and deal only with criminal activity which violates an act of Congress. Sometimes the same conduct violates both federal law and state law, and you may properly consider such conduct.

"As a grand jury, you are not concerned with the wisdom of the criminal laws enacted by Congress. Congress determines the policy in this field. It is every person's duty to conform his acts to the laws enacted by Congress. We are a government of laws and not of persons. All are equal under the law, and no one is above the law.

"Furthermore, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court and is not to be considered by the grand jury in its deliberations.

"There is also a geographical limitation imposed on the scope of your inquiries and the exercise of your powers. You may inquire only into offenses committed in this district.

"Finally, there are limits imposed on the exercise of your powers by your own common sense and sense of propriety. You have the power to call private citizens from their daily business



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and affairs to testify before you, but you should remember th citizens are not to be harried or inconvenienced unless it public interest and justice require it.

"Just as it is hoped and expected that you will serve as th balance wheel between the power of the government and th interests of personal liberty, it is also expected that you wi achieve an appropriate balance in the exercise of your powe Justice is not usually vindicated by excesses in the use of pow or undue haste. Justice is best served by a balanced an reasonable approach to the tasks that await you.

"As I have already explained to you, your function is determine whether a person shall be tried for a serious federa crime alleged to have been committed within this district. Th includes felonies and some misdemeanors. The cases whic come before you will arise in various ways. Frequently, suspect are arrested during or shortly after the commission of an alleged crime. They are taken before a magistrate of the district before you become involved in the case. The United States magistrate holds a preliminary hearing to determine whether there is probable cause to believe that a crime was committed and that the accused committed it. If the magistrate finds such probable cause, he will direct that the accused be held for the action of the grand jury, so that you can consider whether an indictment should be issued.

"Other cases will come to you before an arrest but after an investigation has been conducted by a governmental agency such as the Federal Bureau of Investigation, the Treasury Department, postal authorities or other federal law enforcement officials. These cases are then brought to your attention by the United States Attorney or an Assistant United States Attorney.

"In addition to the matters presented to you by the United States Attorney's office, you have the right and duty to investigate any other offenses committed in this district against the criminal laws of the United States of which you have knowledge or which come to your attention.

"The existence of such crimes may come to your attention in two ways. First, during the course of your inquiry about one offense, the testimony may disclose a different offense. Second, some of you may have personal knowledge of the commission of a federal crime not known to the federal authorities. However,





as you have no power to employ investigators or to draw on federal funds for such purpose, it is best to take up such matters with the United States Attorney. If he refuses to act or is unable to act impartially in the matter, you may then take it up with the court.

"By the terms of the Constitution, you may also make a 'presentment' directly to the court. A presentment is an accusation initiated by the grand jury itself without any formal charge or written indictment having been submitted by the government. To form the basis for a prosecution, it must be followed by an indictment. You have the power to make a presentment, even over the active opposition of the government attorneys, if you believe it is necessary in the interests of justice. I mention this power of presentment to you only to indicate the extent of your powers, and not to suggest that you are likely to find it wise or necessary to exercise this procedure.

"Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop. This shows how important it is that each of you conscientiously attend the meetings. If an emergency prevents your personal attendance at a meeting, you must promptly advise the grand jury foreperson, who has the authority to excuse you from attendance. If your absence will prevent the grand jury from acting, you should, if humanly possible, attend the meeting. You have the right to regulate your sessions to accommodate the convenience of yourselves and the United States Attorney, but you have the overall obligation to be available for duty at all times during the term for which you have been selected. If you find it necessary to seek your discharge from all continued service as a member of the grand jury, such request must be presented to the judge.

"The United States Attorney represents the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States Attorney or one of his assistants will present the accusations which the government desires to have considered by you. He will point out to you the laws which the government deems have been violated and will subpoena for you such witnesses as he may consider important and also such other



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witnesses as you may request or direct to have presented to
in connection with matters under consideration or which c
to your knowledge.

"The evidence that you will consider will normally con
of oral testimony of witnesses and written documents. E
witness will appear before you separately. When the witn
first appears before you, he will be sworn in by the grand j
foreperson. After being sworn, the witness may be question
Ordinarily, the United States Attorney or one of his assista
questions the witness first. Next, the foreperson questions
witness, followed by the other members of the grand jury.

"In certain cases it may be necessary to have an interpre
brought into the grand jury room and sworn to assist the gra
jury in interpreting the testimony of someone who does n
speak the English language. If this be the case, the grand ju
may arrange for an interpreter through the United State
Attorney or one of his assistants.

"Witnesses should be treated courteously when they appea
before you. Questions should be put to them in an orderl
fashion. If there is any doubt as to the propriety of an
questions asked, the advice of the United States Attorney or hi
assistants may be sought. If necessary, a ruling may be obtaine
from the court.

"As you listen to witnesses who are presented to you in the
grand jury room and hear their testimony as to matter
concerning a defendant or defendants, you are the judge of th
credibility of these witnesses. You decide the value of each and
every witness. You may believe the testimony of the witness, o
you may not believe such testimony. The determination of the
credibility of a witness involves a question of fact, and not a
question of law. It is for you to decide whether you believe the
testimony of a witness. It is not for the court, the prosecutors, or
any officer of the court to determine that for you.

"It will assist you in passing on the credibility of witnesses
to consider whether the witnesses are personally interested,
whether their testimony has been corroborated by other wit
nesses or circumstances in the case, what opportunity the
witnesses have had for observing or determining the matter
about which they testify, the reasonableness or probability of
the story which they narrate to you, and the manner and





demeanor of the witnesses in testifying before you. From these factors, you will determine whether you believe the witnesses who testify before you.

"Hearsay testimony, that is testimony as to facts not known by a witness of his own personal knowledge but told to him by others than the accused, may alone, if deemed by you to be persuasive, provide a basis for returning an indictment against an accused. You must be satisfied that there is evidence against the accused showing probable cause, even though such evidence is composed of hearsay testimony.

"You will receive all the evidence presented which may throw light upon the matter under consideration, but you should be cautious in accepting as true mere reports and suspicions, unless they tend to provide you with probable cause to believe in the guilt of the accused. If in the course of your inquiries you have reason to believe that there is other evidence, not presented to you but within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. You have the right to subpoena witnesses from anywhere in the country and may direct the United States Attorney to issue such subpoenas as you see fit. Your right to subpoena witnesses is a powerful one and should be exercised with careful discretion. Persons should not ordinarily be subjected to disruption of their daily lives nor should public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigations.

"You are the sole judges as to the number of witnesses you desire to hear. You are not required to summon witnesses which the accused person may wish to have examined unless you believe that an apparent violation may be explained by their testimony. Similarly, you may refuse to hear witnesses offered by the United States Attorney if you do not believe their testimony will assist you in your functions.

"Witnesses are not permitted to have counsel present with them in the grand jury room. However, the law permits witnesses to confer with their counsel outside of the grand jury room. You are to draw no adverse inference if a witness chooses to exercise this right to confer with counsel outside the grand jury room; an appearance before a grand jury may present



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complex legal problems requiring the assistance of cou
There are also other rights possessed by every witness befo
grand jury. These include the right to refuse to answer
question if the answer thereto would tend to incriminate h
and the right to know that anything he says may be used aga
him.

"Frequently charges are made against more than
person. It will be your duty to examine the evidence as it rel
to each person and to make your finding as to each person in
relationship in which they may be joined in an indictm
against more than one person. In other words, where charges
made against more than one person, in accordance with
evidence as you find it, you may indict all of the persons or o
such persons whom you believe the evidence points to as be
properly deserving of indictment.

"Neither the accused nor any witnesses in his behal
normally will testify before the grand jury. Upon reques
preferably in writing, you may afford the accused an opportuni
to appear before you. If the accused is given this opportunit
and appears, he cannot be forced to testify because of th
provision in the federal Constitution against self-incriminatio
If you attempt to force him to testify, an indictment returne
against him may be nullified.

"Because the appearance of an accused before you may raise
complicated legal problems, if you decide to allow an accused to
appear, you should seek the United States Attorney's advic
and, if necessary, the court's ruling before his appearance is
permitted.

"Even if the accused is willing to testify voluntarily, it is
necessary that he first be warned of his right not to testify, and
he should be required to sign a formal waiver before his
testimony is received. You should be completely satisfied that he
understands what he is doing.

"If a witness exercises his Fifth Amendment right against
compulsory self-incrimination, the grand jurors should hold no
prejudice against him for that reason, and it should play no role
in the return of any indictment against such witness.

"After you have heard all the evidence you wish to hear in a
particular matter, you will then proceed to deliberate whether
the accused person should be indicted. No one, other than your





own members is to be present while you are deliberating or voting.

"After all persons other than the grand jury members have left the room, the foreperson will ask the grand jury members to discuss and vote upon the question whether the evidence persuades the grand jury that a crime has probably been committed by the person or persons accused and that an indictment should be returned.

"To return an indictment charging an individual with an offense, it is not necessary that you find that the accused is guilty beyond a reasonable doubt. You are not a trial jury, and your task is not to decide the guilt or innocence of the person charged. In your deliberative sessions, remember that the accused usually has had no opportunity to present a defense, so that ordinarily you hear only the government's side of the case. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the accused is guilty of the offense charged against him—that is, whether the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty of the offense with which he is charged.

"Each grand juror has the right to express his view of the matter under consideration. Only after all grand jurors have been given full opportunity to be heard will the vote be taken. It should be remembered that at least 16 jurors must be present at all times, and 12 members must vote in favor of an indictment before one may be returned.

"The foreperson shall designate another juror to serve as secretary, and the latter shall keep a record of the number of jurors concurring in the finding of every indictment. The record shall be filed with the clerk of the court. The voting record for each indictment shall not include the names of the jurors but shall indicate the number of affirmative votes.

"You may decide, after deliberation among yourselves, that further evidence should be considered before a vote is taken. In such case, you may direct the United States Attorney to subpoena the additional documents or witnesses you desire to consider.



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"If 12 or more members of the grand jury, after deli tion, believe that an indictment is warranted, then yo request the United States Attorney to prepare the fo written indictment if a proposed indictment has not al been prepared. The indictment will be in the name of the U States, will designate the defendant or defendants, will se the date and place of the alleged offense, will asser circumstances making the alleged conduct criminal and identify the criminal statute violated. The foreperson endorse the indictment as a true bill and place his signatu the space followed by the word 'foreperson.' It is the duty o foreperson to endorse every indictment found with the co rence of at least 12 grand jurors, whether he voted for or ag the finding of the indictment. The grand jury will then re the indictment to the court for action. If less than 12 mem of the grand jury vote in favor of an indictment which has b submitted to you for your consideration, the foreperson w endorse the indictment 'not a true bill' and return it to t court, and the court will impound it.

"Indictments will be presented to a judge or magistrate open court by your foreperson at the conclusion of ea deliberative session.

"In the absence of the foreperson, the deputy forepers may act in all of the former's functions and duties.

"You will recall from my earlier remarks that the grand ju developed in England as an entity independent from the king protect a subject from an unwarranted prosecution. The ki could not charge a subject with a serious crime without fir submitting evidence and witnesses to a grand jury, which th decided whether to return an indictment against the accus person.

"Just as the English grand jury was independent of th king, the federal grand jury under the United States Consti tion is independent of the United States Attorney, the prose torial agent of the executive branch of the federal governme The grand jury is not an arm of the Federal Bureau Investigation; it is not an arm of the Internal Revenue Servic just as it is not an arm of the United States Attorney's offic There has been some criticism of the institution of the gra jury for allegedly acting as a mere rubber stamp approvi





prosecutions that are brought before it by government representatives. You would desecrate your oath and the tradition of the grand jury if you were merely to rubber-stamp the contemplated prosecutions brought before you by the government representatives. Similarly, you would perform a disservice if you did not indict where the evidence warranted an indictment.

"As a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance.

"However, you must remember that you are not the prosecutor's agent. Your role is related to but clearly distinct from that of the government attorneys who will assist you, and it is important that you keep the distinction between the roles clearly in mind. Although you must work closely with the government, you must not yield your powers nor forgo your independence of spirit.

"These comments are meant to be cautionary in nature. The government attorneys are sincere men and women, and you will develop ordinary human feelings as you work with them during your term of service. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith efforts in every matter presented by the government. However, it is because you may tend to expect such high quality from the government's agents that there is a potentially grave risk to your independence of thought and action, which may cause you to lapse into reliance when you should be dubious or questioning.

"You should also remember that the government attorneys are advocates for the government's interest. They are prosecutors; you are not. While they will usually balance fairly the government's interest against the interests of a citizen's personal liberty, it is your responsibility to ensure that the proper balance is achieved in every case brought to your attention. You must exercise your own judgment, and if the facts suggest a different balance than advocated by the government attorneys, then you must achieve the appropriate balance even in the face of their opposition or criticism.



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"Further, in gauging your role and relationship with government, you should be aware of the pressures inhera the development of criminal cases. Frequently, a governm law enforcement agent is the first governmental represent to detect some evidence or indication of a criminal offense may occur long before the matter is brought to the attenti the government attorney or the grand jury. Occasionally, enforcement agent files an incomplete report with the go ment attorneys, secure in his personal belief that he has a pr case or that he will soon have a proper case. This may happe complete good faith on the agent's part. Thus it may de that a case will find its way to the grand jury before a fu adequate investigation has been completed. The governm attorneys may also believe that the investigation by enforcement agents has been completed or they may be actin reliance on the agent's good faith or personal reputation expect the investigation to be shortly concluded and producti of appropriate evidence to support an indictment. Such develo ments are inherent in close working associations and ob serious considerations for you.

"An inadequate or incomplete investigation is a loose drawn net that may snare the innocent and allow the tr offenders to elude the law. It is here that you must be alert your duties. You may find pressures exerted on you to decide an indictment after being presented with an inadequate incomplete investigation. Your task in such a situation may b further complicated by the realization that the governmen request is made in complete good faith.

"Your duties require that you act only after receivi evidence which shows probable cause. Thus, there is no room you to act on the basis of the government's good faith. If yo should encounter an incomplete investigation, then it is yo responsibility to see that a full investigation is developed fo your benefit before voting to return an indictment. As previou ly stated, you have considerable powers to ensure that a prop investigation is in fact accomplished. You must use your goo judgment and be alert to those situations that either abstract or concretely suggest some inadequacy. These considerations a part of your responsibilities as a separate and independent gran jury.





"Just as you must maintain your independent office throughout your dealings with the government attorneys, so should your dealings with the court be on a formal basis. If you should ever have a question for the court or desire to make a presentment or to return an indictment to the court, then you will assemble in the courtroom for these purposes. However, each juror is directed to report immediately to the court any attempt by any person who, under any pretense whatsoever, addresses such juror for the purpose of or with the intent to gain any information of any kind concerning the proceedings of the grand jury, or to influence a juror in any manner or for any purpose.

"Within your prescribed sphere, you occupy an important and independent office in the administration of justice. The government attorneys cannot dominate or command your actions. The court may guide, but cannot dominate or command your actions.

"In performing your duties, you are free to exercise your own judgment without fear or favor and shall not be deterred or influenced by the criticism of the public, the prosecutor, or the court. You are the defenders of the innocent as well as the accusers of the guilty, and in both respects you vindicate the integrity of the law. Ours is a government based on law, and there can be no more significant role in maintaining this precept than that assigned to the grand jury.

"Your proceedings are secret and must remain secret permanently unless and until the court determines that the proceedings or a portion of them should be revealed in the interests of justice.

"There are several important reasons for this secrecy requirement. A premature disclosure of grand jury action may frustrate the ends of justice by giving an opportunity to the accused to escape and become a fugitive or to destroy evidence. Also, if the testimony of a witness is disclosed, he may be subjected to intimidation, retaliation or other tampering before he testifies at trial. Further, the secrecy requirement protects an innocent person who may have come under investigation but who has been cleared by the action of the grand jury. In the eyes of some, investigation alone carries with it a suggestion of guilt. Thus, great injury and injustice can be done to the good name



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and standing of a person, even though he is not indicted, a
it become known that there had ever been a question of hi
or innocence of a crime considered by the grand jury. Be
that person will not go to trial, he will have no opportuni
clear his name in the event of such an unfortunate disc
For all these reasons, the secrecy requirement is of the u
importance and must be regarded by you as practically s

"To ensure the secrecy of grand jury proceedings, th
provides that only authorized persons may be present
grand jury room while evidence is being presented. On
grand jury, the United States attorney or his assistan
witness under examination, the court reporter, and the
preter may be present. If an indictment should ultimate
voted, the presence of unauthorized persons in the grand
room could invalidate it.

"The law also provides that none of those author
persons whom I have just mentioned may disclose any ma
which occurs before you or them. You must be careful
preserve the secrecy of your proceedings by abstaining f
communicating with your families, friends, representative
the news media or any other persons concerning that wh
transpires in the grand jury room. Grand jurors may disc
these matters only among themselves and only in the grand j
room. You may disclose matters which occur before the gra
jury to attorneys for the government for use of such attorney
the performance of their duties. The content of your delibe
tions and the vote of any juror may not, however, be disclo
even to the government attorneys.

"The performance of jury service is the discharge of on
the responsibilities of citizenship. You have taken a
comprehensive oath as grand jurors. Thousands of your forb
ers have taken that oath in years past. Their adherence to it
preserved for us to this time a system of law and a sens
justice. You are now the new link in this chain, and you mus
strong and faithful in the discharge of your office."



# CHAPTER 6

# CONDUCT OF PROCEEDINGS AND ISSUANCE OF THE INDICTMENT

## I. INTRODUCTION AND OVERVIEW

§ 6:01. Grand Jury's Investigative Authority and Right to Evidence.
§ 6:02. Role of Prosecutor.
§ 6:03. Prosecutor's Duty To Present Exculpatory Evidence.
§ 6:04. Grand Jury's Authority and Duty To Hear Exculpatory Evidence.
§ 6:05. Right To Testify or Present Evidence.
§ 6:06. Limits on Kinds of Evidence That Can Be Presented.
§ 6:07. — Applicability of Evidentiary Rules.
§ 6:08. — Applicability of Constitutional Exclusionary Rules.

## II. SUBPOENAS

§ 6:09. Use of Subpoenas To Obtain Evidence.
§ 6:10. — Role of Prosecutor and Grand Jurors in Subpoenaing Evidence.
§ 6:11. — Subpoenas for Purposes Other Than Compelling Testimony.
§ 6:12. — Forthwith Subpoenas.
§ 6:13. — Subpoena Ad Testificandum.
§ 6:14. — "Targets" and "Subjects" of Grand Jury's Investigation.
§ 6:15. — Advising Witnesses of Their Rights Before Grand Jury.
§ 6:16. Witness's Right to Counsel.
§ 6:17. — Constitutional Bases for Right to Counsel.
§ 6:18. Witness's Right To Have Counsel Present During Testimony.
§ 6:19. — Witness's Right To Consult with Counsel.
§ 6:20. Multiple Representation and Conflicts of Interest.
§ 6:21. Evidentiary Privileges.
§ 6:22. — Privilege Against Compulsory Self-Incrimination.
§ 6:23. — Attorney-Client Privilege.
§ 6:24. — First Amendment, Common Law, and Statutory Reporter's Privilege.
§ 6:25. — Grand Jury Inquiries Based on Allegedly Illegal Electronic Surveillance.
§ 6:26. Subpoena Duces Tecum—In General.
§ 6:27. — Objections Based on Fourth Amendment.



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UNITED STATES
v.
COOPER,

Circuit Court, D. Pennsylvania.

April 30, 1880.

The libellous matter complained of was as follows: 'Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia and the Sublime Porte, nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice--a stretch of authority which the monarch of Great Britain would have shrunk from--an interference without precedent, against law and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country; a case too little known, but of which the people ought to be fully apprised, before the election, and they shall be.' [FN1]

FN1 These passages were extracted from the following publication:

April 11, 1800. The bill was found upon the ex officio action of the district attorney, there having been no previous binding over. Some difficulty arose at the outset concerning the right of the defendant to compel the attendance, as witnesses, of several members of congress (congress being then in session), and of the president. An application was made to the court to address a letter to the speaker of the house, requesting him to have process served. This PETERS, District Judge, acceded to, as the proper course. It was refused, however, by CHASE, Circuit Justice, who ordered process to issue without such letter, saying, at the same time, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. The court at the same time refused to permit a subpoena to issue directed to the president of the United States. The cause was then continued to April 19, in order to enable the defendant to procure documentary and other evidence which he considered material.

April 19, 1800. After some difficulty in obtaining the attendance of the members of congress who were subpoenaed, which appears ultimately to have been given under a waiver of the supposed privilege; and after considerable altercation between Judge CHASE and the defendant with regard to the character of the evidence to be produced, the jury was sworn, and Mr. Rawle opened the case to the jury substantially as follows:

The defendant stands charged with attempts which the practice and policy of all civilized nations have thought it right at all times to punish with severity, with having published a false, scandalous and malicious attack on the character of the president of the United States, with an intent to excite the hatred and contempt of the people of this country against the man of their choice. It was much to be lamented that every person who had a tolerable facility at writing should think he had a right to attack and overset those authorities and officers whom the people of this country had thought fit to appoint. Nor was it to be endured that foul and infamous falsehoods should be uttered and published with impunity against the president of the United States, whom the people themselves had placed in that high office, and in which he has acted with so much credit to himself and benefit to them. Thomas Cooper stands charged in the indictment as follows: (Here Mr. Rawle read the indictment.) It was a sense of public duty that called for this prosecution. It was necessary that an example should be made to deter others from misleading the people by such false and defamatory publications. There was a peculiarity in the manner also of this publication: we generally observe that persons who take these liberties endeavour to avoid punishment by sheltering themselves under fictitious signatures, or by concealing their names; but the defendant acted very differently. Being of the profession of the law, a man of education and literature, he availed himself

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of those advantage for the purpose of disseminating his dangerous productions in a remote part of the country where he had gained influence. Such conduct must have arisen from the basest motives. It would be proved to the jury that, at the time of this publication, the defendant went to a magistrate and acknowledged it to be his production, in the same formal manner as if it had been a deed. In conduct so grossly improper had occurred in no instance within his recollection, and the manner constituted no slight aggravation of the offence. Indeed, it was high time for the law to interfere and restrain the libellous spirit which had been so long permitted to extend itself against the highest and most deserving characters. To abuse the men with whom the public has entrusted the management of their national concerns, to withdraw from them the confidence of the people, so necessary for conducting the public business, was in direct opposition to the duties of a good citizen. Mischiefs of this kind were to be dreased in proportion as the country around is less informed, and a man of sense and education has it more in his power to extend the mischief which he is inclined to propagate. Government should not encourage the idea, that they would not prosecute such atrocious conduct; for if this conduct was allowed to pass over, the peace of the country would be endangered. Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection, of which the two instances which had already happened were alarming proofs, and well-known to the jury. That the jury, as citizens, must determine whether, from publications of this kind, the prosperity of the country was not endangered; and whether it was not their duty, when a case of this nature was laid before them and the law was applicable, to bring in such a verdict as the law and the evidence would warrant; and show, that these kinds of attacks on the government of the country were not to be suffered with impunity.

Mr. Rawle, after reading the section of the sedition act applicable to the case on trial, proceeded to call John Buyers, who testified as follows: 'I know this paper. Mr. Cooper brought it to me on the evening of the 6th of December, 1799, at my house at Sunbury. He came to me at the door of my house. Asked me to walk in. We walked in. This was between candle-light and day-light. He asked for a candle. He perused this paper which I have in my hand, pointed to his name, and said, 'This is my name, and I am the author of this piece.' There was nothing further passed, only he said, 'This may save you trouble another time.' I knew very well what he meant by it.'

Cross-examined by Mr. Cooper: 'Had not you and I been in the habit of frequently joking with each other upon political subjects? Ans. O yes--very often.'

Mr. Rawle here read that part of the publication which is included in the indictment, for which reason it is omitted here.

Mr. Cooper then addressed the jury as follows:

If it were true, as it is not true, that, in the language of the attorney general of the district, I have been guilty of publishing with the basest motives a foul and infamous libel on the character of the president; of exciting against him the hatred and contempt of the people of this country, by gross and malicious falsehoods--then, indeed, would it be his duty to bring me before this tribunal, it would be yours to convict, and the duty of the court to punish me. But I hope, in the course of this trial, I shall be enabled to prove to your satisfaction, that I have published nothing which truth will not justify. That the assertions for which I am indicted are free from malicious imputation, and that my motives have been honest and fair. You will observe, gentlemen of the jury, that the law requires it to be proved as a necessary part of the charge, that the passages for which I am indicted should be false and scandalous, and published from malicious motives: and before you will be able, consistently with your oaths, to convict upon this indictment, you must be thoroughly satisfied that both these parts of the charge are well founded. Nor does it appear to me that the expression of the act, to bring the president into contempt, can be fulfilled, if the accusation, as in the present instance, related to an examination of his public conduct, and no improper motives are imputed to him. And that I have carefully avoided imputing any impropriety of intention to the president, even in the very paper complained of; that the uniform tenor of my conduct and language has been to attribute honesty of motive even where I have strongly disapproved of the tendency of his measures, I can abundantly show. You, and all who hear me, well know that this country is divided, and almost equally divided, into two grand parties;

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usually termed, whether properly or improperly, Federalists and Anti-Federalists: and that the governing powers of the country are ranked in public opinion under the former denomination--of these divisions, the one wishes to increase, the other to diminish, the powers of the executive; the one thinks that the people (the democracy of the country) has too much, the other too little, influence on the measures of government: the one is friendly, the other hostile, to a standing army and a permanent navy: the one thinks them necessary to repel invasions and aggressions from without, and commotions within; the other, that a well-organized militia is a sufficient safeguard for all that an army could protect, and that a navy is more dangerous and expensive than any benefit derived from it can compensate; the one thinks the liberties of our country endangered by the licentiousness, the other, by the restrictions of the press. Such are some among the leading features of these notorious divisions of political party. It is evident, gentlemen of the jury, that each will view with a jealous eye the positions of the other, and that there cannot but be a bias among the partisans of the one side, against the principles and doctrines inculcated by the other. In the present instance, I fear it cannot but have its effects; for, without impeaching the integrity of any person directly concerned in the progress of the present trial, I may fairly state that, under the sedition law, a defendant, such as I stand before you, is placed in a situation unknown in any other case. Directly or indirectly, the public, if not the private, character of the president of the United States is involved in the present trial. Who nominates the judges who are to preside, the juries who are to judge of the evidence, the marshal who has the summoning of the jury? The president. Suppose a case of arbitration concerning the property of any one of you, where the adverse party should claim the right of nominating the persons whose legal opinions are to decide the law of the question, and of the very man who shall have the appointment of the arbitrators--what would you say to such a trial? and yet in fact such is mine, and such is the trial of every man who has the misfortune to be indicted under this law. But although I have a right to presume something of political bias against my opinions, from the court who try me, to you who sit there as jurymen, I am still satisfied you will feel that you have some character to support and some character to lose; and whatever your opinions may be on the subjects alluded to in the indictment, you will reverence as you ought the sacred obligation of the oath you have taken. Gentlemen of the jury, I acknowledge, as freely as any of you can, the necessity of a certain degree of confidence in the executive government of the country. But this confidence ought not to be unlimited, and need not be paid up in advance; let it be earned before it be reposed; let it be claimed by the evidence of benefits conferred, of measures that compel approbation, of conduct irreproachable. It cannot be exacted by the guarded provisions of sedition laws, by attacks on the freedom of the press, by prosecutions, pains and penalties on those who boldly express the truth, or who may honestly and innocently err in their political sentiments. Let this required confidence be the meed of desert, and the public will not be backward to pay it. But in the present state of affairs, the press is open to those who will praise, while the threats of the law hang over those who blame the conduct of the men in power. Indiscriminate approbation of the measures of the executive is not only unattacked, but fostered, and received with the utmost avidity; while those who venture to express a sentiment of opposition must do it in fear and trembling, and run the hazard of being dragged like myself before the frowning tribunal, erected by the sedition law. Be it so; but surely this anxiety to protect public character must arise from fear of attack. That conduct which will not bear investigation will naturally shun it; and whether my opinions are right or wrong, as they are stated in the charge, I cannot help thinking they would have been better confuted by evidence and argument then by indictment. Fines and imprisonment will produce conviction neither in the mind of the sufferer nor of the public. Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed. Electors are bound in conscience to reflect and decide who best deserves their suffrage; but how can they do it, if these prosecutions in terrorem close all the avenues of information, and throw a veil over the grossest misconduct of our periodical rulers? After having offered these preliminary remarks, I shall give an account of the paper on which I am accused, and then proceed to examine the charges of the indictment in the order in which they are laid: much that I intended to have advanced I must relinquish, that I may not trespass too long on your time, or weaken the effect of my own defence by fatiguing your attention. The scored paper now

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handed to me by the attorney general, suggests an observation which, though trite, is material. Upon the plan usually adopted in these ex officio accusations, a good Christian might easily be proved an arrant atheist. 'The fool hath said in his heart, there is no God.' Take the four last words, and they are atheistical: take the sentence, and it is Scripture. So, take the marked passages in this paper, and they may, perhaps, be forced into something like improper imputation against the president: take the paper itself, and the very first paragraph is a plain and positive approbation of his intention. Though I must acknowledge that, however upright I might formerly have believed his motives of action, I cannot, upon reflection, pay that tribute to his conduct or his motives on the present occasion. The general circumstances that gave rise to the paper I now hold, are these: Dr. Priestley, a man whose name implies a greater combination of learning, science, and ability, of important discovery, or exertion for the benefit of mankind, and of private integrity, than any other man now living can boast--whose conduct towards me, in the instance detailed in this paper, is praise sufficient to bear up my mind against any consequences which the present trial can produce--had long been an acquaintance and an intimate acquaintance of Mr. Adams, in England and in this country. The letters of the latter to Dr. Priestley are full of strong expressions of friendship and esteem. Relying upon this long intercourse of cordiality between them, Dr. Priestley urged me to permit him to write to Mr. Adams on the subject of a vacancy mentioned in this paper, and which, as you will have it before you when you retire, I shall not read at length. This application was from one friend to another; upon the face of it a confidential communication; although containing nothing but what might do credit to all the parties concerned. Mr. Adams, however, did not think it so confidential; and from some disclosure on his part, has been founded the base and cowardly slander which dragged me in the first instance before the public in vindication of my moral and political character, and has at length dragged me before this tribunal, to protect, if I can, my personal liberty and my private fortune, against the legal attack of an ex officio information. Hence, it is evident, gentlemen of the jury, that this is not a voluntary, but an involuntary publication on my part: it has originated, not from motives of turbulence and malice, but from self-defence; not from a desire of attacking the character of the president, but of vindicating my own. And in what way have I done this? My motives, my private character, my public character, were the object of falsehood and calumny, apparently founded on information of high authority. In reply, I give credit to the intentions of the president: I say nothing of his private character; and I attack only the tendency of measures notorious to the world, which, having been known to disapprove publicly, I was charged with being ready, from motives of interest, to approve privately. I think, gentlemen, you cannot help feeling this contrast of behaviour, and if the president is satisfied with his side of the picture, I am mine.

The first article selected for accusation is, that, at the time I allude to, 'he was but in the infancy of political mistake.' Why this expression should have been fixed on as seditious, I know not, unless it be that 'quem deus vult perdere prius dementat'; for have we advanced so far on the road to despotism in this republican country, that we dare not say our president may be mistaken? Is a plain citizen encircled at once by the mysterious attribute of political infallibility the instant he mounts the presidential chair? If so, then indeed may it be seditious to say he is mistaken; but before you can condemn me for this kind of sedition, you must become catholic believers in this new-fangled doctrine of infallibility. I know that in England the king can do no wrong, but I did not know till now that the president of the United States had the same attribute. I have said (and I am accused for saying it) 'that even those who doubted his capacity thought well of his intentions.' Is it a crime to doubt the capacity of the president? Suppose I had said that there were some who did not give him credit for capacity sufficient for the office he holds, is that a crime? Or if in them, is it a crime in me, who have not said it? Nor can the word 'capacity' here be fairly construed into any other than a comparative meaning; for surely no one who has read his defence, as it is called, of the American constitution, or who reflects that he has had abilities enough to raise himself to his present situation, can say that he is devoid either of industry or talents. But those who voted for his opponent must have believed Mr. Adams of inferior capacity to that gentleman. Of that number was I; of that number was at least one-half of the people of the United States. If it be a crime thus to have thought and thus to have spoken, I fear I shall continue in this respect incorrigible.

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But if of two constructions the one is absurd, improbable and unfavourable, surely it should be rejected in favour of that meaning which was most likely to have occurred, and which in its effects will do least injury to a defendant like myself. This is common, this is legal charity. 'Nor had we yet, under his auspices, been saddled with the expense of a permanent navy.' Gentlemen, is it true or not that we are saddled with the expense of a permanent navy? Is it necessary that I should enter into a detail of authorities to prove that the sun shines at noon-day? But farther, is it true that we incur this expense under his auspices and sanction? I have before me two publications: the one the Gazette of the United States, published by Mr. Fenno in this city; and another, in a form more portable and convenient, purporting to be a selection of addresses and answers to and from the president during the summer of 1798. Not having been able to procure office copies of the documents I wished to refer to, I must offer in evidence such publications as I can find; that class of publications, upon which in fact the mind of the public is usually made up; and upon whose authority the electors of this country determine the characters whom they honour with their suffrage. Indeed, if the opinion that fell from the court this morning be accurate, that no man should hazard an assertion but upon sufficient and legal evidence, and if documents from the public offices in proof of notorious facts are required as such evidence, then are the mouths of the people completely shut up on every question of public conduct or public character; but I cannot help thinking it a fair and reasonable position, that a defendant in such a case as this should be permitted to offer to the jury any evidence that appears to him a sufficient ground for his assertion, and let them decide on its credibility.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

1. In a prosecution under the sedition act of July 14, 1798 (1 Stat. 596), for the publication of a libel against the president of the United States, there must clearly appear an intent to defame him, to bring him into contempt and disrepute, and excite against him the hatred of the good people of the United States. If there be no such intent there can be no guilt.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

2. It is false, within the meaning of the sedition act, to publish that our credit is brought so low that we are obliged to borrow money at 8 per cent. 'in time of peace,' when, although there has been no declaration of war, there have been actual hostilities, captures of vessels, and a prohibition of intercourse.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

3. A murder committed on board a British ship of war is committed within the jurisdiction of Great Britain, within the meaning of article 27 of the treaty with that power, relating to the extradition of persons charged with murder and forgery.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

4. The executive is the party upon whom devolves the duty of surrendering a fugitive in case of extradition under the treaty, and, although he makes use of a judge of the United States as an instrument for ascertaining whether there is sufficient evidence of criminality to require the surrender, the court has no jurisdiction of the crime, and the president cannot truthfully be accused, in connection with such a transaction, of attempting to influence or interfere with a court of justice.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

5. To publish, in respect to the president, that we are threatened, under his auspices, with the existence of a standing army, betrays either the most egregious ignorance or the most wilful intention to

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deceive the public; for there are but two descriptions of armies in the country, one called the 'Western Army,' enlisted for five years only, and the other called the 'Provisional Army,' enlisted during the existence of war with France; and neither of these can with any propriety be called a standing army, especially as the constitution declares that no appropriations shall be made for the support of an army longer than two years.

'To the Public. 'To the Printer--Sir: I should not condescend to answer anonymous slander, but the information on which the falsehoods contained in the following paragraph are grounded, must have been originally derived from the president himself. I cannot believe him capable of such misrepresentation, for I still think well of his intentions, however I may disapprove of his conduct: but the following narrative will show that some of his underlings are capable of anything: 'From the Reading Weekly Advertiser of October 26, 1799: "Communication. Thomas Cooper's address to the readers of the Sunbury and

Northumberland Gazette, of which he was editor, having been republished in this state, with an introduction approbatory of the piece, a correspondent wishes to know if it be the same Thomas Cooper, an Englishman, of whom the following anecdote is related? If it is, every paper devoted to truth, honour, and decency, ought to give it a thorough circulation. Not many months ago, it is said, a Mr. Cooper, an Englishman, applied to the president of the United States, to be appointed 'agent for settling the respective claims of the citizens and subjects of this country and Great Britain.' In his letter, he informs the president, that although he (Thomas Cooper) had been called a Democrat, yet his real political sentiments are such as would be agreeable to the president and government of the United States, or expressions to that effect. This letter was accompanied with another from Dr. Joseph Priestley, who did not fail to assure the president of the pliability of his friend Cooper's Democratic principles. The president, it is said, rejected Cooper's application with disdain, and Priestley's with still stronger marks of surprise, saying, it is said, as he threw the letter on the table, does he think that I would appoint any Englishman to that important office in preference to an American? What was the consequence? When Thomas Cooper found his application for a lucrative office under our president rejected, he writes in revenge the address which appeared in print, and Dr. Priestley exerted his influence in dispersing this very address, which he must know was the offspring of disappointment and revenge! The address is as cunning and insidious a production as ever appeared in the Aurora or the old Chronicle, and as for impudence, it exceeds, or at least equals, Porcupine himself. Priestley and Cooper are both called upon to deny the above narrative. A recourse to the letters themselves, would establish the accuracy of this anecdote, even to a syllable.' 'Yes; I am the Thomas Cooper alluded to--luckily possessed of more accurate information than the malignant writer of that paragraph, from whatever source his intelligence was derived. About the time of the appointment of commissioners under the British treaty, Doctor Ross, who had sedulously brought about an intercourse of civility between Mr. Liston and myself, urged me to permit him to apply on my behalf to that gentleman, for one of the appointments that must then take place. He pressed on me the folly, as he termed it, of my confining myself to Northumberland, his earnest wish to see me settled in Philadelphia, and the duty I owed my family to better my situation by every means in my power. He stated that Mr. Liston, he knew, thought highly of me, and though the post of the fifth commissioner was probably then disposed of, there must be an agent for the British claimants; an office which, from my situation as a barrister in England, and my knowledge of mercantile transactions, I was peculiarly fitted to fill. I replied, that he probably overrated Mr. Liston's opinion and his own influence, and that, at all events, my known political opinions must render it equally improper for Mr. Liston to give, and for me to accept, any office whatever connected with the British interests. That Mr. Liston and I understood each other on this question, and had hitherto avoided all politics whatever. That, being an American, I should not object to any office under this government, if I could fairly obtain it; but that I would never consent to any application to Mr. Liston. Through Mr. Coleman's interest, Mr. Hall of Sunbury was complimented with the offer of being appointed agent of American claims. On mentioning to Dr. Priestley, one night at supper, that Mr. Hall had declined it, Dr. Ross's persuasions occurred to me, and I said that such an office as that would have suited me very well. Dr. Priestley replied, if that was the case, he thought he had some interest with

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Mr. Adams, with whom he had long been acquainted, and who had always expressed himself in terms of the highest friendship: that, as he never intended to ask any favour of Mr. Adams for himself, I might as well let him try for once to ask one for me. On my objecting that Mr. Adams' politics and mine were probably very different, Dr. Priestley declared that this, so far from being an objection, might be an inducement in my favour; for if Mr. Adams meant to be the ruler of a nation, insteal of the leader of a party, he would be glad of an opportunity to exhibit such an instance of liberal conduct. At length I consented, expressly requesting Dr. Priestley to take care that Mr. Adams should not mistake my politics. In consequence of this conversation, Dr. Priestley wrote the following letter,--not a few months, but above two years ago: "August 12, 1797. Dear Sir: It was far from being my intention or wish to trouble you with the request of any favours, though it is now in your power to grant them; and it is not at all probable that I shall ever take a second liberty of the kind. But circumstances have arisen which I think call upon me to do it once, though not for myself, but a friend. The office of agent for American claims was offered, I understand, to Mr. Hall of Sunbury, and he has declined it. If this be the case, and no other person be yet fixed upon, I shall be very happy if I could serve Mr. Cooper, a man I doubt not of equal ability, and possessed of every other qualification for the office, by recommending him. It is true, that both he and myself fall, in the language of our calumniators, under the description of Democrats, who are studiously represented as enemies to what is called government, both in England and here. What I have done to deserve that character, you well know, and Mr. Cooper has done very little more. In fact, we have both been persecuted for being friends to American liberty, and our preference of the government of this country has brought us both hither. However, were the accusations true, I think the appointment of a man of unquestionable ability and fidelity to his trust, for which I would make myself answerable, would be truly such a mark of superiority to popular prejudice as I should expect from you I, therefore, think it no unfavourable circumstance in the recommendation. That you will act according to your best judgment, I have no doubt, with respect to this and

other affairs of infinitely more moment, through which I am persuaded you will bring the country with reputation to yourself, though in circumstances of such uncommon difficulty, perhaps with less ease and satisfaction than I could wish. With my earnest wishes for the honour and tranquillity of your presidency, I am, &c., Joseph Priestley.' 'This letter was accompanied by the following from myself: "Sir: On my expressing an inclination for the office which Mr. Hall has declined, Dr. Priestley was so good as to offer his services with you on my behalf. Probably the office will be filled ere this letter can reach you: probably there may be objections to nominating a person not a native of the country: probably the objection mentioned by Dr. Priestley, may reasonably be deemed of weight in my instance. Be all this as it may, I see no impropriety in the present application to be appointed agent of American claims, for it is still possible I may suppose more weight in the objections than they will be found to deserve. If it should so happen that I am nominated to that office, I shall endeavour to merit the character the Doctor has given me, and your esteem. I am, &c., Thomas Cooper.' 'Is this the letter of a man, or not? I do not appeal to the cowardly propagator of anonymous falsehoods, but to the public. What is there in it of vanity or servility? Do not these letters take for granted that I am a Democrat, though not a disturber of all government? and that what I am I shall remain, even though it be deemed a reasonable objection to my appointment? Is this, or is this not, adhering to my principle, whatever becomes of my interest? Nor is it true that my address originated from any motives of revenge. Two years elapsed from the date of those letters, before I wrote anything on the politics of this country. Nor did I recollect them at the time. Nor do I see the objection to taking any fair means of improving my situation. This is a duty incumbent on every prudent man who has a family to raise, and which I have already too much neglected from public motives: nor can any office to which I am eligible in this country, recompense me for the offers I rejected in its favour. But it is not in the power of promises or threats, of wealth or poverty, to extinguish the political enthusiasm which has actuated my conduct for these twenty years. The prudence of middle age and the claims of duty may make me cautious of sacrificing my interest, but they cannot induce me to sacrifice my principle. Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity

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thought well of his intentions. He had not at that time given the public to understand that he would bestow no office but under implicit conformity to his political opinions. He had not declared that 'a republican government may mean anything.' He had not yet sanctioned the abolition of trial by jury in the alien law, or entrenched his public character behind the legal barriers of the sedition law. Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war; nor had the political acrimony which still poisons the pleasures of private society, been fostered by those who call themselves his friends and adherents; nor had the eminent services of Mr. Humphreys at that time received their reward. Mr. Adams had not yet projected his embassies to Prussia, Russia, and the Sublime Porte; nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice; a stretch of authority which the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy! This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country. A case too little known, but of which the people ought to be fully apprised before the election, and they shall be. Most assuredly, had these transactions taken place in August, 1797, the President Adams would not have been troubled by any request from 'Thomas Cooper. 'Northumberland, Nov. 2, 1797.'

CHASE, Circuit Justice.

What is it that you say, sir, fell from the court? They have not yet decided what was or what not proper evidence for you to adduce. The court said, if you thought the public documents at your service, you were mistaken. If you undertake to publish, without having proper evidence before you to justify your assertions, you do it at your own risk. Most assuredly, in common traverses, you could not offer the evidence you mention. But we acknowledge that, in such a case as this, greater latitude may be given. If you say the president did write a letter, you must prove it. We should incline to admit gazettes and acts of public authority and notoriety: you might read the speech of the president to both houses of congress in evidence. If you want to prove that the president advocated a navy, you may read the journals of congress or any authentic public document.

Mr. Cooper. If I am defeated in my endeavours to procure these documents, I must offer such evidence as I can procure; and where there is no reasonable suspicion or assignable motive why the publications I offer should misrepresent the transactions I allude to, the probability is in favour of their accuracy; especially when the printers of them are severely punishable for wilful misrepresentation or gross mistake in detailing the public acts of government.

PETERS, District Judge.

I admit a great many things from Mr. Cooper, who is without counsel, which I would not admit from others.

CHASE, Circuit Justice.

You may read anything and everything you please.

Mr. Cooper then went on to argue at great length, from a copious collection from the public documents of the day, that the policy of the president had been to saddle upon the country a permanent navy and army, and to keep down the liberties of the citizens by his arbitrary interference in the case of Jonathan Robbins. He then said:

Gentlemen, I have gone through all the charges, and I am satisfied that I have brought in support of my assertions the best evidence the nature of my case would admit of. It is true, by resorting to Danbury for depositions and to Charlestown for records, I might have made the evidence in the last charge more complete; but I did not and do not think them necessary to produce further conviction on your minds than you feel on the subject already. This is an important point under the law in question. If such strictness of testimony is required, there is an end at once of all political conversation in promiscuous society. The time, the labour, the difficulty, the expense, the harassment and fatigue of mind as well as of body, which such doctrine

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would occasion to every citizen whom a corrupt administration might determine to ruin, would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press; and would be a punishment for innocence before trial, too severe to be inflicted on sedition itself. I think you must feel the truth of these remarks: the proceedings on this trial irresistibly suggest them. Gentlemen, if the assertions I have made are true, whatever the motives of them may be, you cannot find me guilty. But I think it impossible, if you consider the paper altogether, that you can asscribe the publication of it to malice: it is on the face of it not voluntary, but compelled. I have, in the very outset of the paper, spoken well of the president: I have been in the habit of thinking his intentions right, and his public conduct wrong: and that this has been the general tenor of my language and behaviour, I believe I can even now bring proof enough from among my friends and my neighbors.

CHASE, Circuit Justice. This is not necessary: it is your conduct, not your character, that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character, and show that you have always been a good citizen; but this is an indictment for a libel against the president, where your general character is not in question. ***638**

Mr. Cooper. I am satisfied. I shall fatigue the jury no longer; but rest my defence here.

Mr. Rawle, in reply, said:

Gentlemen of the jury, the defence you have just heard is one of the most extraordinary and unexampled I ever remember to have witnessed in a court of justice. It is no less than to call into decision whether Thomas Cooper, the defendant, or the president of the United States, to whom this country has thought proper to confide its most important interests, is best qualified to judge whether the measures adopted by our government are calculated to preserve the peace and promote the happiness of America. This, however, does not seem to me the real point which you are to try; and I shall therefore (under direction of the court) proceed to state what I conceive to be the question which you, gentlemen of the jury, are now called upon to determine. Thomas Cooper is charged in the indictment with having published a false, scandalous and malicious libel, with intent to defame the president of the United States, and to bring him into contempt and disrepute, and to excite against him the hatred of the good people of this country. In the act which defines this offence and points out the punishment, a liberality of defence is given, unknown, I believe, in any other country where the party is tried for a libel on the government. Here the defendant is allowed, under the third section of that act, to give in evidence the truth of the matters charged as a libel in the publication, and the jury have a right to determine the law and the fact under the direction of the court. The true spirit of the law is that the defendant shall not be found guilty of publishing defamatory writings, unless they be false, nor, although they may be false, shall he be considered as guilty under the law, unless the intent of the publication appear to be malicious. That such publication has proceeded upon a knowledge of the truth, he is permitted to give as matter of evidence; and if true, it must be allowed to go far to satisfy the minds of the jury that the malicious motives imputed to him are not true. In private actions for slander, where a man seeks pecuniary redress for the injury his character has sustained, the defendant is entitled to give in evidence, as a defence to the action, the truth of the words spoken or the written libel; and if the truth of the assertions be proved, it will amount to a justification. There is no difference, then, between the defence that may be set up to an action of slander, or libel on a private person, and that which is permitted under the law whereon this indictment is grounded. The defendant has undertaken to satisfy the mind of the jury that, in this publication, he had no malicious intention against the president of the United States; I join issue with him on the point, and request your particular attention to it. He alleges that he did not impute improper motives to the president, and attempts to substantiate his allegation by referring you to his declaration in the outset, where he says that 'I cannot believe him (the president) capable of such gross misrepresentations, for I still think well of his intentions, however I may disapprove of his conduct.' But to this I shall add that he goes on and concludes with a paragraph, evincing in the clearest manner a settled design to persuade the public that the president of the United States is not fit for the high office he bears, and of this you must be fully convinced from the whole tenor of the expressions which have been read to you in the indictment. It is very far from my views to press hard upon any part

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of his long address to you, or to make use against him of any unguarded expression, which, on more deliberate consideration, he might have omitted or corrected; yet, when I cannot but observe, from the whole tenor of his present argument, as well as from his publication, that his object is not so much to convince you, gentlemen of the jury, that his assertions are true, as to cast an unmerited reflection on the general character and conduct of the president, I cannot help suspecting him of the motives he disclaims, and I must do my duty by exposing the design as well as the fallacy of the justification he has set up. The defendant has used a little observation respecting the separating in the indictment the text from the context, as I believe he was pleased to term it; and argued that by this means the most upright intentions and laudable expressions might be perverted from their true and obvious meaning. Such an insinuation, however, is not calculated to influence your minds. In framing an indictment, it is my duty to leave out matters of little importance, and to introduce those circumstances only that are truly and legally reprehensible: and he well knows that he can read, if he pleases, the whole of the publication, and that you will have it with you when you consider of your verdict. You will judge, therefore, whether by this observation, it was his, or whether it is my design to confound and perplex the sense. Whether the reflections he has thrown upon the conduct of government, in so many instances throughout his defence as well as in his publication, evince the regard he professes to entertain for the intentions of the president, is to me, as it will be to you, extremely dubious; nor have those professions been confirmed by the singular manner in which he has cited and selected the passages on which his defence has been grounded. Throughout the quotations he has made, particularly from the addresses to the president, and the answers to them, there has been a series of misrepresentations, which it will be my duty to observe upon when I come to consider that part of the charge and his vindication of it. But it is fair to observe that if, from the perusal of partial extracts and passages selected from various publications, he has thought proper ***639** to publish a libel, such as that for which he is indicted, against the character of our president, there is no excuse for his conduct; if, on the other hand, he had the whole of the publications before him, and has extracted from them partially and unfairly, his conduct is still more reprehensible, and there is the less excuse, as it is evident, and as you, gentlemen of the jury, must have observed, that he is a man of talents and letters.

Mr. Rawle then proceeded to consider at great length the several points of justification started by Mr. Cooper, and then said:

Gentlemen, you have attended to the words of this charge in the indictment, and you cannot but be impressed that they convey on the face and in the very tenor of them, a conclusive proof of a mala mens, of a malicious and deliberate intention to injure the character of the president: no man can read them without receiving this impression from the perusal. I have not touched on the article respecting the embassies to Prussia, Russia, and the Porte; because I did not think it of importance sufficient to occupy much of your time. Indeed, I believe no embassy was ever sent to Russia. There is enough for your consideration against the defendant, without dwelling on these lesser articles of the indictment. Gentlemen, I have no personal animosity against Mr. Cooper; but I have instituted this prosecution because I thought it my duty so to do, and I must make those remarks which the same duty calls forth. The defendant has endeavoured to show that his publication was without malice; but his conduct with Buyers, and his expressions in that publication, prove otherwise: the nature of his defence, though he has stated his opinion of the good intentions of the president, evidently shows that he meant to justify his own conduct and language throughout. You, gentlemen of the jury, under the direction of the court, will decide whether he has presented to you such a justification as will entitle him to your verdict in his favour.

CHASE, Circuit Justice (charging jury). Gentlemen of the jury: When men are found rash enough to commit an offence such as the traverser is charged with, it becomes the duty of the government to take care that they should not pass with impunity. It is my duty to state to you the law on which this indictment is preferred, and the substance of the accusation and defence. Thomas Cooper, the traverser, stands charged with having published a false, scandalous and malicious libel against the president of the United States, in his official character as president. There is no civilized country that I know of, that does not punish such offences; and it is necessary to the peace and welfare of this

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country, that these offences should meet with their proper punishment, since ours is a government founded on the opinions and confidence of the people. The representatives and the president are chosen by the people. It is a government made by themselves; and their officers are chosen by themselves; and, therefore, if any improper law is enacted, the people have it in their power to obtain the repeal of such law, or even of the constitution itself, if found defective, since provision is made for its amendment. Our government, therefore, is really republican; the people are truly represented, since all power is derived from them. It is a government of representation and responsibility. All officers of the government are liable to be displaced or removed, or their duration in office limited by elections at fixed periods. There is one department only, the judiciary, which is not subject to such removal; their offices being held 'during good behaviour,' and therefore they can only be removed for misbehaviour. All governments which I have ever read or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow, but most sure and certain, means of bringing about the destruction of the government. The legislature of this country, knowing this maxim, has thought proper to pass a law to check this licentiousness of the press: by a clause in that law it is enacted. (Judge CHASE here read the second section of the sedition law.) It must, therefore, be observed, gentlemen of the jury, that the intent must be plainly manifest. It is an important word in the law; for it there is no such intent to defame, &c., there is no offence created by that law. Thomas Cooper, then, stands indicted for having published a false, scandalous and malicious libel upon the president of the United States, with intent to defame the president, to bring him into contempt and disrepute, and to excite against him the hatred of the good people of the United States. This is the charge. The traverser has pleaded not guilty, and that he has not published, &c., with these views. He has also pleaded in justification (which the law provides for), that the matters asserted by him are true, and that he will give the same in evidence.

It is incumbent on the part of the prosecution to prove two facts: (1) That the traverser did publish the matters contained in the indictment. (2) That he did publish with intent to defame, &c. For the intent is as much a fact as the other, and must be proved in the same manner as other facts; and must be proved as stated in the law of congress--the mere publication is no offence; and in making up your verdict, though you consider them separately, you must take the whole tenor and import of the publication, since the offence is committed by the two coupled together. ***640**

First, then, as to the publication. The fact of writing and publishing is clearly proved; nay, in fact, it is not denied. It is proved to have taken place at Sunbury, a considerable distance from the seat of government. It appears from the evidence that the traverser went to the house of a justice of the peace with this paper, whom, of all others, he ought to have avoided; for he must know that it was the duty of the justice of the peace to deliver it immediately to those who administer the government. He did so. It was indecent to deliver such a paper to a justice of the peace, and the manner in which it was delivered was yet more outrageous--if it was done in joke, as the traverser would wish to imply, it was still very improper--but there was the same solemnity in his expression, 'This is my name, and I am the author of this handbill,' as if the traverser was going to part with an estate. This conduct showed that he intended to dare and defy the government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be founded in truth. It is proved most clearly to be his publication. It is your business to consider the intent as coupled with that, and view the whole together. You must take that publication, and compare it with the indictment. If there are doubts as to the motives of the traverser, he has removed them; for, though he states in his defence that he does not arraign the motives of the president, yet he has boldly avowed that his own motives in this publication were to censure the conduct of the president, which his conduct, as he thought, deserved. Now, gentlemen, the motives of the president, in his official capacity, are not a subject of inquiry with you. Shall we say to the president, you are not fit for the government of this country? It is no apology for a man to say, that he believes the president to be honest, but that he has done acts which prove him unworthy the

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confidence of the people, incapable of executing the duties of his high station, and unfit for the important office to which the people have elected him: the motives and intent of the traverser, not of the president, are the subject to be inquired into by you.

Now we will consider this libel as published by the defendant, and observe what were his motives. You will find the traverser speaking of the president in the following words: 'Even those who doubted his capacity, thought well of his intentions.' This the traverser might suppose would be considered as a compliment as to the intentions of the president; but I have no doubt that it was meant to carry a sting with it which should be felt; for it was in substance saying of the president, 'You may have good intentions, but I doubt your capacity.' He then goes on to say: 'Nor were we yet saddled with the expense of a permanent navy, nor threatened, under his (the president's) auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace.' Now, gentlemen, if these things were true, can any one doubt what effect they would have on the public mind? If the people believed those things, what would be the consequence? What! the president of the United States saddle us with a permanent navy, encourage a standing army, and borrow money at a large premium? And are we told, too, that this is in time of peace? If you believe this to be true, what opinion can you, gentlemen, form of the president? One observation must strike you, viz.: That these charges are made not only against the president, but against yourselves who elect the house of representatives, for these acts cannot be done without first having been approved of by congress. Can a navy be built, can an army be raised, or money borrowed, without the consent of congress? The president is further charged for that 'the unnecessary violence of his official expressions might justly have provoked a war.' This is a very serious charge indeed. What, the president, by unnecessary violence, plunge this country into a war! and that a just war? It cannot be--I say, gentlemen, again, if you believe this, what opinion can you form of the president? Certainly the worst you can form: you would certainly consider him totally unfit for the high station which he has so honorably filled, and with such benefit to his country. The traverser states that, under the auspices of the president, 'our credit is so low that we are obliged to borrow money at eight per cent. in time of peace.' I cannot suppress my feelings at this gross attack upon the president. Can this be true? Can you believe it? Are we now in time of peace? Is there no war? No hostilities with France? Has she not captured our vessels and plundered us of our property to the amount of millions? Has not the intercourse been prohibited with her? Have we not armed our vessels to defend ourselves, and have we not captured several of her vessels of war? Although no formal declaration of war has been made, is it not notorious that actual hostilities have taken place? And is this, then, a time of peace? The very expense incurred, which rendered a loan necessary, was in consequence of the conduct of France. The traverser, therefore, has published an untruth, knowing it to be an untruth.

The other part of the publication is much more offensive. I do not allude to his assertions relating to the embassies to Prussia, Russia, and the Sublime Porte. They are matters of little consequence, and, therefore, I shall pass over them. The part to which I allude is that where the traverser charges the president with having influenced the judiciary department. I know of no charge which can be more injurious to the president than that of an attempt to influence a court of judicature; the judicature of the country is of the greatest consequence to the liberties and existence of a nation. If your constitution was destroyed, ***641** so long as the judiciary department remained free and uncontrolled, the liberties of the people would not be endangered. Suffer your courts of judicature to be destroyed; there is an end to your liberties. The traverser says that this interference was a stretch of authority that the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy. Is not this an attack, and a most serious attack on the character of the president? The traverser goes on thus: 'This melancholy case of Jonathan Robbins, a native of America, forcibly impressed by the British, and delivered, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country,--a case too little known, but of which the people ought to be fully apprised before the election, and they shall be.' Now, gentlemen, there are circumstances in this publication which greatly aggravate the offence. The traverser does not only tell you that the president interfered to influence a court of justice without precedent, against law and against mercy; but that he so interfered in order to

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deliver up a native American citizen to be executed by a British court-martial under a mock trial, against law and against mercy. Another circumstance is adduced to complete the picture. He tells you that this Robbins was not only an American, but a native American, forcibly impressed by the British; and yet that the president of the United States, without precedent, against law and against mercy, interfered with a court of justice, and ordered this native American to be delivered up to a mock trial by a British court-martial. I can scarcely conceive a charge can be made against the president of so much consequence, or of a more heinous nature. But, says Mr. Cooper, he has done it. I will show you the case in which he has done it. It is the case of Jonathan Robbins. It appears then that this is a charge on the president, not only false and scandalous, but evidently made with intent to injure his character, and the manner in which it is made is well calculated to operate on the passions of Americans, and I fear such has been the effect. If this charge were true, there is not a man amongst you but would hate the president. I am sure I should hate him myself if I had thought he had done this. Upon the purity and independence of the judges depend the existence of your government and the preservation of your liberties. They should be under no influence--they are only accountable to God and their own consciences--your present judges are in that situation.

There is a little circumstance which the attorney-general, in his observations to you, omitted to state, but which I think it right to recall to your recollection, as it appears with what design the traverser made this publication. In this allusion to Jonathan Robbins he expressly tells you this is 'a case too little known, but of which the people ought to be fully apprised before the election, and they shall be.' Here, then, the evident design of the traverser was, to arouse the people against the president so as to influence their minds against him on the next election. I think it right to explain this to you, because it proves, that the traverser was actuated by improper motives to make this charge against the president. It is a very heavy charge, and made with intent to bring the president into contempt and disrepute, and excite against him the hatred of the people of the United States. The traverser has read in evidence a report made by the president to the house of representatives, and a letter written by the secretary of state, to show that the president had advised and directed this Robbins to be given up; but subsequent facts could not excuse the traverser for what he had written before. Now, gentlemen, with regard to this delivery of Jonathan Robbins, I am clearly of opinion that the president could not refuse to deliver him up. This same Jonathan Robbins, whose real name appears to have been Nash, was charged with murder committed on board the Hermione, British ship of war. This Nash being discovered in America, the British minister made a requisition to the president that he should be delivered up. Then we must inquire whether the president was obliged to give him up? By the twenty-seventh article of the treaty with Great Britain, it is stipulated, 'that either of the contracting parties will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided this shall be done only on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had been there committed.' If the president, therefore, by this treaty, was bound to give this Nash up to justice, he was so bound by law; for the treaty is the law of the land: if so, the charge of interference to influence the decisions of a court of justice, is without foundation. The reason why this article was inserted in the treaty, is evident. Murder is a crime against the laws of God and man, and ought never to be committed with impunity. Forgery is an offence affecting all commercial countries, and should never go unpunished; and therefore every government, especially a commercial one, acts wisely in delivering fugitives guilty of such crimes to justice. Nash was charged with having committed murder on board a British ship of war. Now a dispute has arisen whether murder committed on board such a ship of war, was committed within the jurisdiction of Great Britain. I have no doubt as to the point. All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations. All nations have this jurisdiction, and the reason is obvious, ***642** for every country carrying on commerce, is answerable to other nations for the conduct of their subjects on the ocean. Were it not so, crimes committed on board vessels of war would go unpunished; for no other country can claim jurisdiction. This person, then, was charged with

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murder committed on board a British ship of war. I say it was committed within the jurisdiction of Great Britain, By the constitution, (since the treaty is the law of the land,) America was bound to give him up: but who is the person to deliver up a fugitive according to that article in the treaty? The president was the only person to take the proper steps, and to take cognizance of the business. He represents the United States in their concerns with foreign powers. This affair could not be tried before a court of law. No court of justice here has jurisdiction over the crime of murder committed on board a British ship of war. Now, as the requisition was made to the president on the part of the British government to deliver this man up, it became necessary to know whether there was sufficient evidence of his criminality pursuant to the treaty. The judge of the court of Carolina was therefore called upon to inquire into the evidence of his criminality. He was the instrument made use of by the president to ascertain that fact. His delivery was the necessary act of the president, which he was by the treaty and the law of the land, bound to perform; and had he not done so, we should have heard louder complaints from that party who are incessantly opposing and calumniating the government, that the president had grossly neglected his duty by not carrying a solemn treaty into effect. Was this, then, an interference on the part of the president with the judiciary without precedent, against law and against mercy; for doing an act which he was bound by the law of the land to carry into effect, and over which a court of justice had no jurisdiction? Surely not; neither has it merited to be treated in the manner in which the traverser has done in his publication. A defence of greater novelty I never heard before.

Take this publication in all its parts, and it is the boldest attempt I have known to poison the minds of the people. He asserts that Mr. Adams has countenanced a navy, that he has brought forward measures for raising a standing army in the country. The traverser is certainly a scholar, and has shown himself a man of learning, and has read much on the subject of armies. But to assert, as he has done, that we have a standing army in this country, betrays the most egregious ignorance, or the most wilful intentions to deceive the public. We have two descriptions of armies in this country--we have an army which is generally called the Western army, enlisted for five years only--can this be a standing army? Who raises them? Congress. Who pays them? The people. We have also another army, called the provisional army, which is enlisted during the existence of the war with France--neither of these can, with any propriety, be called a standing army. In fact, we cannot have a standing army in this country, the constitution having expressly declared that no appropriation shall be made for the support of an army longer than two years. Therefore, as congress may appropriate money for the support of the army annually, and are obliged to do it only for two years, there can be no standing army in this country until the constitution is first destroyed. There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the president, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him.

It is too much to press this point on the traverser. But he deserves it. This publication is evidently intended to mislead the ignorant, and inflame their minds against the president, and to influence their votes on the next election. The traverser says, he has proved that the president has advocated a standing army--how has he proved it? There is no standing army; I have before stated, the army is only raised for five years, and during the existing differences--he tells you, Mr. Adams is a friend to the establishment of a navy; I wonder who is not a friend to a navy which is to protect the commerce and power of this country. The traverser has, to prove these points, read to you many extracts from the addresses and answers to the president. He has selected a number of passages, which, he asserts, prove the approbation of the president to the creation of a navy, and forming a standing army. But we are to recollect gentlemen, that when in consequence of the unjust proceedings of France, the great mass of the people thought proper to address the president, expressing in those addresses, sentiments of attachment and confidence in the president, and their determination to resist the oppression of the French government, the president replied to them, in answers which generally were the echo of their sentiments, and in fact, his expressions were as general as the nature of the addresses would permit--therefore, the traverser ought to have blamed the addressers, and not the president. The

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Marine Society of Boston, as old seamen, address the president in favour of a navy. The president in reply, thinks a navy is the proper defence of the country.

I believe, gentlemen, in the first part of my charge, I made remarks on the assertions of the traverser, that the president had borrowed money at eight per cent. in time of peace. Therefore, it will not be necessary to enlarge on that point. You will please to notice, gentlemen, that the traverser in his defence must prove every charge he has made to be true; ***643** he must prove it to the marrow. If he asserts three things, and proves but one, he fails; if he proves but two, he fails in his defence, for he must prove the whole of his assertions to be true. If he were to prove, that the president had done everything charged against him in the first paragraph of the publication--though he should prove to your satisfaction, that the president had interfered to influence the decisions of a court of justice, that he had delivered up Jonathan Robbins without precedent, against law and against mercy, this would not be sufficient, unless he proved at the same time, that Jonathan Robbins was a native American, and had been forcibly impressed, and compelled to serve on board a British ship of war. If he fails, therefore, gentlemen, in this proof, you must then consider whether his intention in making these charges against the president were malicious or not. It is not necessary for me to go more minutely into an investigation of the defence. You must judge for yourselves--you must find the publication, and judge of the intent with which that publication was made, whether it was malice or not? If you believe that he has published it without malice, or an intent to defame the president of the United States, you must acquit him. If he has proved the truth of the facts asserted by him, you must find him not guilty.

After the jury had returned with a verdict of guilty:

CHASE, Circuit Justice. Mr. Cooper, as the jury have found you guilty, we wish to hear any circumstances you have to offer in point of the mitigation of the fine the court may think proper to impose on you, and also in extenuation of your punishment. We should therefore wish to know your situation in life, in regard to your circumstances. It will be proper for you to consider of this. As you are under recognizance, you will attend the court some time the latter end of the week. (The court appointed Wednesday.)

Proceedings on Wednesday, April 30, 1800.

CHASE, Circuit Justice. Mr. Cooper, have you anything to offer to the court previous to passing sentence?

Mr. Cooper. The court have desired me to offer anything relating to my circumstances in mitigation of the fine, or any observation that occurs to me in extenuation of the offence. I have thought it my duty (not for the purpose of deprecating any punishment which the court may deem it proper to inflict, but) to prevent any accidental or apparent harshness of punishment on part of the court, for want of that information which it is in my power to give. For this reason, therefore, and that the court may not be misled, I think it right to say, that my property in this country is moderate. That some resources I had in England, commercial failures there have lately cut off: that I depend principally on my practice: that practice, imprisonment will annihilate. Be it so. I have been accustomed to make sacrifices to opinion, and I can make this. As to circumstances in extenuation, not being conscious that I have set down aught in malice, I have nothing to extenuate.

CHASE, Circuit Justice. I have heard what you have to say. I am sorry you did not think proper to make an affidavit in regard to your circumstances; you are a perfect stranger to the court, to me at least. I do not know you personally-- I know nothing of you, more than having lately heard your name mentioned in some publication. Every person knows the political disputes which have existed amongst us. It is notorious that there are two parties in the country; you have stated this yourself. You have taken one side--we do not pretend to say, that you have not a right to express your sentiments, only taking care not to injure the characters of those to whom you are opposed. Your circumstances ought to have been disclosed, on affidavit, that the court might have judged as to the amount of the offence; nor did we want to hurt you, by this open disclosure.

Mr. Cooper. I have nothing to disclose that I am ashamed of.

CHASE, Circuit Justice. If we were to indulge

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our own ideas, there is room to suspect that in cases of this kind, where one party is against the government, gentlemen who write for that party would be indemnified against any pecuniary loss; and that the party would pay any fine which might be imposed on the person convicted. You must know, I suppose, before you made any publication of this kind, whether you were to be supported by a party or not, and whether you would not be indemnified against any pecuniary loss. If the fine were only to fall on yourself, I would consider your circumstances; but, if I could believe you were supported by a party inimical to the government, and that they were to pay the fine, not you, I would go to the utmost extent of the power of the court. I understand you have a family, but you have not thought proper to state that to the court. From what I can gather from you, it appears that you depend on your profession for support; we do not wish to impose so rigorous a fine as to be beyond a person's abilities to support, but the government must be secured against these malicious attacks. You say that you are not conscious of having acted from malicious motives. It may be so; saying so, we must believe you; but, the jury have found otherwise. You are a gentleman of the profession, of such capacity and knowledge, as to have it more in your power to mislead the ignorant. I do not want to oppress, but I will restrain, as far as I can, all such licentious attacks on the government of the country.

Mr. Cooper. I have been asked by the court whether, in case of a fine being imposed upon me, I shall be supported by a party. Sir, I solemnly aver, that throughout my life, here and elsewhere, among all the political questions is which I have been concerned, I have ***644** never so far demeaned myself as to be a party writer. I never was in the pay or under the support of any party; there is no party in this, or any other country, that can offer me a temptation to prostitute my pen. If there are any persons here who are acquainted with what I have published, they must feel and be satisfied that I have had higher and better motives, than a party could suggest. I have written, to the best of my ability, what I seriously thought would conduce to the general good of mankind. The exertions of my talents, such as they are, have been unbought, and so they shall continue; they have indeed been paid for, but they have been paid for by myself, and by myself only, and sometimes dearly. The public is my debtor, and what I have paid or suffered for them, if my duty should again call upon me to write or to act, I shall again most readily submit to. I do not pretend to have no party opinions, to have no predilection for particular descriptions of men or of measures; but I do not act upon minor considerations; I belong here, as in my former country, to the great party of mankind. With regard to any offers which may have been made to me, to enable me to discharge the fine which may be imposed, I will state candidly to the court what has passed, for I wish not to conceal the truth; I have had no previous communication or promise whatever, I have since had no specific promises of money or anything else. I wrote from my own suggestions. But, many of my friends have, in the expectation of a verdict against me, come forward with general offers of pecuniary assistance; these offers I have, hitherto, neither accepted nor rejected. If the court should impose a fine beyond my ability to pay, I shall accept them without hesitation; but if the fine be within my circumstances to discharge, I shall pay it myself. But the insinuations of the court are ill founded, and if you, sir, from misapprehension or misinformation have been tempted to make them, your mistake should be corrected.

PETERS, District Judge.

I think we have nothing to do with parties; we are only to consider the subject before us. I wish you had thought proper to make an affidavit of your property. I have nothing to do, sitting here, to inquire whether a party in whose favour you may be, or you, are to pay the fine. I shall only consider your circumstances, and impose a fine which I think adequate; we ought to avoid any oppression. It appears that you depend chiefly upon your profession for support. Imprisonment for any time would tend to increase the fine, as your family would be deprived of your professional abilities to maintain them.

CHASE, Circuit Justice.

We will take time to consider this. Mr. Cooper, you may attend here again.

Thursday, Mr. Cooper attended, and the court sentenced him to pay a fine of four hundred dollars; to be imprisoned for six months, and, at the end of that period, to find surety for his good behaviour,

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himself in a thousand, and two sureties in five hundred dollars each.

NOTE. Judge Chase's conduct in this case, which was marked with a moderation in strong contrast with the harshness afterwards exhibited in the prosecution of Callender [Case No. 14,709], was ably defended by Mr. Harper, in a speech on the sedition act, in the house of representatives in January, 1801 (Harper's Works, 375), and was not thought sufficiently marked, to entitle it even to a nominal place in the memorable articles of impeachment, of November, 1804. Mr. Cooper's defence, however, so written out by himself as to make up a review of the whole administration, attracted great attention; and his imprisonment for an offence thought so trivial, was a popular subject for electioneering declamation. Mr. Adams himself thought the thing had gone too far, and would have pardoned him, had not Mr. Cooper issued a letter, in which he told him, that, so far from asking for clemency, he would not 'accept' it, unless coupled with an acknowledgment by the president of the breach of good faith which the publication of the alleged provocatory letter involved. See Aurora, for May 10, 1700. Of course nothing could be done but let the imprisonment run out. This it did, and the fine was paid. Forty years afterwards, at the same time with that imposed upon Lyon [Case No. 8,646], it was repaid with interest. In Porcupine, Mr. Cooper, as well as Dr. Priestley, were among the principal subjects of ridicule and denunciation; but, perhaps, the most bitter notice taken of them by Cobbett, was a poem called 'Prison Eclogue,' published by him in London, in 1801, and afterwards incorporated in Porcupine's works. The student will find in the Aurora of May 6, May 9, and May 19, papers of some interest emanating from Mr. Cooper on the subject of the trial in the text.

Mr. Cooper's life, however, is so connected with American history, as to require more than a general notice. He was born in London in 1759, and was educated at Oxford. Intended for the law, he did not confine himself to merely legal studies, but devoted himself with great success to the natural sciences, particularly chemistry, over which he soon obtained a mastery. His professional studies, so far as his history shows, never were very severely conducted; and soon after his advent at the bar, he allowed himself to be carried into another orbit, by accepting an ambassadorship from a democratic club in England, to a democratic club in France. For this both he, himself, and his patron, Mr. Watt, of steamengine fame, from whom his diplomatic credentials had issued, were assailed in the house of commons by Mr. Burke. This gave Mr. Cooper an opportunity which he but too gladly seized; and at once there issued a pamphlet reply, which made up for the want of vivacity of its style by the excessive inflammation of its temper. 'As long as you sell this at a high price,' said Sir John Scott, 'you can do no harm; but the moment it is turned into a penny slip, that moment I will prosecute you.' This kindly caution of course shrunk the circulation of the 'reply,' and the result was, that Mr. Cooper, abandoning for a time politics, undertook to introduce into practice in Manchester, the important secret of extracting chlorine from common salt, which though afterwards so valuable, he was not then able to bring into successful operation.

Leaving the wreck both of business and of political fortune, Mr. Cooper at last made up his mind to accompany Dr. Priestley to America, not free, it must be admitted,--at least so far as Dr. Priestley is concerned,--from the conviction that, resist it as they might, the young republic would soon press them into the ranks of its law-makers. But this seemed to be a mistake, and the result was, that Mr. Cooper soon went into a violent opposition to Mr. Adams, the then president, not, however, until he had first somewhat ***645** circuitously intimated that he might accept the post of commissioner of the British treaty. Of this opposition, the prosecution in the text was the fruit. On coming out of prison, Mr. Cooper found the minority rapidly turning into a majority, and in a short time, the administration which had prosecuted him was overthrown. His untiring industry, his almost universal philosophical attainments, and his courageous temper, but more particularly the sufferings he had undergone in the maintenance of the freedom of the press, placed him high in the esteem of the dominant party. After having been appointed a commissioner to negotiate a settlement of the Luzerne difficulties in Pennsylvania--a duty he discharged with remarkable skill and success--he was nominated by Governor McKean to the president judgeship of a judicial district.

Mr. Cooper's proceedings after he became the wielder of judicial power, form an odd sequel to his experience when he was its subject. Scarcely five

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years had passed after he was out of prison, before he was on the bench; and scarcely five years more had passed before he was impeached before the senate of Pennsylvania, upon charges, which, were it not that they were gravely preferred and amply supported, might be considered burlesques of those upon which he was instrumental in impeaching Judge Chase, in the senate of the United States. He was charged with pouncing upon delinquent jurors on the first day of the court, with fines and bench warrants, in violation of the venerable Pennsylvania practice, of giving them the quarto die post; with imprisoning a Quaker for not pulling off his hat; with committing three parties for 'whispering,' an offence for which he declared he would hear no apology; with issuing warrants without previous oath, and then committing the constables who refused to serve them; with insisting in one case in examining under oath, a prisoner charged with crime, as to his own guilt; with sending private notes to juries in criminal cases, tending to extract a verdict of guilty; with carting a Luzerne convict to the Philadelphia prison, a thing not then provided for, which ended in the convict being kept in abeyance by the Philadelphia jailor, who refused to receive him, and the court who refused to take him back, thereby, under his new ambulatory commitment, withdrawing the sheriff from his public duties; and with brow-beating counsel, witnesses and parties, in cases so numerous as to make their recapitulation cover three pages. The Presbyterian and Quaker professions, he was charged with declaring in open court, to be 'all damned hypocrisy and nonsense;' and divers specifications were given of illegal interference on his part in the profits of cases before him, an of private speculations in interests which were to pass under his adjudication. On February 21, 1811, these charges having been formally laid before the Pennsylvania house of representatives, were referred to a committee, who two days afterwards reported, that the evidence produced before them sufficiently substantiated the specifications of passionate and oppressive judicial bearing, leaving, however, the accusation of peculation without any further basis than that afforded by an imprudent purchase of certain property, sold at sheriff's sale under process from the court, a transaction which, though clear from any moral stain, the committee thought to be of doubtful propriety and dangerous precedent. They submitted, in conclusion, a resolution, 'that a committee be appointed to draft an address to the governor for the removal of Thomas Cooper, Esq., from the office of president judge of the Eighth judicial district of Pennsylvania.' Under this resolution, which passed 73 to 20, a committee was appointed which reported an address to the governor, which was carried 59 to 34, in the face of a very powerful protest by Mr. Gibson, now chief justice of Pennsylvania, who took the ground that the offences specified by the committee were misdemeanours, cognizable by impeachment alone. To this was joined a paper, in which the greater portion of the minority joined, declaring, that whatever may have been the peculiarities of manner of Mr. Cooper, there was no evidence which showed judicial misconduct. Under the Pennsylvania constitution, the governor 'may,' on address from the legislature, remove a judge from office; and, as Governor Snyder on a former occasion, when the attempt had been made to shake off the judges of the supreme court, had declared that 'may' sometimes means 'won't,' a vigorous effort was now made to induce him to give once more the same lenient grammatical construction. The governor, it seems, had been the client of Mr. Cooper in former times, and had lived with him for many years on terms of personal intimacy, but whether from this account he felt a greater delicacy in interfering, or whether, in fact, he thought that the case was one in which he ought not to defeat the legislative will, the only reply he made, was a note through the secretary of the commonwealth, announcing that Mr. Cooper's judicial tenure was closed.

Of this procedure, in everything but its result, a duodecimo of the more solemn trial, which in the senate of the United States Judge Chase was the subject, not the least remarkable feature was, that it was carried on, with a few exceptions, by the very party of which Mr. Cooper had been lately one of the most lively leaders, and for which,--if political persecution by an outgoing administration is to be considered as a calamity,--he was one of the greatest sufferers. It may be that, like Callender, he felt a natural disgust when he found that under Mr. Jefferson, many men were put ahead of him who had not received the honours of martyrdom under Mr. Adams; or it may be that when he got on the bench,--for which, by the way, he had not received the necessary professional training,--he became subject to that nervous debility by which the most plethoric patriotism is sometimes there prostrated; but it is certain that very soon he cooled towards the

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Democrats, and, as was alleged in the evidence before the house committee, even went so far as to drop, when in court, expressions by no means complimentary to their persons, or their doctrines. This change--though not the overt acts said to have sprung from it--he confesses in an address issued from him at the close of the proceedings, at Lancaster, April 4, 1811. 'Nor have I been anxious to conceal,' he says, 'that during a long course of observation on the conduct of parties in this country, I have not found that the Democrats or Republicans have much reason to boast of more disinterested views, or more tolerant principles, than their opponents. I have long found it impossible for me to go all lengths with the party to which I belonged, and, of course, I have shared the fate of all moderate men; I have influence with no party, and have willingly and deliberately incurred the decided hatred of the most violent and thorough going of my own. I went over to France in 1792, an enthusiast, and I left it in disgust. I came here; and seventeen years experience of a democratic government in this country, has also served to convince me it may have its faults; that it is not quite so perfect in practice, as it is beautiful in theory, and that the speculations of my youth do not receive the full sanction of my maturer age; nor do I find that justice and disinterestedness, wisdom, and tolerance, are the necessary fruits of universal suffrage, as it is exercised in Pennsylvania, for these are not always the qualifications that procure a man to be sent as the representative of the people.'

Mr. Cooper's fine chemical acquirements, which, during all the storms of his eventful life, had never been submerged, now gave him a safe retreat. He was first placed in a philosophical professorship in Dickinson College, and afterwards in a highly honourable post in the University of Pennsylvania, which he finally abandoned for the chemical chair in Columbia College, South Carolina, of which he soon became president. In the nullification struggle he took ***646** a bold part, issuing documents of the most ultra states' rights tone, and showing that if he had added nothing to the sprightliness, he had lost nothing of the fire, of the pamphleteer of 1795-1800. He died in 1840, when engaged in revising the South Carolina Statutes, a duty charged on him by the legislature, after having published, besides numberless tracts on politics, divinity, and metaphysics, a treatise on the bankrupt laws, a translation of Justinian, a treaties on political economy, a manual of chemistry, as well as a general compendium of useful information.

The defendant applied to the court for a letter to be addressed to several members of congress requesting attendance as witnesses on his behalf, which motion was refused. See Case No. 14,861.

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TELECOPY COVER SHEET

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TO: ERIC JASO

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# MEMORANDUM

TO: Alex Azar
Eric H. Jaso

FROM: Rajeev Duggal

DATE: June 13, 1995

RE: Review of Press Stories Regarding Presidents as Witnesses

1. Jefferson in 1807

Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Mr. Jefferson's first Vice President. Justice Marshall, presiding over the trial, declared that the President was subject to the law. After first resisting, citing the independence of the executive branch from the judicial branch, Mr. Jefferson submitted the letter, making clear that his decision was voluntary. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

2. Monroe in 1818

President James Monroe was served with a subpoena to testify at a criminal trial, but based on his attorney general's advice, he declined, saying his presidential duties were paramount. He said he would submit to a deposition, but the court instead used interrogatories, which he answered. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

3. Tyler and Adams in 1846

Former Presidents John Tyler and John Quincy Adams appeared before congressional committees in response to subpoenas in the investigation of whether their Secretary of State Daniel Webster improperly disbursed funds from a confidential fund. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

4. Lincoln in 1862

Abraham Lincoln voluntarily appeared before a congressional committee. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.



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5. Grant in 1875

Ulysses S. Grant at first volunteered to testify at a criminal trial, but after consulting with his staff chose to give a deposition instead. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

6. Nixon in 1974

a. During the 1974 trial in the coverup of the Watergate affair, John D. Ehrlichman, a domestic policy adviser at the Nixon White House, sought Mr. Nixon's appearance. U.S. District Judge John Sirica agreed that former President Nixon should be called to testify as a defense witness.

Nixon objected that he was too ill to travel from his home in San Clemente to Washington as he was suffering from phlebitis [vein inflammation]. Sirica in response sent a panel of court appointed doctors to examine Nixon and excused Nixon only after they reported that he was seriously ill. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; Robert L Jackson, North Lawyers Renew Bid for Reagan to Testify, The L.A. Times, Mar. 25, 1989, at A14.

b. Nixon was ordered to produce the Watergate tapes in response to a subpoena after the tapes were shown to be necessary to a fair administration of justice. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

7. Ford in 1975

In 1975, Gerald Ford consented to a videotaped interview for use in the trial of Lynette "Squeaky" Fromme, who was convicted of attempting to assassinate him. The videotape was played for jurors at trial. Administration lawyers lost a bid to have the court accept a written statement by the President. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; North Tactic Revives an Old Debate: Can a President be Forced to Testify?, Associated Press, Jan. 4, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

8. Carter in 1980s

a. In 1980, Jimmy Carter while in office voluntarily answered questions on a videotape in a grand jury investigation of Robert L. Vesco, a fugitive financier. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1



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b. President Carter while in office voluntarily provided videotaped testimony as a government witness in the perjury and gambling trial of a Georgia State Senator. North Tactic Revives an Old Debate: Can a President be Forced to Testify?, Associated Press, Jan. 4, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

c. A circuit court judge refused to subpoena President Carter in the bribery case against a businesswoman charged with trying to buy an Illinois lawmaker's vote for the Equal Rights Amendment. Deborah Singer, Judge in EPA Bribery Case Refuses to Subpoena Carter, Associated Press, Aug. 1, 1980.

9. Nixon in 1980

In 1980, Nixon voluntarily appeared as a witness in the trial of two former officials of the FBI who had been accused of conducting illegal break-ins. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1.

10. Nixon in 1982

Process servers were unable to get past Secret Service agents to serve former President Nixon with a subpoena seeking written testimony in a case by a couple against the Ford Motor Company. Bob Springer, Lawyer Says Can't Get Past Door to Serve Nixon With Subpoena, Associated Press, Aug. 25, 1982.

11. Reagan and Bush in the North Trial

a. Reagan answered interrogatories written by Independent Counsel Lawrence Walsh and submitted to the grand jury that returned an indictment against Oliver North. Judge Gesell ruled that Reagan need not testify in North's trial. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

b. U.S. District Judge Gesell threw out Oliver North's subpoena of President Bush but ruled that former President Reagan could be compelled to testify. Bush Excused From North Trial, The L.A. Times, Jan. 30, 1989, at A1.

c. "Both Reagan and Bush received defence subpoenas at North's Iran-Contra trial, but the judge in that case ruled that their testimony was not necessary or relevant." James Vincini, Bush, Reagan to be Subpoenaed at Poindexter Iran-Contra Trial, Reuters, June 16, 1989.



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d. During two hours of oral argument D.C. Circuit Judge Silberman "noted that Reagan's written answers to questions in the Iran-Contra affair were submitted to a grand jury, but were never provided to North's lawyers." Silberman questioned "why, 'as a matter of basic fairness'" the written answers were not turned over to North. Pete Yost, Appeals Judge Questions Why Reagan Didn't Testify for North, Associated Press, Feb. 6, 1990.

12. Reagan and Bush in the Poindexter Trial

a. Judge Greene ruled that Poindexter may not subpoena President Bush's notes and diaries because Bush had no operational control over Bush. Ronald Ostrow, Judge Grants Access To Reagan's Papers, The L.A. Times, Oct. 25, 1989, at A1.

b. Judge Greene ordered President Reagan to release 29 excerpts and to answer 154 of the 183 questions posed by Poindexter's lawyers. Poindexter's Right to a Fair Trial Outweighs Reagan's Right to Executive Privilege, Newsday, Feb. 8, 1990, at 60.

c. "The great majority of some 183 questions Iran-Contra defendant John Poindexter proposes to ask former President Reagan are material to his defense, the U.S. District Court for the District of Columbia held Feb. 5 as it ordered Reagan to give testimony via videotaped deposition for use at the defendant's trial."

"There is no precedent for compelled in-court testimony by a former president, the court noted; on the other hand, written answers to interrogatories cannot fulfill the essence of the defendant's Sixth Amendment right. However, taking Reagan's testimony by videotape has the virtue of permitting him to fully exercise his right to claim executive privilege, if he so chooses, while at the same time eliminating the inevitable disruptions repeated claims of privilege would cause at trial. Moreover, the court said, national security concerns argue in favor of taking Reagan's testimony in a private setting." Former President Reagan Must Give Taped Testimony in Iran-Contra Trial, 58 U.S.L.W. 1126 (Feb. 20, 1990).

d. President Reagan was set to testify in the Poindexter trial. "'This will be the first time a sitting president has been compelled to appear in a court proceeding for adversarial questioning on his own conduct in office,' notes Prof. Paul F. Rothstein of the Georgetown University Law Center, a criminal law expert who has closely followed the Iran-Contra proceedings. 'It is really quite an event.'" Fred Strasser, Reagan Testimony Takes Center Stage, The National Law Journal, Feb. 26, 1990, at 1.

13. Other

a. "Courts going back to the early 1800s have ruled that presidents may be forced to testify in a criminal case. However, no president or former president actually has been forced to testify under subpoena." "'Everybody says it [can be done] but nobody has done it,' remarked Judge Greene during yesterday's hearing." Poindexter Lawyers Must Put Questions to Reagan in Writing, The Washington Times, Jan. 24, 1990, at A4.



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b. No sitting president has ever testified in court in a criminal trial, although a few Presidents and former Presidents have provided testimony or its equivalent in criminal trials and grand jury proceedings. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1.



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Paula Corbin **JONES**, Plaintiff,
v.
William Jefferson **CLINTON** and Danny Ferguson, Defendants.

No. LR-C-94-290.

United States District Court,
E.D. Arkansas,
Western Division.

Dec. 28, 1994.

Former state employee brought civil rights action against sitting President of the United States and against state trooper who was assigned to President when President was Arkansas governor for alleged conduct occurring when President was governor. The District Court, 858 F.Supp. 902, ruled that issue of presidential immunity deserved threshold consideration and, therefore, President would be allowed to defer filing of any other pleadings or motions until immunity issue was resolved. President moved for immunity. The District Court, Susan Webber Wright, J., held that: (1) President was not entitled to absolute immunity, and (2) President was entitled to limited or temporary immunity from immediate trial, but discovery and deposition process could proceed as to all persons including the President.

Motion denied.

[1] UNITED STATES ⊜ 26
393k26
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[1] UNITED STATES ⊜ 50.5(5)
393k50.5(5)
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[1] UNITED STATES ⊜ 50.10(1)
393k50.10(1)
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[2] FEDERAL CIVIL PROCEDURE ⊜ 1266
170Ak1266
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] FEDERAL CIVIL PROCEDURE ⊜ 1323.1
170Ak1323.1
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] UNITED STATES ⊜ 26
393k26
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment

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action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] UNITED STATES ⇐ 50.5(5)
393k50.5(5)
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[3] FEDERAL CIVIL PROCEDURE ⇐ 1956
170Ak1956
Allegations against state trooper who was assigned to sitting President of United States when President was Arkansas governor would be tried at the same time as those against the President who was entitled to limited or temporary presidential immunity from immediate trial with respect to sexual harassment action brought against President and trooper stemming from alleged incident when President was Arkansas governor because there was too much interdependency of events and testimony to proceed piecemeal; trooper's case was integrally related to allegations against President and both cases arose out of the same alleged incident.

***691** Daniel M. Traylor, Traylor Law Firm, Little Rock, AR, and Gilbert K. Davis and Joseph Cammarata Fairfax, VA, for plaintiff.

Kathlyn Graves, Wright, Lindsey & Jennings, Stephen C. Engstrom, Wilson, Engstrom, Corum, Dudley & Coulter, Little Rock, AR, and Robert S. Bennett, Skadden, Arps, Slate, Meaghen & Flom, Washington, DC, for defendants.

Bill W. Bristow, Seay & Bristow, Jonesboro, AR and Robert Batton, Jacksonville, AR, for Mr. Ferguson.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, District Judge.

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable activities on his part. Defendant Clinton responded with a motion to bifurcate the briefing schedule so as to permit the question of Presidential ***692** immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. Jones v. Clinton, 858 F.Supp. 902 (E.D.Ark.1994).

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The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. Id. at 907 n. 6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date--which was usually 1607, 1620, or 1776--except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark.Code Ann. § 1-2-119 (Michie 1987); Ark.Stat.Ann. § 1-101 (1976 Repl.); discussed in Moore v. Sharpe, 91 Ark. 407, 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. E.g. Biscoe v. Thweatt, 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); Horsley v. Hilburn, 44 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); Moody v. Walker, 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to ***693** Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the Magna Carta. See generally William Swindler, Magna Carta: Legend and Legacy 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He

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subsequently would become Chief Justice of the King's Bench under King James I. See 3 Roscoe Pound, Jurisprudence 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, supra, at 172. He also stated in Dr. Bonham's Case, 8 Co. 113b, 118a, 77 Eng.Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., The American Constitution 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

> I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto--Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, supra, at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. Sub Deo et Lege [FN1] was the law of the land.

> FN1. In Prohibitions Del Roy, 77 Eng.Rep. 1342, 1343, 12 Co.Rep. 64, 65 (K.B.1608), Lord Coke wrote: [B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et lege. [That the King ought not to be under any man, but under God and the law.] quoted in DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 203 (1963). In Catherine Drinker Bowen's book, The Lion and the Throne, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century. Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed it this way: Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong: which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the

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people, and therefore cannot be exerted to their prejudice. The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original). Of course, when Blackstone published his Commentaries, this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness. The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R.J. Gray, Private Wrongs of Public Servants, 47 CAL.L.REV. 303, 307 (1959). See also Mayer G. Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 NW.U.L.REV. 526 (1977). States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties--the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights. Moreover, as Chief Justice John Marshall pointed out in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

***694** B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President. [FN2] Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schlesinger, Jr., The Constitution: Article II, in An American Primer 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only slightly from the original. It sets out the powers and duties of the Executive Branch (i.e., the President and the administrators he appoints), but it does not address the immunity question.

FN2. Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King--the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it--which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative ***695** appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent

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branches of government is discussed by Alexander Hamilton [FN3] in The Federalist No. 51:

> FN3. Some attribute this paper to James Madison. In I THE PEOPLE SHALL JUDGE 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton or Madison."

> Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal ...
> [We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others.... The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I The People Shall Judge 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from The Federalist No. 69: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about impeachment under Article II, Section 4, under which the President may be "removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." That has nothing to do with immunity from civil suit. Article II, and Hamilton, were addressing criminal conduct on the part of the President.

This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982):

> [T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); id., at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams--both delegates to the Convention--that 'the President, personally, was not the subject to any process whatever.... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.' Journal of William Maclay 167 (E. Maclay ed. 1890).

***696** 457 U.S. at 751-52 n. 31, 102 S.Ct. at 2701-02 n. 31.

Justice Powell also quoted from Justice Joseph Story's Commentaries on the Constitution of the United States to this effect:

> 'There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them ... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.' 3 J. Story, Commentaries on the Constitution of the United States Sec. 1563, pp. 418-419 (1st ed.

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1833).
457 U.S. at 749, 102 S.Ct. at 2701.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to Fitzgerald had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from The Federalist No. 69, "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, Selected Writings on the Constitution 46-47 n. 94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention--although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in Fitzgerald. There was much opposition even to the impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In United States v. Burr, 25 F.Cas. 30 (C.C.D.Va.1807) (No. 14,692d), Chief Justice John Marshall ruled that a subpoena duces tecum could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in Nixon v. Fitzgerald, 457 U.S. at 751 n. 31, 102 S.Ct. at 2701-02 n. 31.) In Livingston v. Jefferson, 15 F.Cas. 660 (C.C.D.Va.1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163.

***697** However, in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished Marbury by stating that it only related to ministerial duties involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. See similarly, Kendall v. United States, 37 U.S. (12 Pet.) 524, 610, 9 L.Ed. 1181 (1838), and National Treasury Employees Union v. Nixon, 492 F.2d 587, 608-612 (D.C.Cir.1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of

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Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, People ex rel. Hurley v. Roosevelt, 179 N.Y. 544, 71 N.E. 1137 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, Devault v. Truman, 354 Mo. 1193, 194 S.W.2d 29 (1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim from an automobile accident occurring during the 1960 campaign, which was ultimately settled, Bailey v. Kennedy, No. 757,200 (Cal.Super.Ct.1962).

However, the case most applicable to this one is Nixon v. Fitzgerald, cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, The President: Office and Powers 138 (3d ed. 1948).

But the facts of Fitzgerald, as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, supra, was of the mind that the President possessed immunity from civil suit, and the Supreme Court in Fitzgerald agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none ***698** exists. As stated by Chief Justice John Marshall in Marbury v. Madison, however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

[1] This Court recognizes the reasoning of Justice Powell and his thin majority in Nixon v. Fitzgerald that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

[2] The question does not end here, however, because the intent of the Supreme Court in Nixon v. Fitzgerald would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention under the

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circumstances would be to interfere with the conduct of the duties of the office.

Justice Powell states unequivocally the following: "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751, 102 S.Ct. at 2702. He adds:

> In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

457 U.S. at 753, 102 S.Ct. at 2703.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762, 102 S.Ct. at 2707.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same--the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situation, as stated by Justice Powell in one of the preceding quotations from Nixon v. Fitzgerald, could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal ***699** needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an in rem foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in The American Spectator, in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as Fitzgerald seems to require due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

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This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

[3] Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the President; both cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

III.
Conclusion

The Court has attempted to follow its understanding of Nixon v. Fitzgerald and other cases as well as to adhere to the historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. Sub Deo et lege is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. ***700** An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including United States v. Nixon, supra, and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." Marbury, 5 U.S. (1 Cranch) at 177. United States v. Nixon reaffirmed that statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 705, 94 S.Ct. at 3106. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407, 4 L.Ed. 579 (1819), [FN4] and that it is intended to endure for generations and to be applied to the various crises of human affairs.

FN4. As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials.... By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a

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> document that could not, by its nature and uses, 'partake of the prolixity of a legal code.' " ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990).

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED.

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Citation 25 F.Cas. 55 FOUND DOCUMENT Database DCT-OLD Mode Page

**(Cite as: 25 F.Cas. 55, *55)**

***55** George Hay, Dist. Atty., William Wirt, and Alexander MacRae, counsel for the prosecution.

[FN2]Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

FN2 Prior proceedings on the examination for commitment will be found reported as Case No. 14,692a.

The court was opened at half past twelve o'clock, when Col. Aaron Burr appeared, with his counsel, Edmund Randolph, John Wickham, Benjamin Botts and John Baker. [Luther Martin also appeared as counsel at a later stage of the trial.]

The clerk having called the names of the gentlemen who had been summoned on the grand jury, Mr. Burr's counsel demanded a sight of the panel, which was shown to them.

Mr. Burr addressed the court, pointing out some irregularities in summoning a part of the panel. The marshal, he said, by the law of Virginia under which he acted, was required ***56** to summon twenty-four freeholders of the state to compose the grand jury. When he has summoned that number his function is completed. He proposed to inquire of the marshal and his deputies what persons they had summoned, and at what periods, to ascertain whether some had not been substituted in the place of others stricken off the panel. After some discussion as to the authority of the marshal to excuse grand jurors who had once been summoned, and to substitute others on the panel in lieu of them.

MARSHALL, Chief Justice

MARSHALL, Chief Justice, remarked that it was not in the power of the marshal to summon more than twenty-four, as the act of assembly authorized only that number. If he should summon twenty-five, the last would not have power to act; and the marshal would have no power to displace any one of the others, to put the last in his place. When the panel had been completed by the marshal, its deficiencies could only be supplied from the bystanders, under the directions of the court.

Mr. Burr said, the court having established the principle, we must ask their aid to come at the facts. We wish to know when certain persons were summoned, when discharged, and whether other persons were substituted in their stead.

Major Scott, the marshal, said he had not the least objection to state all the facts. A few days ago he had received a letter from Col. John Taylor, of Caroline, one of those whom he had summoned on the jury, stating that a hurricane had destroyed his carriagehouse, and with it his carriages, so that he could not use them; and that indisposition would prevent him from riding to Richmond on horseback. This letter he had laid before their honors, and the chief justice had deemed his excuse reasonable. He had then summoned Mr. Barbour to serve in Col. Taylor's place. He had also received a letter from Mr. John MacRae, informing him that he was going to leave the state for his health. He had, in consequence, summoned Doctor Foushee in his place. He added, that he felt it his duty to bring twenty-four jurymen into court, and acted upon that principle.

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THE COURT

THE COURT decided that Mr. Barbour and Dr. Foushee were not on the grand jury.

Mr. Burr said, the panel being now reduced to sixteen, he understood it to be the proper time to make any other exceptions to the panel. With regret he should proceed to exercise the privilege of challenging for favor; and in the exercise of this right he should perhaps appeal to the authority of the court to try the jurors challenged.

Mr. Hay called for the law justifying the application.

Mr. Burr said he desired it to be distinctly understood that he claimed the same right of challenging the grand jury for favor that he had of challenging the petit jury. He admitted it was not a peremptory challenge, but that he must show good cause to support it. It would, of course, be necessary to appoint triers to decide, and before whom the party and the witnesses to prove or disprove the favor must appear.

Mr. Botts argued and cited authorities in support of the motion.

Mr. Hay disavowed the intention of opposing substantial exceptions, and admitted the law to be as stated by the opposite counsel. [FN3]

FN3 This is in accordance with both Robertson's and Carpenter's reports. But in his speech on the motion to arrest the evidence, Mr. Hay said the challenge of grand jurors was 'not warranted by any English precedent,' and intimated that he had acquiesced in it because he was indifferent 'whether A, B and C, or D, E and F composed a part' of the grand jury. Mr. Martin, in his reply to Mr. Hay, said, 'if he had examined Hawkins's Pleas of the Crown, even in the index, he would have found that grand jurors may be challenged. It is there briefly stated that any person under prosecution may, before he is indicted, challenge a grand juror, as being outlawed for felony, &c., a villein, or returned at the instance of the prosecutor, or not returned by the proper officer.' He also referred to the 'American Museum,' where, he said, it would be seen 'that in a case that came before Judge Grimke, in South Carolina, it was expressly decided that the counsel of the accused have a right to challenge, for good cause, all or any of the grand jury.' These authorities do not seem to sustain Mr. Burr's position, that he had the same right to challenge the grand jury 'for favor' that he had of challenging the petit jury. Hawkins says, 'it seems' that grand jurors may be challenged as aforesaid, but refers to no decision on that subject. At most the authority goes no further than this: that a grand juror may be challenged for incompetency, or for being irregularly or improperly returned. This is a very different thing from a general right of challenge 'for favor.' It is believed that no authority, anterior to this trial, can be found extending the right to challenge grand jurors further than the citation from Hawkins goes. Later decisions and dicta may be found, admitting the right of challenge for favor; but it is believed they are all based upon the authority of Burr's Case, or on special statutory provisions. In Com. v. Clark, 2 Browne, 325, Judges Tilghman and Breckenridge allowed a challenge for favor. In U. S. v. White [Case No. 16,679], the court said that 'an exception for favor which might be a good cause of challenge, cannot be pleaded to the indictment.' The decision in the former case, and the implication in the latter, are both based upon the authority of Burr's Case

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Mr. Burr.--I shall, then, proceed to name the persons and causes of challenge. The first I shall mention is William B. Giles, against whom there are two causes of challenge. The first is a matter of some notoriety, because dependent on certain documents or records; the second is a matter of fact, which must be substantiated by witnesses. As to the first, Mr. Giles, when in the senate of the United States, had occasion to pronounce his opinion on certain documents by which I was considered to be particularly implicated. Upon those documents he advocated the propriety of suspending the writ of habeas corpus. The constitution however, forbids such suspension, except in cases of invasion or insurrection, when the public safety requires it. It was therefore to be inferred that Mr. Giles did ***57** suppose that there was a rebellion or insurrection, and a public danger of no common kind. It is hardly necessary to observe that with this rebellion, and this supposed danger, I myself had been supposed to be connected. Perhaps this may be a sufficient reason to set aside Mr. Giles. But if not, I shall endeavor to establish by evidence that he has confirmed these opinions by public declarations; that he has declared that these documents, involving me, contained guilt of the highest grade.

Mr. Botts.--There is no necessity of adding anything to the observations of Colonel Burr. If the right of challenge exists, the right to try the challenge exists also. But while I am up, I will declare that no reflection is intended to be made on the character or conduct of Mr. Giles. That gentleman will be candid enough to admit that there is not the least design to wound his feelings. It is with the utmost reluctance that Colonel Burr has prevailed upon himself to advance this exception. I have authorities, however, to prove that these two causes are sufficient to disqualify Mr. Giles. The first relates to his public, the second to his individual conduct.

Mr. Giles.--As to exceptions to myself personally, I can have no objection to have them tried. The court will, however, perceive the delicate situation in which I shall be placed. The triers will have to interrogate witnesses, and the result either way is ineligible. I have no objection to state to the court every impression I have ever had upon this subject. But to calling witnesses to detail loose conversations, so liable to be misunderstood, forgotten, or misrepresented, I am certainly opposed.

Mr. Hay.--I was about to make a proposition which might relieve us from all this useless embarrassment, and which might gratify the views of the accused. If the gentlemen who are challenged on the jury will consent to withdraw themselves, I can have no objection. I am content that every one who has made declarations expressive of a decisive opinion should be withdrawn from the jury. I am not disposed to spend time on such points as these.

Mr. Burr.--It will certainly save time, and I assent to the proposition.

Mr. Giles.--The circumstances which have just occurred place me in an unpleasant situation. I have no objection to disclose in the usual way, with candor, the real state of my mind in relation to the accused. But I have an objection to the introduction of witnesses to prove casual expressions, which are so liable to be misconceived. In the present state of things, expressions

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might be imputed to me which I never used, or expressions which I really used might be mistaken or misrepresented by the witness; or the witness might deduce inferences from my expressions which they did not justify. It was by no means agreeable to me to have been summoned on this grand jury. But for some time past I have invariably pursued this maxim: 'Neither to avoid nor to solicit any public appointment; but when called to the discharge of any public duty by the proper authority, conscientiously to attempt its execution.' In undertaking to serve on the present grand jury, I was influenced by the same consideration. With respect to my public conduct, I presume it is of public notoriety, and it will speak for itself. I not only voted for the suspension of the privilege of the writ of habeas corpus, in certain cases, but I proposed that measure. I then thought, and I still think, that the emergency demanded it; that it was fully justified by the evidence before the senate; and I now regret that the nation had not energy enough to support the senate in that measure. This opinion was formed upon the state of the evidence before the senate, which, in all questions of a general nature, is of a very different character from the legal evidence necessary in a judicial investigation. My mind is, however, free to receive impressions from judicial evidence. In relation to the accused, I feel very desirous, and have often so expressed myself, that the various transactions imputed to him should undergo a full and fair judicial investigation; and that, through that medium, they should receive their just and true character, whatever in point of fact they might be, and that he should be presented in that character to the world. I have no personal resentments against the accused; and if he has received any information inconsistent with this statement, it is not true. However, as it is left to me to elect whether to serve on the grand jury or not, I will certainly withdraw.

THE CHIEF JUSTICE.--The court thinks that if any gentleman has made up and declared his mind it would be best to withdraw.

Mr. Burr.--A gentleman who has prejudged this cause is certainly unfit to be a juryman. It would be an effort above human nature for this gentleman to divest himself of all prepossessions. I believe his mind to be as pure and unbiased as that of any gentleman under such circumstances. But the decisive opinion he has formed upon this subject, though in his public character, disqualifies him for a juryman. But he is one of the last men on whom I would wish to cast any reflections. So far from having any animosity against him, he would have been one of those whom I should have ranked among my personal friends. The other gentleman whom I shall challenge is Wilson Cary Nicholas.

Mr. Nicholas desired that the objection against him should be stated.

Mr. Burr.--The objection is, that he has entertained a bitter personal animosity against me; and therefore I cannot expect from him that pure impartiality of mind which is necessary to a correct decision. I feel the delicacy ***58** of my situation; but if the gentleman will consent to withdraw, I will waive any further inquiry.

Col. Wilson C. Nicholas rose and addressed the court as follows: My being in this situation certainly was not a thing of choice. When I was summoned by the marshal, I urged him in the strongest manner to excuse me. I mentioned to him that it would be extremely inconvenient to me to attend the court, and that it would be very unpleasant to serve on the jury, on account of the various relations in which I had stood to Colonel Burr. I had been in congress at the time when the attempt was made to elect Colonel Burr president of the United

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States. My feelings and opinions on that occasion are well known. I had served three years in the senate while Colonel Burr was president of that body, and was one of those who, previous to the last election, had taken a very decided part in favor of the nomination of the present vice president, for the office at that time filled by Colonel Burr. Moreover, from the time that Colonel Burr first went to the Western country, my suspicions were very much excited a to his probable objects in that part of the United States; in consequence of which I gave early, and perhaps too great, credit to the charges which were brought against him. Such was my opinion of the importance of New Orleans, not only to the prosperity, but to the union of the states, that I felt uncommon anxiety at what I believed to be the state of our affairs in the West, and had expressed my impressions very freely in conversation, and in letters to my friends during the last winter. Under these circumstances, I doubted the propriety of my being put on the jury; but I felt no distrust of myself, as I was confident that I could discharge the duty under just impression of what I owe to my country, to the accused, and to my own character. The marshal assured me that he felt the strongest disposition to oblige me, but that he thought he could not do it consistently with his duty. He supposed there was scarcely a man to be found who had not formed and expressed opinions about Colonel Burr. That he, too, was in a situation of great delicacy and responsibility, and that without the utmost circumspection on his part, he would be exposed to censure. I renewed my application to the marshal several times, and always received the same answer. Thus situated, I determined to attend the court, both from a sense of duty and because I would not put it in the power of the malicious and those disposed to slander me to assign motives for absenting myself which had no kind of influence on me. Another reason for pursuing this course presented itself some time after I had formed this determination. I conceived that an attempt had been made to deter me from attending this court. I was informed by a friend in the city, that he had heard that one of the most severe pieces which had ever been seen was preparing for publication, if I did attend, and serve on the grand jury. From what quarter this attack was to come, I do not know. The only influence which that circumstance had was to confirm me in the determination I had made, as I was much more inclined to defy my enemies than to ask their mercy or forbearance. From the first I hesitated whether I ought not to make the same representation to the court that I had made to the marshal. As I was in doubt on the subject before I came from home, I committed to paper the substance of what I have now said, and consulted three gentlemen who were lawyers, men of honor, and my personal friends. Their advice to me was not to mention it, for they did not believe that the court would or ought to discharge me for the reasons I had mentioned. As I was in doubt myself I determined to follow their advice, and the more readily as they seemed confident that I would not be discharged, and I was not ambitious of acquiring in this way a reputation for scrupulous delicacy. I was perfectly willing that my reputation should rest on the general tenor of my life, and did not believe that my character required such a prop. At present I feel myself embarrassed how to act. I certainly was, and an, anxious not to serve on the jury, but am unwilling to withdraw, lest it should be thought that I shrink from the discharge of public duty of great responsibility, and am not willing to be driven from the discharge of that duty in a way which should lead to a belief that the objection to me is

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either acknowledged to be well founded or has been sustained by the court. Upon this subject, the example of Mr. Giles has great weight with me. That consideration, and a hope that my motives cannot now be misunderstood or misrepresented, will induce me to do as he has done.

Colonel Burr.--The circumstance mentioned by the gentleman, that an attempt has been made to intimidate him, must have been a contrivance of some of my enemies for the purpose of irritating him, and increasing the public prejudice against me, since it was calculated to throw a suspicion on my cause. Such an act was never sanctioned by me, nor by any of my friends. I view it with indignation, and disclaim any knowledge of the fact in question.

THE COURT established the following as being the proper questions to be put to jurors: First, have you made up your mind on the case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise? and finally, have you formed and expressed (or delivered) and opinion on the guilt or innocence of Colonel Burr (or the accused?)

Mr. Joseph Eggleston asked to be excused from serving on the grand jury. He had, on reading the deposition of Gen. Eaton in the newspapers, expressed considerable warmth ***59** and indignation on the subject likely to come before the grand jury, and on that account it might be both indelicate and improper for him to serve on that body. But after being examined by the CHIEF JUSTICE as to the nature of the opinions he had formed, Mr. Burr remarked, that the industry which had been used to prejudice the public mind against him left him very little chance of an impartial jury, and that on the subject of Major Eggleston's application to be excused he should remain perfectly passive. The court did not excuse him.

The panel was here called over, and fourteen only appeared. The marshal then summoned from the bystanders John Randolph, Jr., and William Foushee. The court appointed Mr. John Randolph foreman of the grand jury. Being called upon to take the foreman's oath, Mr. Randolph asked to be excused from serving, on the ground that he had formed an opinion concerning the nature and tendency of certain transactions imputed to Col. Burr.

Mr. Burr remarked that he was really afraid they should not be able to find any man without such prepossessions.

The CHIEF JUSTICE remarked that a man must not only have formed, but declared an opinion, to disqualify him. Mr. Randolph said he did not recollect of having declared one; and he was not excused.

Mr. John Randolph was then sworn as foreman; and the rest of the panel being called to the book, when the name of Dr. Foushee was called he stated that from reading the president's message, Gen. Eaton's deposition, and other publications, he had formed an opinion of Col. Burr's guilt. After some discussion, Dr. Foushee was permitted to withdraw, and Col. James Barbour was summoned in his place.

The grand jury were then sworn, as follows: John Randolph, Junior, Foreman, Joseph Eggleston, Joseph C. Cabell, Littleton W. Tazewell, Robert Taylor, James Pleasants, James M. Garnett, William Daniel, John Brockenbrough, John Mercer, Edward Pegram, Mumford Beverly, John Ambler, Thomas Harrison, Alexander Shephard, and James Barbour.

The CHIEF JUSTICE delivered an appropriate charge to the grand jury, in which he particularly dwelt upon the nature of treason, and the testimony requisite to prove it; after which the jury retired.

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Mr. Burr then stated his desire that the court should instruct the grand jury on certain leading points, as to the admissibility of certain evidence which he supposed would be laid before the grand jury by the attorney for the United States.

Mr. Hay objected to the proposition as unprecedented. After some discussion, in which Messrs. Burr, Hay, Randolph, and Botts participated,

The CHIEF JUSTICE observed that he was not prepared at present to say whether the same evidence was necessary before the grand jury as before the petit jury; whether two witnesses to an overt act were required to satisfy a grand jury. This was a point he would have to consider. That he had not made up his mind on the evidence of facts said to be done in different districts; how far the one could be adduced as evidence in proof or confirmation of the others; but his present impression was, that facts done without the district may be brought in to prove the material fact said to be done within the district, when that fact was charged.

The question was postponed for further discussion, on Mr. Hay's pledging himself that no evidence should be laid before the grand jury without notice being first given to Mr. Burr and his counsel.

Saturday, May 23, 1807.

The counsel for Col. Burr observed that, if it met the approbation of the court, the discussion of the propriety of giving special instructions to the grand jury would take place on Monday next. This proposition was assented to, and it was understood that Mr. Burr's counsel were to give due notice of the propositions they intended to submit.

The grand jury appearing pursuant to adjournment, the CHIEF JUSTICE informed them that the absence of Gen. Wilkinson, a witness deemed important by the counsel for the United States, and the uncertainty of his arrival at any particular period, made it necessary that they should be adjourned.

After some conversation between the court and bar as to the propriety of adjourning the grand jury to some future day of the term, they were finally adjourned till the Monday following.

Monday, May 25, 1807.

The grand jury appeared in court, and on its being stated by their foreman that they had been two days confined to their chambers, and had no presentment to make, or bill before them, Mr. Hay observed that he had two bills prepared, but wished to postpone the delivering of them till the witnesses were present, and until it was ascertained that all the evidence relied upon by the counsel for the prosecution could be had. He thought it probable that in the course of a week he should hear of Gen. Wilkinson, who was still absent, and whose testimony was deemed very important. After some conversation as to the propriety of adjourning the grand jury to a distant day of the term,

Mr. Hay gave notice of his intention to submit a motion to commit Mr. Burr on a charge of high treason. On the previous examination, he said, there was no evidence of an overt act, and he was committed for a misdemeanor only. The evidence is different now.

Some remarks having been made as to the impropriety of discussing the subject in the presence of the grand jury, they were requested to withdraw.

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The argument and opinion delivered on the *60 motion to commit will be found reported as Case No. 14,692b. The opinion was delivered on Tuesday, May 26, 1807. It closed with these words: 'If it is the choice of the prosecutor on the part of the United States to proceed with this motion, it is the opinion of the court that he may open his testimony.'

Mr. Hay then rose, and observed that he was struck with the observations of the court relative to 'publications,' and he would attempt, if possible, to make some arrangement with the counsel on the other side, to obviate that inconvenience; and he understood they were disposed to do the same.

The counsel on both sides then retired by permission of the court for this purpose. They returned in a short time, and Mr. Hay informed the court that the counsel for the United States and for Colonel Burr, not having yet been able to agree upon any arrangement which would attain his object, namely, that of having Colonel Burr recognized in a sum sufficiently large to insure his appearance to answer the charge of high treason against the United States, without incurring the inconvenience resulting from a public disclosure of the evidence at this early stage of the proceeding, wished to have further time for that desirable purpose. This was granted by the court, and it then adjourned till next day.

Wednesday, May 27, 1807.

Mr. Hay informed the court that all hopes of the arrangement which he had mentioned yesterday were at an end; for he had received a letter from Colonel Burr's counsel positively refusing to give additional bail. He therefore deemed it his duty to go on with the examination of the witnesses in support of his motion to commit Mr. Burr. He observed, that he regretted extremely that it became necessary in his judgment to pursue this course. He felt the full force of the objections to a disclosure of the evidence, and to the necessity of the court's declaring its opinion, before the case was laid before a jury; but those considerations must yield to a sense of what his engagements to the United States imperiously demanded of him; that in adducing the evidence, he should observe something like chronological order. He should first read the depositions of the witnesses who were absent, and afterwards bring forward those who were present, so as to disclose all the events, as they successively happened.

Mr. Wickham stated that there were two distinct charges against Colonel Burr. The first was for a misdemeanor, for which he had already entered into recognizance; the second was a charge of high treason against the United States, which was once proposed without success, and is now again repeated. On this charge the United States must substantiate two essential points: first, that there was an overt act committed; and secondly, that Colonel Burr was concerned in it. Everything that does not bear upon these points is of course inadmissible; the course therefore laid down by the attorney for the United States is obviously improper. He proposes to examine his witnesses in a kind of chronological order.

Colonel Burr required that the evidence should be taken in strict legal order. The court and even the opposite counsel will see the propriety of observing this order. If the attorney for the United States has affidavits to

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produce, let him first demonstrate that they have a right to produce them. We first call upon him to prove by strict legal evidence, that an overt act of treason has been committed. If he cannot establish that one point, all the evidence which he can produce is nugatory and unavailing.

Mr. Hay protested against the right of counsel for the accused to dicate to him the order of introducing his testimony. The two charges against Aaron Burr, he said, were naturally and intimately blended. They form distinct parts of one great design. What that great design was, in all its bearings and remifications, he was not absolutely certain; but had always conceived that before Mexico was invaded New Orleans was to be taken. How, then, was it possible to separate these two allegations? How could the prosecution separate, line by line, and word by word, the evidence produced to prove these two distinct allegations? It appeared to him as though the counsel for the defence were determined to stop him at the very threshold of everything which he attempted to do. How could he advance if every inch of ground was to be measured out to him with such strictness and objections? The proposition was wholly unprecedented, that the counsel before an examining court should be instructed how to bring out his evidence. He claimed the right to bring it forward in its chronological order.

After some remarks by Mr. Wickham and Mr. Burr.

The CHIEF JUSTICE said it would certainly be better, if the evidence was produced to prove the fact first, and that to show their coloring afterwards; for no evidence certainly has any bearing on the present case unless an overt act be proved. However, if the attorney for the United States thinks the chronological order the best, he may pursue his own course; but the court trusts to him, that he will produce nothing which does not bear upon the case.

After some further remarks by Mr. Hay and Mr. Randolph, Mr. Hay produced Gen. Wilkinson's affidavit.

Mr. Botts objected to the admissibility of the paper, on the ground that it was not competent evidence. He said on this question the supreme court were divided.

The CHIEF JUSTICE here interposed, and remarked that the supreme court were divided on the question of the competency of ***61** the letter annexed to the affidavit, not as to the admissibility of the affidavit itself.

Mr. Botts proceeded to state his objections to the competency of the affidavit in this court in the present proceeding. First, he objected that an ex parte affidavit ought not to be received when the witness himself could be produced in court. General Wilkinson could and ought to have been here, and this being the case, his affidavit ought not to be received. But the proposition which he mainly pressed was, that no evidence of any nature whatever, ought to be taken until there is indubitable proof that there was war levied in this district, (Virginaia,) and until it is proved that an overt act was committed by Mr. Burr.

Mr. Hay, interrupting, observed that the gentleman was renewing a proposition which had been decided by the court.

Mr. Burr said he had understood the gentleman who spoke first apprized the court that the evidence should come forward subject to discussion, which would be made as the evidence went on. The gentleman was only going into the nature of the evidence presented.

Mr. Botts resumed. He quoted the constitutional definiton of treason, and

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asked if it meant that, if one-half of the crime of treason was to be found in this district, you might look for the other half elsewhere? If the affidavit imported anything, it was a declaration or confession; and no declaration or confession could constitute any ingredient of an overt act, unless that confession be made 'in open court.' He enforced his views at considerable length.

Messrs. Wickham and Randolph followed, in support of the motion to exclude the testimony at this stage of the proceeding.

The CHIEF JUSTICE stated that the supreme court had already decided, that the affidavit might be admitted under certain circumstances; but they had also determined that General Wilkinson's affidavit did not contain any proof of an overt act; that he was certainly extremely willing to permit the attorney for the United States to pursue his own course in the order of drawing out his evidence, under a full confidence that he would not waste the time of the court by producing any extraneous matters; but where was the necessity of producing General Wilkinson's affidavit first? If there was no other evidence to prove the overt act, General Wilkinson's affidavit goes for nothing, for so the supreme court have already decided; and by that decision he should consider himself bound, even if he had dissented from it. Why, then, introduce this affidavit?

After some further discussion by counsel, the CHIEF JUSTICE said that unless there was a fact to be proved, he was of opinion that no testimony ought to be produced. The question before the court was not whether there had been a treasonable intent, but an overt act. That fact must be proved before there can be any treason, or any commitment for treason.

Mr. Hay then called Peter Taylor, who was Mr. Blennerhassett's gardener, and Jacob Allbright, a laborer, who had worked on his island, who gave their testimony. [This testimony is more fully detailed hereafter, and, in consequence, is omitted here.]

After these witnesses were examined, the affidavit of Jacob Dunbaugh was offered. The argument on the motion to exclude it, which took up the balance of the day, and the opinion of the court excluding the affidavit, delivered the following day, are reported as Case No. 14,692c.

Mr. Hay observed that as the examination of Colonel Burr for treason had already taken up much time without any progress in the business, and, from the disposition manifested by his counsel, it might last not only ten days, but even ten years longer, he considered it his duty, from information which he had received that morning, to suggest to the court the propriety of binding Colonel Burr in a further recognizance from day to day till the examination could be ended. He stated, on the authority of a letter just come to hand from the secretary at war, that General Wilkinson, with several other witnesses, might be expected here between the 28th and 30th of this month. This circumstance, said he, renders it essential that he should be considered in custody until he gives security that his person shall be forthcoming to answer the charge of treason against the United States. The gentlemen who appear as counsel for Colonel Burr may be, and no doubt are sincere, in the opinion they have expressed, that he will not shrink from the charges exhibited against him, and will not, in any conjuncture of circumstances which may occur, fly from a trial; but those gentlemen must pardon me for saying that I entertain a very different opinion. I must believe that his regard for the safety of his own

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life, would, if he perceived it in danger, prevail over his regard for the interest of his securities. I give notice, therefore, that I consider him as being already in custody to answer the motion I have made for his commitment, and that he cannot be permitted to go at large without giving security for his appearance from day to day. His situation now is the same as that when he was first apprehended and brought before a single judge for the purpose of examination. Your honor at that time considered him as in custody, and bound him over from day to day; and I only contend that the same course should be pursued at this time.

Mr. Wickham.--The gentleman thinks he has obtained the effect of his motion merely by having made it. I cannot perceive the propriety of a motion to compel Colonel Burr to give bail in any sum before the probable cause to believe him guilty of treason has ***62** been shown. When he was brought before your honor for examination, you conceived the sum of $5,000 sufficient security for his daily appearance. But a recognizance has already been given in double that sum, binding him not to depart without the leave of this court. Yet now, although no probable proof of treason has been exhibited, Mr. Hay requires the court to demand of Colonel Burr additional security! I trust that such a motion will not prevail.

Mr. Martin.--It has already been decided by the supreme court of the United States, that not a single expression in Wilkinson's affidavit amounts to any proof of the charge of treason. The motion of the gentleman amounts to this: 'We have no evidence of treason, and are not ready to go to trial for the purpose of proving it; we therefore move the court to increase the bail.'

Mr. Randolph.--The first motion of the counsel for the United States was to commit Colonel Burr on the ground of probable cause only. This goes a step farther, and wishes the same thing to be done on the ground of a probable cause of a probable cause; but we trust that we shall not be deprived of our liberty or held to bail on a mere uncertain expectation of evidence.

Some further remarks were made by Mr. MacRae, Mr. Wirt, Mr. Botts, and Mr. Hay.

The CHIEF JUSTICE delivered the opinion of the court, the substance of which was as follows: It is certainly necessary that a person accused should be retained in custody, or required to give security for his appearance while his examination is depending. The amount of the security to be required must depend, however, upon the weight of the testimony against him. On a former occasion, Colonel Burr was held to bail for his daily appearance in the sum of five thousand dollars only, because there was no evidence before the judge to prove the probability of his having been guilty of treason. When the examination was completed, the sum of ten thousand dollars was considered sufficient to bind him to answer the charge of a misdemeanor only, because the constitution requires that excessive bail should not be taken; but that recognizance had no application to the charge of treason. Yet, whether additional security ought to be required in the present stage of this business, before any evidence has appeared to make the charge of treason probable, is a question of some difficulty. It would seem that evidence sufficient to furnish probable cause must first be examined before the accused can be deprived of his liberty or any security can be required of him. Yet, before this could be done, he might escape and defeat the very end of the examination. In common cases, where a person charged with a crime is arrested and brought before a

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magistrate, the arrest itself is preceded by an affidavit, which furnishes grounds of probable cause. The prisoner therefore is continued in custody, or bailed until the examination is finished: but here there has been no arrest for treason, and Colonel Burr is not in custody for that offence. The evidence then must be heard, to determine whether he ought to be taken into custody; but as the present public and solemn examination is very different from that before a single magistrate; as very improper effects on the public mind may be produced by it, I wish that the court could be relieved from the embarrassing situation in which it is placed, and exempted from the necessity of giving any opinion upon the case, previously to its being acted upon by the grand jury. It is the wish of the court, that the personal appearance of Colonel Burr could be secured without the necessity of proceeding in this inquiry.

Colonel Burr rose and observed, that he denied the right of the court to hold him to bail in this stage of the proceedings; that the constitution of the United States was against it--declaring that no person shall be arrested without probable cause made out by oath or affirmation. But if the court were embarrassed, he would relieve them by consenting to give bail; provided it should be understood that no opinion on the question even of probable cause was pronounced by the court by the circumstance of his giving bail.

The CHIEF JUSTICE said, that such was the meaning of the court.

Mr. Martin said, for his part, he should prefer that all the evidence should be fully gone into. Instead of fearing that public prejudice would thereby be excited against Colonel Burr, he believed it would remove all the prejudices of that sort which now prevailed.

The CHIEF JUSTICE.--As a bill would probably be sent up to the grand jury, the court wishes to declare no opinion either way.

Some conversation then occurred relative to the quantum of bail; and Colonel Burr mentioned, that he would propose that the sum should be ten thousand dollars, if he should be able to find security to that amount, of which he expressed himself to be doubtful. Mr. Hay contended that fifty thousand dollars would not be too much. But the court finally accepted of the offer, made by Colonel Burr, who, after a short interval, entered into a recognizance with four sureties, to wit: Messrs. Wm. Langburn, Thomas Taylor, John G. Gamble, and Luther Martin; himself in the sum of ten thousand dollars, and each surety in the sum of two thousand five hundred dollars, conditioned, that he would not depart without leave of the court.

Mr. Martin, when offered as surety for Colonel Burr, said, that he had lands in the district of Virginia, the value of which was more than double the sum; and that he was happy to have this opportunity to give a public proof of his confidence in the honor of Colonel Burr, and of his conviction that he ***63** was innocent. All further proceedings in the case were thereupon postponed until the next day.

On Friday, the 29th of May, and on Monday, Tuesday, and Wednesday, the 1st, 2d, and 3d of June, the court met and adjourned without taking up the case, on account of the non-arrival of General Wilkinson. On the last dmentioned day the district attorney stated that he did not think it probable that General Wilkinson would arrive for ten or twelve days, and suggested an adjournment of the grand jury for that length of time. Finally, they were adjourned to Tuesday, the 9th of June.

Tuesday, June 9, 1807.

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The court met pursuant to adjournment, and all the grand jorors appeared. General Wilkinson not having yet arrived, after some conversation between the court and bar as to the probable time of his arrival, the grand jury were further adjourned to Thursday following.

Immediately upon the adjournment of the grand jury a question arose as to the production of certain papers by the government, and was followed by a motion for a subpoena duces tecum directed to the president of the United States, which will be found reported as Case No. 14,692d. The argument consumed several days, and an opinion was delivered Saturday, June 13, 1807. After which

Mr. Burr called up the motion for a supplemental charge to the grand jury, in support of which he had, on yesterday, submitted a series of propositions, with citations of authorities.

The CHIEF JUSTICE stated that he had drawn up a supplemental charge, which he had submitted to the attorney for the United States, with a request that it should also be put into the hands of Colonel Burr's counsel; that Mr. Hay had, however, informed him that he had been too much occupied to inspect the charge with attention, and deliver it to the opposite counsel; but another reason was, that there was one point in the charge which he did not fully approve. He should not, therefore, deliver his charge at present, but should reserve it until Monday. In the meantime, Colonel Burr's counsel could have an opportunity of inspecting it, and an argument might be held on the points which had produced an objection from the attorney for the United States.

(After some conversation between the court and bar, as to whether the arguments on the supplemental charge should be submitted in writing or orally, the subject was passed over, and it appears never to have been again called up.)

At the instance of the district attorney, four witnesses, viz. Thomas Truxton, William Eaton, Benjamin Stoddert, and Stephen Decatur, were sworn to testify before the grand jury. The clerk then proceeded to call four other witnesses to the book, but when Erick Bollman appeared, Mr. Hay addressed the court to the following effect: Before Mr. Bollman is sworn I must inform the court of a particular, and not an immaterial circumstance. He, sir, has made a full communication to the government of the plans, the designs, and views of Aaron Burr. As these communications might criminate Dr. Bollman before the grand jury, the president of the United States has communicated to me this pardon (holding it in his hands) which I have already offered to Dr. Bollman. He received it in a very hesitating manner, and I think informed me that he knew not whether he should or should not accept it. He took it from me, however, as he informed me, to take the advice of counsel. He returned it in the same hesitating manner; he would neither positively accept nor refuse it. My own opinion is that Dr. Bollman, under these circumstances, cannot possibly criminate himself. This pardon will completely exonerate him from all the penalties of the law. I believe his evidence to be extremely material. In the presence of this court I offer this pardon to him, and if he refuses, I shall deposit it with the clerk for his use. Will you (addressing himself to Dr. Bollman) accept this pardon?

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Dr. Bollman.--No, I will not, sir.
Mr. Hay then observed that Dr. Bollman must be carried up to the grand jury with an intimation that he had been pardoned.
Mr. Martin.--It has always been Dr. Bollman's intention to refuse this pardon; but he has not positively refused it before, because he wished to have this opportunity of publicly rejecting it.
Several other witnesses were sworn.
Mr. Martin did not suppose that the pardon was real or effectual; if he made any confessions before the grand jury, they might find an indictment against him, which would be valid, notwithstanding the pardon; that the pardon could not be effectual before it was pleaded to an indictment in open court.
Mr. Hay inquired whether Dr. Bollman might not go to the grand jury.
The CHIEF JUSTICE suggested that it would be better to settle the question about the validity of the pardon before he was sent to the grand jury.
Mr. Hay.--I am anxious to introduce the evidence before the grand jury in a chronological order, and the suspension of Dr. Bollman's testimony will make a chasm in my arrangement. He added that, however, it was not very important whether he was sent now or some time hence to the grand jury.
Mr. Martin.--Dr. Bollman is not pardoned, and no man is bound to criminate himself.
The CHIEF JUSTICE required his authorities.
Mr. Martin.--I am prepared to show that a party even possessed of a pardon is still indictable by the grand jury, unless he has pleaded it in court.
The other witnesses were sent to the grand jury, and Dr. Bollman was suspended. Four other witnesses were then sworn. ***64**
Mr. Hay.--I again propose to send Dr. Bollman to the grand jury.
At this time the marshal entered, and Mr. Hay informed the court that the grand jury had sent for the article of the constitution and the laws of congress relating to treason, and the law relating to the misdemeanor.
Jacob Dunbaugh was sworn and sent to the grand jury.
Some desultory conversation here ensued between the bar and the court respecting Dr. Bollman, when Mr. Hay addressed the opposite counsel: Are you then willing to have Dr. Bollman indicted? Take care in what an awful condition you are placing this gentleman.
Mr. Martin.--Doctor Bollman, sir, has lived too long to be alarmed by such menaces. He is a man of too much honor to trust his reputation to the course which you prescribe for him.
The CHIEF JUSTICE.--There can be no question but Dr. Bollman can go up to the jury; but the question is, whether he is pardoned or not? If the executive should refuse to pardon him, he is certainly not pardoned.
Mr. Martin.--But there can be no doubt, if he chooses to decline his pardon, that he stands in the same situation with every other witness, who cannot be forced to criminate himself.
Some desultory conversation here ensued, when Mr. Hay observed that he should extremely regret the loss of Dr. Bollman's testimony. He believed it to be material. He trusted that he should obtain it, however reluctantly given. The court would perceive, that Dr. Bollman now possessed so much zeal as even to

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encounter the risk of an indictment for treason. Whether he should appear before the grand jury under the circumstances of a pardon being annexed to his name, might hereafter become the object of a distinct inquiry. In the meantime he might go up without any such notification. The counsel of Mr. Burr acquiesced.

The CHIEF JUSTICE.--Whether he be really pardoned or not, I cannot at present declare. I must take time to deliberate.

Mr. Hay.--Categorically then I ask you, Mr. Bollman, do you accept your pardon?

Mr. Bollman.--I have already answered that question several times. I say no. I repeat, that I would have refused it before, but that I wished this opportunity of publicly declaring it.

Mr. Hay.--If the grand jury have any doubts about the questions that they put to Dr. Bollman, they can apply to the court for instructions. I assert, sir, that Mr. Bollman is a pardoned man. I wish the opposite counsel to prove that he is not. I therefore move, sir, that he be sent up to the grand jury, certified by you, that he is pardoned. I make this motion that gentlemen who wish to discuss the question may have an opportunity of adducing their arguments.

Mr. Williams appeared as counsel for Dr. Bollman, and addressed the court in his behalf, insisting he was not bound to criminate or calumniate himself, although pardoned. He claimed, however, that the pardon having been refused, the court could take no notice of it. He also insisted that no pardon except by statute could protect a party against a criminal prosecution, as a pardon under the great seal was not effectual until it had been pleaded and allowed in court. He cited numerous authorities in support of his positions.

Mr. Martin supported the same positions. He said, another reason why Dr. Bollman had refused the pardon was, that it would be considered an admission of guilt. He did not consider a pardon necessary for an innocent man. Dr. Bollman, sir, knows what he has to fear from the prosecution of an angry government, but he will brave it all. The man who did so much to rescue the Marquis La Fayette from his imprisonment, and who has been known at so many courts, bears too great a regard for his reputation, to wish to have it sounded throughout Europe that he was compelled to abandon his honor through a fear of unjust prosecution.

After some remarks by Messrs. MacRae and Hay, Dr. Bollman was sent up to the grand jury without any particular notification; the questions as to the effect of the pardon tendered to him, and how far he could be compelled to testify, being reserved for future discussion and decision.

Mr. Hay requested leave to inform the grand jury that fatigue alone had prevented General Wilkinson from attending them on that day, but that he should appear before them on Monday. The court then adjourned to Monday.

Monday, June 15, 1807.

The court met pursuant to adjournment.

Gen. Wilkinson was sworn and sent to the grand jury, with a notification that it would facilitate their inquiries if they would examine him immediately.

Mr. Wickham reminded the court that the attorney for the United States had pledged himself to send up no papers to the grand jury which had not previously passed the inspection of the court; but it had since occurred to Col. Burr's counsel that the witnesses themselves might carry up improper papers. He

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submitted to the court whether they ought not to instruct the grand jury to receive no papers, except through the medium of the court.

Upon this motion a running debate of considerable length ensued.

Finally, the CHIEF JUSTICE remarked that he was not satisfied that a court ought to inspect the papers which form a part of a witness's testimony before he is sent to the grand jury. He had reduced to writing an opinion to be sent to the grand jury. It instructed them not to inspect any papers, but such as formed a part of the narrative of the witness, and proved to be the papers of the person against whom an indictment was exhibited.

At the instance of Mr. Hay, the instruction ***65** was so amended as to submit such papers as tend to justify the witness, but not to bear upon the accused.

Mr. Hay informed the court that the grand jury had sent for Dr. Bollman; that they wanted him to decipher, if he could, a ciphered letter annexed to Mr. Willie's affidavit, and which he held in his hand; that Mr. Willie, the reputed secretary of Mr. Burr, would prove the identity of the paper, and Dr. Bollman, it was expected, would interpret it.

At the suggestion of Mr. Martin, the affidavit was severed from the letter.

Mr. Willie appearing in court, Mr. Hay produced the ciphered letter annexed to his affidavit, and said: This is the letter which I wish to transmit to the grand jury. It is addressed, I understand, to Dr. Bollman, under a fictitious name, and is all in the handwriting of Mr. Willie.

Mr. Botts objected to its being sent up to the grand jury until both its materiality and its authenticity had been proved.

Mr. Hay said that was a hard proposition, as it was written partly in ciphers and partly in German. He deemed it material, because he understood it was either dictated by the accused, or first written by him and afterwards written by his secretary, and at his request. It was addressed to Henry Wilbourn, alias Erick Bollman. He wished it to be sent up while Dr. Bollman was before the grand jury.

After considerable sparring between counsel, Mr. Willie was called to the stand.

The argument of the question of the right to compel Willie to testify took up the balance of the day, and will be found reported in Case No. 14,692e.

Tuesday, June 16, 1807.

As soon as the court met, Mr. Hay produced and read the following letter from the president of the United States, in answer to his letter on the subject of the subpoena duces tecum, observing, at the same time, that he read it to show the disposition of the government not to withhold any necessary papers, and that if gentlemen would specify what orders they wanted, they would be furnished without the necessity of expresses:

'Washington, June 12, 1807.

'Sir: Your letter of the 9th is this moment received. Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require. But the letter of General Wilkinson, of October 21st, requested for the defence of Colonel Burr, with every other paper relating to the charges against him, which were in my possession when the attorney general went on to Richmond in March. I then delivered to him; and I

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have always taken for granted he left the whole with you. If he did, and the bundle retains the order in which I had arranged it, you will readily find the letter desired under the date of its receipt, which was November 25th; but lest the attorney general should not have left those papers with you, I this day write to him to forward this one by post. An uncertainty whether he be at Philadelphia, Wilmington, or New Castle, may produce delay in his receiving my letter, of which it is proper you should be apprised. But as I do not recollect ehe whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice. With this application, which is specific, a prompt compliance is practicable; but when the request goes to copies of the orders issued in relation to Colonel Burr to the officers at Orleans and Natchez, and by the secretaries of the war and navy departments, it seems to cover a correspondence of many months, with such a variety of officers civil and military, all over the United States, as would amount to the laying open of the whole executive books. I have desired the secretary of war to examine his official communications, and on a view of these we may be able to judge what can and ought to be done towards a compliance with the request. If the defendant allege that there was any particular order which, as a cause, produced any particular act on his part, then he must know what this order was, can specify it, and a prompt answer can be given. If the object had been specified, we might then have had some guide for our conjectures, as to what part of the executive records might be useful to him. But with a perfect willingness to do what is right, we are without the indications which may enable us to do it. If the researches of the secretary at war should produce anything proper for communication, and pertinent to any point we can conceive in the defence before the court, it shall be forwarded to you. I salute you with esteem and respect

'Thomas Jefferson.

'George Hay, Esq.'

Some conversation ensued about the specification of the papers wanted from the executive.

Mr. Hay stated that in his communication to the president, to which this letter was a reply, he had mentioned these papers in the terms by which he thought the opposite counsel would probably have described them. The president, however did not deem this description sufficient.

Colonel Burr's counsel then stated that they had sent an express to Washington for these papers, with a subpoena to the president, and that it would appear on the return whether they could obtain them or not.

Here a desultory conversation ensued, in ***66** which Mr. Hay insisted that Dr. Bollman was a pardoned man, and ought to communicate all he knew to the grand jury, which was denied by the other side; when Dr. Bollman, addressing himself to the court, said: I have answered every question that was put to me by the grand jury.

The CHIEF JUSTICE inquired if there was any objection to asking Dr. Bollman if he could decipher the letter.

Mr, Martin said it would be time enough to discuss that question after the letter shall have been before the grand jury.

Mr. MacRae.--I wish the question now put. I asked Willie whether he

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understood that part of the letter which is in cipher; he could not be criminal if he did not understand it. I wish the part which is written in German now to be explained, to show that there is nothing criminal in it. I wish Bollman to translate that part.

The CHIEF JUSTICE said he would prefer to proceed with the other point; how far a witness may refuse to answer a question which he thinks would criminate himself.

Mr. Botts then addressed the codurt at some length on that point. In the course of his remarks he intimated that the letter in question had been obtained by the robbery of the post office, and referred to the mark '25' on its back, (which he said was the only post mark of many of the country post offices,) as evidence that it has been taken from the post office.

Mr. Williams, counsel for Mr. Willie, followed Mr. Botts in support of the position that the witness was not bound to answer any question, the answer to which he believed would tend to criminate himself.

Messrs. MacRae and Hay replied at some length, after which the court adjourned.

Wednesday, June 17, 1807.

At the meeting of the court Mr. Hay referred to the insinuations that had been thrown out yesterday, that the ciphered letter in question had been taken improperly if not feloniously from the post office; and said this was evidently done to affect the character of Gen. Wilkinson. He read a note which he had just received from Gen. Wilkinson, stating that the letter was delivered to him by Charles Patton, of the house of 'Meeker, Williamson & Patton,' New Orleans.

Mr. Martin then addressed the court on the question of the right of Mr. Willie to decline answering the questions prolpounded to him by the counsel for the prosecution. He contended that 'a witness is not compelled to answer when it tends to criminate him, nor where it does not relate to the issue,' and cited authorities in aupport of the proposition.

Mr. Wickham followed in an argument on the same side.

After some further desultory conversation, the CHIEF JUSTICE asked whether there were any other questions before the court.

Mr. MacRae requested a decision on Dr. Bollman's case, as he wished to interrogate him about the ciphered letter.

Mr. Williams said he was ready to discuss the question.

Mr. Burr.--There will arise some very important questions, affecting the very source of the jurisdiction of this country. I have several affidavits to produce to show that improper means have been used to procure witnesses, and thereby contaminate the public justice. When these proofs have been duly exhibited, it will be the province of the court to decide whether they will not arrest the progress of such improper conduct, and prevent the introduction of such evidence.

Mr. Botts rose to apprise the oppositite counsel that there were three or four questions of importance which the counsel for Mr. Burr should bring forward as soon as possible. Two or three days ago he had commented on the plunder of the post office, and he assured the counsel for the prosecution that he should probe that subject to the bottom, as no man could be more anxious than himself that the stigma which this transaction attaches to the inferior or superior officers of the government should be wiped off.

CHIEF JUSTICE.--Unless these allegations affected some testimony that was

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about to be delivered, how can you introduce this subject?

Mr. Burr.--The court has very properly demanded some proof of the relevancy of our proposition. Sir, we are ready to prove the violation of the post office. We are ready to fasten it on individuals now here, and we are ready to name the post offices if the court require it, which have been thus plundered. When it comes out that evidence has been thus improperly obtaidned, we shall say, sir, that it is contaminated by fraud. I will name three persons who have been guilty of improper conduct, in improperly obtaining letters from the post office to be evidence against me. These are Judge Toulmin, of the Mississippi territory, John G. Jackson, a member of congress, and General Wilkinson. Two of these persons are within the reach of this court. As well as the improper manner in which they have procured affidavits and witnesses against me, I mention these circumstances for two reasons: first, that the facts may be proved to the satisfaction of the court; and second, that the court may lay their hands on testimony thus procured.

Mr. Botts.--The circumstance of the post mark proves that the post office was robbed of that letter; therefore it is not evidence.

The CHIEF JUSTICE said, let the consequences be as they may, this court cannot take cognizance of any act which has not been committed within this district. That mark is not necessarily a post mark. The court can only know the fact, in a case to which it applies, except to commit and send for trial.

Mr. Hay.--Let some specific motion be ***67** made, and the evidence procured; and if there have been any crime committed, let the offenders be prosecuted according to law. These gentlemen know the course, and I most solemnly promise to discharge the duties of my office, whether they bear against General Wilkinson, or the man at the bar. If the crime have been committed, it is not the province of the court to notice it till after an indictment has been found.

Mr. Botts.--We only wish to prove and prevent a repetition any continuance of this improper mode of proceeding. The proof will affect General Wilkinson.

CHIEF JUSTICE.--If it did affect General Wilkinson it could not prevent him from being a witness.

Some desultory conversation here ensued, when Mr. Burr observed that he was afraid he was not sufficiently understood, from mingling two distinct propositions together. As to the subject of the post offices, it might rest for the present; but as to the improper means employed in obtaining testimony, they were at this moment in actual operation.

Some witnesses had been brought here by this practice, and it was one which ought immediately to be checked; he did not particularly level his observations against General Wilkinson. He did not say that the attorney for the United States ought to indict, or that such a crime, if committed out of this district, was cognizable by the court, unless it be going on while the court is in session, or the cause depending; in those cases improper practices relative to crimes committed out of the limits of this court may be examined, and the persons committing them attached. Such practices have been since I have been recognized here, and they ought to be punished by attachment.

Mr. Wirt.--I do not yet understand the gentlemen. What is the object of their motion? Mr. Botts.--We shall hereafter make it; we have no other object by the present annunciation than to give gentlemen a timely notice of our intentions.

Mr. Burr.--We have sufficient evidence on which to found our motion.

What motion? demanded Mr. Hay.

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Mr. Burr.--I thought, sir, I had sufficiently explained my intentions. I may either move for a rule to show cause why an attachment should not issue against Judge Toulmin, John G. Jackson, and General Wilkinson, or what is sometimes, though not so frequently practiced, I may directly move for an attachment itself.

Mr. MacRae.--At whose instance?

Mr. Burr.--At the public's.

Mr. MacRae.--A pretty proceeding, indeed! that the public prosecution should thus be taken out of the hands of the public prosecutor, and that the accused should supersede the attorney for the United States!

Mr. Burr.--A strange remark indeed! As if it were not the business of the injured person himself to institute the complaint.

Mr. Hay.--I wish for further explanation. Let the specific charge on which their motion is founded be clearly pointed out and reduced to writing.

Mr. Burr.--The motion will be for an attachment for the irregular examination of witnesses, practicing on their fears, forcing them to come to this place, and transporting them from New Orleans to Norfolk.

At this moment Mr. Randolph entered the court, and observed that if he had been present he would have himself opened this motion, which was intended to operate immediately upon General Wilkinson, and ultimately upon some other persons. Mr. Randolph here read the motion which he would have submitted to the court.

Mr. Hay protested against this proceeding, which, he said, was calculated to interrupt the course of the prosecution, and was levelled at General Wilkinson alone.

After some further remarks from Mr. Hay and from Messrs. Randolph and Martin--Mr. Hay said he should move to postpone the motion of the gentlemen till the prosecution was over, because it would necessarily interrupt the business before the court, because it was intended to impeach the credit of a witness, and because this inquiry could as well be conducted after as before the prosecution.

Mr. Wickham replied to Mr. Hay. He said, among other things, that General Wilkinson had brought witnesses with him from New Orleans by military force. He had taken their depositions entirely ex parte at the point of the bayonet, for the purpose of keeping their testimony straight. He would lay down the broad proposition that the man who goes about collecting affidavits upon affidavits in relation to a matter to be investigated in this court corrupts the fountains of justice. We have already seen a volume of such at this bar. He particularly referred to Mr. Jackson, who comes here with the depositions of witnesses who are thus bound hand and foot, thus tongue-tied, because their depositions had been taken. He had seen them in this very court examining witnesses with affidavits in their hands, and comparing the one with the other; depositions taken not by commissions, but ex parte. When an interested agent thus goes about collecting depostitions, and with ignorant men shaping them just as he pleases, he acts contrary to law and to the spirit and genius of our government; and such acts are a contempt of this court, if done during the prosecution, by interfering with the purposes of justice. Such men are liable

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to attachment from the very moment that the government took possession of Colonel Burr's person; not from the moment of first arrest, but from the time when they ordered Perkins to conduct his prisoner from Fredericksburg to Richmond. It was necessary to institute this proceeding now to prevent the repetition of such practices during the progress of the trial. At the conclusion of Mr. Wickham's remarks.

The CHIEF JUSTICE said that the pendency *68 of the prosecution was no objection to hearing the motion, but it was another question whether there were any grounds for it or not, and that the court would not say that a motion relating to the justice of the case ought not to be heard.

The court then adjourned.

Thursday, June 18, 1807. As soon as the court met, the CHIEF JUSTICE delivered an opinion in the case of Willie. This will be found reported as Case No. 14,692e. After the delivery af such opinion

Mr. Williams (counsel for Mr. Willie) stated that he had misunderstood him the other day in court, and in a subsequent conversation had obtained more accurate information. He does understand a part of that letter.

Mr. Hay requested that Mr. Willie should be called into court. When he appeared Mr. Hay interrogated him. Do you understand the contents of that letter? Answer. No. Mr. Willie afterwards said that he understood the part of the letter which is written in Dutch.

Mr. Hay.--Was this letter written by the hand or the direction of Aaron Burr?

Mr. Wickham objected to the question.

The CHIEF JUSTICE.--The witness and his counsel will consult.

Mr. Hay repeated the question. Mr. Willie. Yes. Mr. Hay. Which? by his hand or his direction? Mr. Willie. By his direction. It was copied from a paper written by himself.

Mr. Hay.--I wish this paper to be carried to the grand jury. I presume there can be no objection.

Mr. Botts.--No objection! We call upon you to show the materiality of that letter.

Mr. Hay.--I deny the necessity of any such thing. Until this letter be deciphered it will be perfectly unintelligible to me and to the grand jury. It is no more than a blank piece of paper.

Mr. Wickham.--I had always understood before that the testimony which is laid before a grand jury must not only be legal in itself, but proved to be material.

Mr. Williams begged leave to interrupt the gentleman. Mr. Willie is anxious to be particularly understood. He says that this ciphered letter was first written by Colonel Burr, and afterwards copied. But it is the cipher only which has been copied from Colonel Burr's original.

Mr. Hay.--It is quite sufficient, sir. If Colonel Burr wrote the ciphered part, he will be considered the author of the whole.

Mr. Wickham.--The gentleman has stated a curious proposition indeed! I had always understood before that the whole included the part; but it seems now that the part is to comprehend the whole.

After some further discussion, in which several of the counsel participated,

The CHIEF JUSTICE said he had in some measure anticipated this question, and had reflected upon it; his opinion was, that a paper to go before the grand or petit jury must be relevant to the case, even if its materiality were not

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proved. Why send this paper before the grand jury, if it cannot be deciphered? If it can be deciphered before the grand jury, why not before the court? Let it, then, be deciphered, and its relevancy may at once be established.

Mr. Hay then requested Dr. Bollman to be called, that he might be interrogated as to its contents; but before he appeared, Mr. John Randolph entered at the head of the grand jury, and addressed the court as follows: May it please the court: One of the witnesses under examination before the grand jury has answered certain questions touching a letter in ciphers. The grand jury understand that this letter is in the possession of the court, or of the counsel for the prosecution. They have thought proper to appear before you, to know whether the letter referred to by the witness be in the possession of the court?

The CHIEF JUSTICE then remarked that as the letter was wanted by the grand jury, a witness having referred to it, that was sufficient to establish its relevancy, and directed it to be delivered to them.

Mr. MacRae hoped that before the grand jury retired they would be informed that a witness had proved that this letter was originally written by Aaron Burr.

Mr. Wickham hoped that they would also be informed that the superscription on that letter has not been proved to have been written by Colonel Burr. The witness did not and would not say that he knew the superscription to have been written by him. The grand jury retired and the court adjourned.

Friday, June 19, 1807.

As soon as the court met, Mr. Burr addressed them. He stated that the express that he had sent on to Washington with the subpoena duces tecum had returned to this city on Wednesday last, but had received no other than a verbal reply from the president of the United States that the papers wanted would not be sent by him, from which I have inferred, said Mr. Burr, that he intends to send them in some other way. I did not mention this circumstance yesterday to the court, under an expectation that the last night's mail might give us further intelligence on the busject. I now rise to give notice that unless I receive a satisfactory intimation on this subject before the meeting of the court, I shall to-morrow move the court to enforce its process.

Motion was then made for an attachment against General Wilkinson 'for a contempt in obstructing the administration of the justice of this court,' the argument on which occupied the balance of the day. Case No. 14,692f.

Saturday, June 20, 1807.

The court met according to adjournment. Present, the same judges as yesterday. ***69**

Mr. Randolph rose to proceed with his motion, when he was interrupted by Mr. Hay, who spoke to this effect:

I have a communication to make to the court, and to the counsel of the accused. The court will recollect the answer which I received from the president, to my letter respecting certain papers. He stated in that letter that General Wilkinson's letter of the 21st October had been delivered to Mr. Rodney, the attorney general, from whom he would endeavor to obtain it. By the last mail I have received this letter from the president on the same subject.

'Washington, June 17, 1807.

'Sir: In answering your letter of 9th, which desired a communication of one

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to me from General Wilkinson, specified by its date, I informed you in mine of the 12th that I had delivered it, with all other papers respecting the charges against Aaron Burr, to the attorney general when he went to Richmond; that I had supposed he had left them in your possession, but would immediately write to him, if he had not, to forward that particular letter without delay. I wrote to him accordingly on the same day, but having no answer I know not whether he has forwarded the letter. I stated in the same letter that I had desired the secretary of war to examine his office in order to comply with your further request to furnish copies of the orders which had been given respecting Aaron Burr and his property; and, in a subsequent letter of the same day, I forwarded you copies of two letters from the secretary at war, which appeared to be within the description expressed in your letter. The order from the secretary of the navy you said you were in possession of. The recdipt of these papers has, I presume, so far anticipated, and others this day forwarded, will have substantially fulfilled the object of a subpoena from the district court of Richmond, requiring that those officers and myself should attend the court in Richmond, with the letter of General Wilkinson, the answer to that letter, and the orders of the department of war and the navy therein generally described. No answer to General Wilkinson's letter, other than a mere acknowledgment of its receipt in a letter written for a different purpose, was ever written by myself or any other. To these communications of papers I will add, that if the defendant suppose there are any facts within the knowledge of the heads of departments or of myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we shall be ready to give him the benefit of it, by way of deposition through any persons whom the court shall authorize to take our testimony at this place. I know indeed that this cannot be done but by consent of parties, and I therefore authorize you to give consent on the part of the United States. Mr. Burr's consent will be given of course, if he suppose the testimony useful.

'As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority.

'With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in requests of papers from the legislative to the executive branch, an exception

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is carefully expressed, 'as to those which he may deem the public welfare may require not to be disclosed,' as you will see in the inclosed resolution of the house of representatives, which produced the message of January 22d, respecting this case. The respect mutually due between the constituted authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candor and integrity to which the nation has, in like manner, trustee in the disposal of its judiciary authorities. Considering you as the organ for communicating these sentiments to the court, I address them to you for that purpose, and salute you with esteem and respect.

Thos. Jefferson.'

Accompanying this letter is a copy of the resolution of the house of representatives containing the exception to which the president refers. I have also received a letter from Mr. Smith, the secretary of the navy, containing an authentic copy of the order which was wanted, precisely corresponding with the unauthenticated copy in my possession.

Mr. Wickham.--I presume that these must be considered and noted as the return to the 'subpoena duces tecum.'

Mr. Hay.--So far as they go. When we receive General Wilkinson's, the return will be complete. I have also received a letter ***70** from the secretary of war, which contains all the orders of his department relative to Aaron Burr. All which papers I shall deposit with the clerk of this court.

The following is the order of the navy department:

'I certify that the annexed is a true copy from the records in the office of the department of the navy of the United States of of the navy of the United States of the letter from the secretary of the navy to Captain John Shaw, dated 20th December, 1806. In faith whereof, I, Robert Smith, secretary of the navy of the United States of America, have signed these presents, and caused the seal of my office to be affixed hereto, at the city of Washington, this 17th day of June, Anno Domini 1807, and in the 31st year of the independence of the said states.

'(Registered,) Rt. Smith,'

'Secretary of the Navy.

'Ch. W. Goldsborough,

'Ch. Clk., N. D.'

'(Copy.)

'Navy Department, 20th December, 1806.

'Sir: A military expedition formed on the western waters by Colonel Burr will soon proceed down the Mississippi, and by the time you receive this letter will probably be near New Orleans. You will, by all the means in your power, aid the army and malitia in suppressing this enterprise. You will, with your boats, take the best position to intercept and to take, and, if necessary, to destroy, the boats descending under the command of Colonel Burr, or of any person holding an appointment under him. There is great reliance on your vigilance and exertions. I have the honor to be, sir, your most obedient,

'(Signed) Rt. Smith.

'Captain John Shaw, or the Commanding Naval Officer at New Orleans.'

Thereupon the motion for attachment was brought on and argued. The argument and opinion will be found reported as Case No. 14,692f.

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On Wednesday, the 24th of June, while Mr. Botts was speaking on the motion for an attachment, the grand jury entered, when Mr. John Randolph, their foreman, addressed the court, and stated that they had agreed upon several indictments, which he handed in at the clerk's table. The clerk then read the endorsements upon them as follows: 'An indictment against Aaron Burr for treason. A true bill.' 'An indictment against Aaron Burr for a misdemeanor. A true bill.' 'An indictment against Herman Blannerhasset [FN4] for treason. A true bill.' 'An indictment against Herman Blannerhassett for a misdemeanor. A true bill.' The foreman then stated that the grand jury had still other subjects for their consideration, and had adjourned themselves to meet to-morrow at ten o'clock.

FN4 So in the indictment. The correct spelling is 'Harman Blennerhassett.'

After Mr. Botts had concluded his argument, Mr. Burr addressed the court, and observed that as bills had been found against him, it was probable the public prosecutors would move his commitment. He would, however, suggest two ideas for the consideration of the court: the one was, that it is within their discretion to bail in certain cases, even when the punishment was death; and the other was, that it was expedient for the court to exercise their discretion in this instance, as he should prove that the indictment against him had been obtained by perjury.

Mr. Hay moved for the commitment of Aaron Burr. He stated that if the court had power to bail by the 33d section of the judicial act, it was only to be exercised according to their sound discretion, and that the prisoner was not to demand bail as a matter of right.

Mr. Martin said the counsel for the prosecution had admitted the right of the court to give bail according to its discretion.

Mr. MacRae did not understand from the judicial act that the discretion was to be exercised at this stage of the business, but only at the time of making the arrest.

After some further remarks by Messrs. Martin, Wirt, and Wickham, the CHIEF JUSTICE said: Mr. Martin, have you any precedents where a court has bailed for treason, after the finding of a grand jury, on either of these grounds; that the testimony laid before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in possession of the grand jury?

Mr. Martin said that he had not anticipated this case, and had not, therefore, prepared his authorities; but he had no doubt that such existed.

Mr. Burr said, if the court have no discretion, it is unnecessary to produce evidence. That question ought, therefore, to be previously settled.

Some further discussion ensued, as to the question whether the court had any discretion, when Mr. Burr said, that if the court thought it had the power to bail in any case after bill found, it would then be necessary to show that it ought to exercise its discretion in this instance. That the finding of the jury was founded on the testimony of a perjured witness. That General Tupper would prove that there had been no such resistance of his authority as had been

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stated by that witness.
After same further conversation between counsel, Mr. Burr wished to know whether the court would go into testimony extrinsic to the indictment.
The CHIEF JUSTICE said he had never known a case similar to the present when such an examination had taken place. [FN5]

FN5 The court will in no instance inquire into the character of the testimony which has influenced the grand jury in finding an indictment. State v. Boyd, 2 Hill (S. C.) 288. ***71**

Mr. Martin would produce authorities if he had time allowed him.
The CHIEF JUSTICE insisted upon the necessity of producing adjudged cases to prove that the court could bail a party against whom an indictment had been found.
Mr. Burr did not wish to protract the session of the court to suit his own personal convenience. There was no time at present to look for authorities.
The CHIEF JUSTICE observed that he was then under the necessity of committing Colonel Burr.
Mr. Burr stated that he was willing to be committed, but hoped that the court had not forestalled its opinion.
The CHIEF JUSTICE.--I have only stated my present impression. This subject is open for argument hereafter. Mr. Burr stands committed to the custody of the marshal.
He was accordingly committed to the gaol, and the court adjourned.
On Thursday, the 25th of June, while Mr. Hay was addressing the court on the motion for an attachment against General Wilkinson, the grand jury entered, and their foreman, Mr. John Randolph, addressed the court as follows: 'May it please the court: The grand jury have been informed that there is in the possession of Aaron Burr a certain letter, with the post mark of May 13th, from James Wilkinson, in ciphers, which they deem to be material to certain inquiries now pending before them. The grand jury are perfectly aware that they have no right to demand any evidence from the prisoner under prosecution which may tend to criminate himself. But the grand jury have thought proper to appear in court to ask its assistance, if it think proper to grant it, to obtain the letter with his consent.'
Mr. Burr rose and asked whether the court were about to give an opinion?
The CHIEF JUSTICE stated that the court was about to say that the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself; he presumed that the grand jury wished also to know whether the person under prosecution could be examined on other questions not criminating himself?
Mr. Burr declared that it would be impossible for him, under certain circumstances, to expose any letter which had been communicated to him confidentially; how far the extremity of circumstances might compel him to such a conduct, he was not prepared to decide; but it was impossible for him even to deliberate on the proposition to deliver up anything which had been confided to his honor, unless it were extorted from him by law.
Mr. Randolph.--We will withdraw to our chamber, and when the court has decided upon the question it will announce it to the grand jury.
The CHIEF JUSTICE knew not that there was any objection to the grand jury

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calling before them and examining any man as a witness who laid under an indictment.

Mr. Martin said there could be no objection.

Mr. Randolph said he was afraid that the object of the grand jury had been misunderstood by the court. The grand jury had not appeared before the court to apply for the person of Aaron Burr, to obtain evidence from him, but for a certain paper which might or might not be in his possession; and upon that paper being or not being in his possession, and upon its being possible or not possible to identify that paper, it might depend whether Aaron Burr himself were or were not a material evidence before them; and then the grand jury withdrew.

When Mr. Hay had concluded his argument, Mr. MacRae addressed the court. He was solicitous he said, to lay a communication before it, on a circumstance which had lately transpired. The grand jury had asked for a certain letter in ciphers, which was supposed to have been addressed by General Wilkinson to the accused. The court had understood the ground on which the accused had refused to put it in their possession, to be an apprehension lest his honor should be wounded by his thus betraying matters of confidence. I have seen General Wilkinson, sir, since this declaration was made. I have informed him of the communication which has thus been made, and the general has expressed his wishes to me, and requested me to express those wishes, that the whole of the correspondence between Aaron Burr and himself may be exhibited before the court. The accused has now, therefore, a fair opportunity of producing this letter; he is absolved from all possible imputation; his honor is perfectly safe.

Mr. Burr.--The court will probably expect from me some reply. The communication which I made to the court, has led, it seems, to the present invitation. I have only to say, sir, that this letter will not be produced. The letter is not at this time in my possession, and General Wilkinson knows it.

Mr. MacRae hoped that notice of his communication would be sent to the grand jury.

Mr. Martin hoped that Colonel Burr's communication also would go along with it.

The CHIEF JUSTICE was unwilling to make the court the medium of such communications.

Mr. MacRae hoped the court would notify his communication to the grand jury, and for an obvious reason. When the grand jury came into court to ask for the paper, what did the accused say? Did he declare that it was not in his possession? No: he merely said that honor forbade him to disclose it. The inference undoubtedly was, that he had the paper, but could not persuade himself to disclose it. And what then must have been the impression of the grand ***72** jury? A cloud of suspicions must have fastened itself upon their minds; suspicions unjustly injurious to the character of General Wilkinson and which the present communication may at once disperse. It is but justice, therefore, to General Wilkinson, to whom the inquiries of the grand jury may at present relate, to give them the benefit of this information.

Mr. Burr.--General Wilkinson, sir, is extremely welcome to all the eclat which he may expect to derive from this challenge; but as it is a challenge from him, it is a sufficient reason why I should not accept it. But as the remarks of

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the last gentleman seem to convey some reproach against me, (which no man who knows me can believe me to deserve) it may be proper to say, that I did voluntarily, and the presence of a witness, put the letter out of my hands, with the express view that it should not be used improperly against any one. I wished, sir. to disable any person, even myself, from laying it before the grand jury. General Wilkinson knows this fact.

The CHIEF JUSTICE then reduced these communications to writing, and transmitted them to the grand jury.

Mr. Burr.--Let it be understood, that I did not put this letter out of my possession because I expected the grand jury would take up this subject but from a supposition that they might do so.

Mr. Wickham, about to speak, was interrupted by the entrance of the grand jury when Mr. Randolph, their foreman, informed the court that they had agreed upon some presentments, which he then delivered into the hands of the clerk. The clerk then read as follows:

'The grand inquest of the United States, for the district of Virginia, upon their oaths, present, that Jonathan Dayton, late a senator in the congress of the United States, from the state of New Jersey; John Smith, a senator in the congress of the United States, from the state of Ohio; Comfort Tyler, late of the state of New York; Israel Smith, late of the state of New York; and Davis Floyd, late of the territory of Indiana, are guilty of treason against the United States, in levying war against the same, to wit: at Blennerhassett's Island, in the county of Wood, and state of Virginia, on the 13th day of December, 1806.'

Friday, June 26, 1807.

The court met about nine o'clock, and, about ten o'clock, the grand jury entered, and Mr. Randolph, their foreman, presented ten indictments, found true bills; that is, one indictment for treason, and another for a misdemeanor, against each of the following individuals, viz.: Jonathan Dayton, John Smith, Comfort Tyler, Israel Smith, and Davis Floyd.

The CHIEF JUSTICE then made a short address to the grand jury, in which he complimented them upon the great patience and cheerful attention with which they had performed the arduous and laborious duties in which they had been so long engaged, and concluded, by discharging them from all further attendance.

The court then adjourned till twelve o'clock. As soon as it met again, Mr. Botts requested the court to remove Mr. Burr from the public gaol, to some comfortable and convenient place of confinement. He depicted, in very strong terms, the miserable state of the prison where he was then confined. The grounds of this motion are to be found in the following affidavit made by some of Mr. Burr's counsel, and laid before the court:

'We, who are counsel in the defence of Colonel Burr, at the suit of the United States, beg leave to represent to the court, that in pursuance of our duty to him, we have visited him in his confinement in the city gaol: that we could not avoid remarking the danger, which will most probably result to his health, from the situation, inconveniences and circumstances attending the place of his confinement; but we cannot forbear to declare our conviction, that we ourselves cannot freely and fully perform what we have undertaken for his defence, if he remain in the gaol aforesaid, deprived, as he is, of a room to himself, it being scarcely possible for us to consult with him upon the various necessary occasions which must occur, from all which we believe that he will be deprived

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of that assistance from counsel, which is given to him by the constitution of the United States, unless he be removed.
Edmund Randolph.
'John Wickham.
'Benjamin Botts.
'Sworn to in open court, by Edmund Randolph, John Wickham, and Benjamin Botts, Esquires. June 25th, 1807.
'William Marshall, Clerk.'
The counsel for the prosecution were perfectly silent on the motion. After a long and desultory argument by Mr. Burr's counsel, the court determined that the prisoner should be removed to his former lodgings near the capitol, provided they could be made sufficiently strong for his safe keeping, being of opinion that the act of congress authorized it, on the foregoing affidavit, to make the order of removal.
Mr. Latrobe, surveyor of the public buildings of the United States, was requested to inspect them; and upon his report the court passed the following order: 'Whereupon, it is ordered, that the marshal of this district do cause the front room of the house now occupied by Luther Martin, Esq., which room has been and is used as a dining room, to be prepared for the reception and safe keeping of Colonel Aaron Burr, by securing the shutters to the windows of the said room by bars, and the door by a strong bar or padlock. And that he employ a guard of seven men to be placed on the floor of the adjoining unfinished house, and on the same story with the before described front room, and also at the door ***73** opening into the said front room; and upon the marshal's reporting to the court that the said room has been so fitted up and the guard employed, that then the said marshal be directed, and he is hereby directed, to remove to the said room, the body of the said Aaron Burr from the public gaol, there to be by him safely kept.'
Mr. Hay.--My only wish is, that this prosecution should be regularly conducted. Is it not the usual practice to read the indictment first and then move for the venire?
Mr. Burr.--I have been furnished with a copy of the indictment; I have perused it and I am ready to plead not guilty to it.
Mr. Wirt.--The usual form requires the actual arraignment of the prisoner; however, the court may dispense with it, if it think proper.
Mr. Hay was indifferent about the form, if the law could be substantially executed. He supposed that a simple acknowledgment of the prisoner was sufficient, without the customary form of holding up his hand.
CHIEF JUSTICE.--It is enough, if he appear to the indictment, and plead not guilty.
The clerk then read the indictment against Aaron Burr, for treason against the United States; which specifies the place of the overt act, to be at Blennerhassett's Island; and the time, the 10th day of December, 1806.
When he had concluded, Mr. Burr addressed the court: I acknowledge myself to be the person named in the indictment. I plead not guilty; and put myself upon my country for trial.
Mr. Hay then addressed the court on the venire that was to try the issue between the prisoner and the United States. He expressed some doubt whether the 29th section of the act of congress called the judicial act [1 Stat. 88], was still in force, which required twelve jurors, at least, to be summoned
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from the county where the offence was committed. If this law was still in force, it would be necessary to summon twelve petit jurors from the county of Wood, which would render it impossible to have the trial at an early day.

The CHIEF JUSTICE said he had no doubt the law was still in force.

Mr. Burr said as this law was most probably intended for the benefit of the accused, he consented to waive the right.

Mr. Wirt suggested a doubt whether consent in such a case could take away error.

The CHIEF JUSTICE believed that the provision was not absolutely obligatory, if both parties would waive the right.

Mr. Hay said he felt no disposition to delay the trial; but he could not think of pledging himself to such a measure without due deliberation. He would consult the gentlemen associated with him, and inform the court of the result.

The counsel for the prosecution then retired to consult. On their return, Mr. Hay informed the court that they could not assume the responsibility of consenting to such a proposition, as the law seemed imperative. He must therefore request the court to direct a venire of twelve men, at least, to be summoned from Wood county.

A long conversation ensued as to the time that would be necessary to summon the venire from Wood county, as it would be necessary to postpone the trial accordingly; opinions varying from twenty to thirty-five days. The court made an order for a venire of forty-eight jurors, twelve of whom, at least, were to be summoned from Wood county. Without fixing the time for the trial, the court adjourned.

On Saturday, the 27th of June, an order was made postponing the trial to the third day of August, and for the return of the venire on that day.

Monday, June 29, 1807.

Mr. Hay laid the following order of the executive council before the court:

'In Council, June 29, 1807. The board being informed that an affidavit has been filed in the circuit court of the United States, for the Virginia district, which states that the gaol for the county of Henrico and city of Richmond is inconvenient and unhealthy, and so crowded with state offenders and debtors that there are no private apartments therein for the reception of persons charged with offences against the laws of the United States, it is therefore advised that the governor be requested to tender the said court, (through the federal attorney of the district of Virginia,) apartments in the third story of the public gaol and penitentiary house for the reception of such persons as shall be directed under the authority of the United States to be confined therein.

'Extract from the minutes.

'Daniel L. Hylton, Clerk of the Council.'

The following was the order of the court on this subject: 'Which tender the court doth accept for the purpose above mentioned.'

The final decision of the motion to commit Aaron Burr to the penitentiary was postponed until to-morrow.

Tuesday, June 30, 1807.

After the court met the motion to commit Aaron Burr to the penitentiary was renewed. It was objected to by his counsel, on the ground (and an affidavit was made by them to the same effect) that in so important a case it was essentially necessary for the most uninterrupted intercourse to subsist between

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the prisoner and his counsel; but that the distance of the penitentiary, combined with their own professional avocations, would necessarily narrow and interrupt this intercourse. It was also said that, by particular regulations of the penitentiary, the custody of the prisoner would be transferred from the marshal to the superintendent, and that the communications of the prisoner with his counsel would be limited to the very same short period which was allowed to the other visitants: that is, from eleven to one o'clock. ***74**

The attorney for the United States replied to these objections.

The CHIEF JUSTICE said when there was a public gaol not unreasonable distant or unfit for the reception of the prisoner, and when the court was called upon on the part of the United States to commit a prisoner to its keeping, that he conceived himself bound to comply with the requisition; that when he had given the order for his removal from the gaol to his own lodgings, it was under an expectation that the trial would be prosecuted immediately, and that the intercourse between the prisoner and his counsel would be necessarily incessant; but as a postponement had taken place, such an intercourse would not be absolutely necessary; under such circumstances, therefore, he should direct the removal of the prisoner to the penitentiary, if he were still to continue in the possession of the marshal, and if his counsel were to have free and uninterrupted access to him.

Some difficulty having thus occurred on these points, the executive council was immediately convened. In a short time the following letter was submitted to the court:

'Council Chamber, June 30, 1807.

'Sir: In pursuance of an advice of the council of state, I beg leave, through you, to inform the circuit court of the United States, now sitting, that any persons who may be confined in the gaol and penitentiary house, on the part of the United States, will be considered as in the custody, and under the sole control of the marshal of the district; that he will have authority to admit any person or persons to visit the confined that he may think proper, and that he will be authorized to select for the purposes aforesaid, any apartment in the penitentiary now unoccupied, that he may deem most conducive to safety, health, and convenience. I am, with great respect, sir, your obedient servant,

'Wm. H. Cabell.

'George Hay, Esq.'

The court then made the following order: 'In consequence of the offer made by the executive of apartments in the third story of penitentiary and state prisoa, for persons who may be confined therein, under the authority of the United States, and of the foregoing letter from the governor of this commonwealth, it is ordered, on the motion of the attorney for the United States, that so soon as the apartments in the third story of the public gaol and penitentiary shall be fit for the reception and safe keeping of Aaron Burr, that he be removed thereto, and safely kept therein by the marshal, until the second day of August next, when he shall be brought back to the prison where he is now placed, there to be guarded in like manner as at present, until the further order of the court.'

Monday, August 3, 1807.

On this day the circuit court of the United States for the Fifth circuit and district of Virginia, was held according to adjournment. Present: the CHIEF JUSTICE of the United States; George Hay, William Wirt, and Alexander MacRae,

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Esquires, counsel for the prosecution.

The prisoner was brought into court from his apartment, near the Swan Tavern, to which he had been removed on Saturday.

Edmund Randolph, John Wickham, Benjamin Botts, John Baker, and Luther Martin, Esquires, appeared as his counsel.

The court assembled at twelve o'clock. An immense concourse of citizens attended to witness the proceedings of this important trial.

Mr. Hay observed that he could take no steps in this business until he had ascertained whether the witnesses summoned on the part of the United States were present; he therefore requested that their names might be called over; they were more than one hundred in number. Their names were accordingly called.

Mr. Hay begged leave to mention that he had nothing more to submit to the court this day. There were many of the witnesses of whose places of residence he was ignorant; several had not appeared; many had been merely pointed out to him by the attorney general of the United States. He observed that, therefore, he had not yet been able to furnish Colonel Burr with a list of the witnesses, and a statement of the places of their residence, as the law requires; that, as many of those who had been summoned and recognized had failed to appear, he was not ready to proceed with the trial immediately. He also informed the court that a list of the venire had been delivered on Saturday to Colonel Burr, but had since been discovered to be inaccurate. It became, therefore, necessary (an act of congress having directed this to be done at least three days before the trial) to deliver a correct list on this day; and, of course, the trial would be postponed until the requisite time should have elapsed.

The CHIEF JUSTICE inquired, then, to what day it would be proper to adjourn the court.

Mr. Hay could not possibly state by what day he should be able to prepare his lists.

Mr. Burr observed that it was not probable that he should avail himself of any privileges to which he might be entitled from any delay in furnishing him with the list of jurors, or of any incorrectness in the list; and therefore the court might adjourn to any day which was convenient to the attorney for the United States. If the day of adjournment depended on his own consent, he should not object to any adjournment, provided it did not extend further than Wednesday.

Mr. Hay had no objection to that day.

At the instance of Mr. Hay the names of the jurors were called, when forty-six answered to their names, two only being absent.

Mr. Burr reminded the court of the motion which he had made, on a former occasion, for a subpoena duces tecum, addressed to the president of the United States. That motion ***75** had been partly complied with. He wished to know of the court whether it were not a matter of right for him to obtain a subpoena duces tecum. If it were not, he should then lay a specific motion before the court.

The CHIEF JUSTICE did not believe it to be the practice in Virginia to obtain such a subpoena upon a mere application to the clerk. The motion must be brought before the court itself.

Mr. Hay said that he would say nothing on this subject until he understood the object of the application: that if it were to obtain the letter which was not

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formerly furnished, he would inform the opposite counsel that he had it now among his papers, and was ready to produce it.

Mr. Burr.--That is one object of the application. Another is, to obtain a certain communication from General Eaton to the president of the United States, which is mentioned in his deposition.

Mr. Hay said that he was not certain whether he had that communication, but believed that it was among his papers. If it were there, he would certainly produce it.

Mr. Burr.--But if, after a search, the gentleman finds that he has not that paper, will he consent, out of court, to issue a subpoena to the president of the United States, under the qualification I have mentioned? I wish not, at the present exigency, to derange the affairs of the government, or to demand the presence of the executive officers at this place. All that I want are certain papers.

Mr. Hay said that he could not consent to it; he would rather that a regular application should be made for it to the court.

Mr. Burr.--Then, sir, I shall move for a subpoena duces tecum, to the president of the United States, directing him to attend with certain papers. This subpoena will issue as in the former instance. I shall furnish the clerk with the necessary specification of the paper which I require.

The court was then adjourned till Wednesday, twelve o'clock.

Wednesday, August 5, 1807.

The court met, according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States.

The names of the witnesses being called over, and many being still absent, Mr. Hay was not ready to proceed. He presumed all of the witnesses would be present in a few days.

After some conversation as to the time to which the court should adjourn, Mr. Hay proposed an arrangement as to the mode of conducting the trial, in respect to the order in which counsel should speak.

The CHIEF JUSTICE said the best mode appeared to him to be this: that the case should be opened fully by one of the gentlemen on the part of the United States; then opened fully by one of the counsel on the other side; that the evidence should be next gone through, and the whole commented upon by another of the gentlemen employed by the United States, who should be answered by the rest of the counsel for Colonel Burr; and one only of the counsel for the United States should conclude the argument.

Without coming to any arrangement, the court adjourned till Friday, twelve o'clock.

Friday, August 7, 1807.

The court met according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States, and CYRUS GRIFFIN, Judge of the District of Virginia.

The witnesses were again called over, and several who had not been present before, appeared, and were recognized to attend until discharged by the court. The counsel for the United States, however, not being as well prepared to go into the trial as they expected to be, (many of their witnesses being still absent,) the trial was farther postponed, and the court adjourned until Monday next, at twelve o'clock.

In the course of this day, a difficulty was suggested by Major Scott, the

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marshal of the Virginia district, as arising out of the order of the court, by virtue of which Colonel Burr had been removed from the penitentiary house to his present lodgings. He stated that he had been informed from good authority, that the secretary of the treasury had declared that he would not allow his charge of seven dollars per day, for the guards employed for the safe-keeping of the prisoner; and, therefore, he might lose that sum, which he had hitherto been advancing out of his own pocket.

The CHIEF JUSTICE declared the firm conviction of the court, that the order, heretofore made, was legal and proper; that the payments made in pursuance thereof would be sanctioned by the court, and ought to be allowed by the secretary of the treasury. He could not believe that the secretary would finally disallow those items in the marshal's account. But, as the officer of the court ought not to be subjected to any risk in obeying its directions, and if the secretary should refuse to allow him a credit for the money paid, the court had no power to compel him to do so, and the situation of the marshal was such that he dared not enter into a controversy with the secretary; the court was disposed to rescind the order, unless some arrangement could be made by Colonel Burr and his counsel, for the indemnification of the marshal.

Colonel Burr declared that an offer had already been made on his part to indemnify the marshal, and that he was still ready and willing to give him satisfactory security that the money should be paid him, in case the secretary of the treasury should refuse to allow the credit.

Some desultory conversation ensued, but nothing positive was agreed upon; but it appeared ***76** to be understood that security was to be given to Major Scott, and that Colonel Burr was to remain in his apartment near the Swan Tavern.

Monday, August 10, 1807.

The court met pursuant to adjournment.

Harman Blennerhassett was brought into court, and Mr. Hay moved that he be arraigned for treason. Mr. Botts objected, on the ground that he had not been furnished with a copy of the indictment three days previously; and he was reconducted to his prison. Four of the venire were excused on account of indisposition. The clerk informed Mr. Burr that he was at liberty to challenge such of the venire as he might object to.

Mr. Burr begged leave to inform the jurors, who were within hearing, that a great number of them may have formed and expressed opinions about him which might disqualify them from serving on this occasion. He expected that, as they came up, they would discharge the duties of conscientious men, and candidly answer the questions put to them, and state all their objections against him. The deputy marshal then summoned first, Hezekiah Bucky.

Mr. Botts.--We challenge you for cause. Have you ever formed and expressed an opinion about the guilt of Colonel Burr? Mr. Bucky. I have not, sir, since I have been subpoenaed. Question. Had you before? Answer. I had formed one before in my own mind.

Mr. Hay wished that the question of the opposite counsel could assume a more precise and definite form. If this question were proposed to this man, and to every other man of the panel, he would venture to predict that there could not be a jury selected in the state of Virginia, because he did not believe that there was a single man in the state, qualified to become a juryman, who had not, in some form or other, made up, and declared an opinion on the conduct of

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the prisoner. The transactions in the West had excited universal curiosity; and there was no man who had not seen and decided on the documents relative to them. Do gentlemen contend that in a case so peculiarly interesting to all, the mere declaration of an opinion is sufficient to disqualify a juryman? A doctrine of this sort would at once acquit the prisoner; for where is the jury that could try him? Such a doctrine amounts to this: that a man need only to do enough to draw down the public attention upon him, and he would immediately effect his discharge. Mr. Hay concluded with a hope that the question would assume a more definite form; he should not pretend to decide the form in which it should be proposed, for that was province of the court; it was a privilege to which every court is entitled, and one which the court had exercised in the case of James T. Callender.

Mr. Botts considered it as a misfortune ever to be deplored, that in this country, and in this case, there had been too general an expression of the public sentiment, and that this generality of opinion would disqualify many, but he had never entertained a doubt, until the gentleman for the prosecution had avowed it, that twelve men might be found in Virginia, capable of deciding this question with the strictest impartiality. He still trusted that the attorney for the United States was mistaken, that the catastrophe was not completely fixed, and that every man in the state had not pledged himself to convict Colonel Burr whether right or wrong. He was not present at the trial of James T. Callender; but all America had heard the question which was then propounded to the juryman, and that was, whether he had made up and expressed an opinion respecting the guilt of the prisoner.

Mr. Hay said that he would put Mr. Botts right as to matter of fact. The court would recollect that on the trial of Callender, the question was, not whether the juryman had formed and expressed an opinion on that case generally, but on the subject-matter that was to be tried, and contained in the indictment. The question then in the present case should be, have you formed and expressed an opinion on the point at issue: that is, whether Aaron Burr be guilty of treason? On the trial of Callender, the court would particularly recollect that Mr. John Bassett having objected to himself, because he had read the libellous publication, was actually overruled, because it was not on the book itself, but on the subject-matter of the indictment, that he was called upon to say whether he had ever expressed an opinion?

Mr. Burr declared that there was a material distinction between that and the present case. Mr. Bassett's acknowledging that he had seen the book did not disqualify him from serving on the jury; in the same manner the person who had seen a murder committed would not be an incompetent juror in the prosecution for that crime. But if a man pretended to decide upon the guilt of a prisoner, upon mere rumor, he would manifest such a levity and bias of mind as would effectually disqualify him. Mr. Bucky, however, has not yet come out completely with his declarations. Let him be further interrogated.

Mr. Hay observed that the question would still be too general and vague, if it were even to be 'Have you expressed any opinion on the treason of Aaron Burr?' for the case stated in the indictment was infinitely more specific. It was treason in levying war against the United States at Blennerhassett's Island. Unless this particular allegation be proved, it sefeats all the other parts of the accusation; and it was probably on this point that the juror had never made up any opinion.

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Mr. Martin contended that it was the duty of every juryman to come to the trial of any case with the most perfect impartiality, and ***77** more particularly one where life and reputation were at stake; that it was a libel upon Virginia, a blot upon the whole state, to assert, that twelve men could not be found to decide such a case, with no other knowledge that what they had picked up from newspapers; that there was a material distinction between this and Callender's Case [Fed. Cas. No. 14,709]; the libel was a book in every man's hand, but does any juryman in the present case pretend to know the testimony on which this charge depends? The gentleman proposes to ask the juryman whether he has made up an opinion on Colonel Burr's treason? But it is expressly probable that most of them knew not what treason is; and though they may decide upon the guilt of Colonel Burr, they may be ignorant whether it come under the name and description of treason.

The CHIEF JUSTICE observed that it might save some altercation if the court were to deliver its opinion at the present time; that it was certainly one of the clearest principles of natural justice, that a juryman should come to a trial of a man for life with a perfect freedom from previous impressions, that it was clearly the duty of the court to obtain, if possible, men free from such bias; but that if it were not possible from the very circumstances of the case--if rumors had reached and prepossessed their judgments, still the court was bound to obtain as large a portion of impartiality as possible, that this was not more a principle of natural justice, than a maxim of the common law, which we have inherited from our forefathers, that the same right was secured by the constitution of the United States, which entitles every man under a criminal prosecution, to a fair trial by 'an impartial jury.' Can it be said however, that any man is an impartial juryman who has declared the prisoner to be guilty and to have deserved punishment? If it be said that he has made up this opinion, but has not heard the testimony, such an excuse only makes the case worse; for if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies himself from the functions of a juryman. It is too general a question to ask, whether he has any impressions about Colonel Burr. The impressions may be so light that they do not amount to an opinion of guilt, nor do they go to the extent of believing that the prisoner deserves capital punishment. With respect to Mr. Bassett's opinion, it was true he had read 'The Prospect Before Us;' and he had declared that it was a libel, but Mr. Bassett had formed no opinion about James T. Callender's being the author. It was the same principle in the present case. If a juryman were to declare that the attempt to achieve the dismemberment of the Union, was treason, it would not be a complete objection or disqualification; but it would be the application of that crime to a particular individual; it would be the fixing it on Aaron Burr that would disable him from serving in this case. Let the counsel then proceed with the inquiry.

Mr. Botts.--Have you said that Colonel Burr was guilty of treason? Mr. Bucky.--No. I only declared that the man who acted as Colonel Burr was said to have done, deserves to be hung. Question. Did you believe that Colonel Burr was that man? Answer. I did, from what I had heard.

Mr. Hay.--I understand then, that the question proposed in Callender's Case is

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to be overruled?
The CHIEF JUSTICE.--My Brother, Judge GRIFFIN, does not recollect whether it particularly went to the indictment or not.
GRIFFIN, District Judge.--I think the question was 'relative to the matter in issue.'
Mr. Hay.--The very position that I have laid down.
The CHIEF JUSTICE.--The simple question is, whether the having formed an opinion, not upon the evidence in court, but upon common rumor, renders a man incompetent to decide upon the real testimony of the case?
Mr. Wirt (addressing Mr. Bucky).--Did I understand you to say that you concluded upon certain rumors you had heard, that Colonel Burr deserved to be hung? Mr. Backy.--I did. Question. Did you believe these rumors? Answer. I did. Question. Would you, if you were a juryman, form your opinion upon such rumors? Answer. Certainly not.
Mr. MacRae.--Did you form and express your opinion upon the question, whether an overt act of treason had been committed at Blennerhassett's Island? Answer. It was upon other rumors, and not upon that, that I had formed an opinion.
Mr. Martin submitted it to the court, whether he could be considered on impartial juryman.
THE COURT decided that he ought not to be so considered, and he was accordingly rejected.
James G. Laidly stated that he had formed and expressed some opinions unfavorable to Colonel Burr; that he could not pretend to decide upon the charges in the indictment, which he had not heard; that he had principally taken his opinions from newspaper statements; and that he had not, as far as he recollected, expressed an opinion that Colonel Burr deserved hanging; but that his impression was, that he was guilty. He was therefore set aside.
James Compton being challenged for cause and sworn, stated that he had formed and expressed an opinion from hearsay that Colonel Burr was guilty of treason, and of that particular treason of which he stood charged, as far as he understood. He was rejected.
Mr. Burr observed, that as gentlemen on the part of the prosecution had expressed a willingness to have an impartial jury, they could not refuse that any juryman should state all his objections to himself; and that he had no doubt, in spite of the contrary assertions ***78** which had been made, that they could get a jury from his panel.
Hamilton Morrison, upon being called, said that he had frequently thought and declared that Colonel Burr was guilty, if the statements which he had heard were true; that he did not know whether they were so, but only thought, from the great clamor which had been made, that it might be possible that they were true; that he had not passed any positive opinion, nor was he certain that he had always qualified it by saying, 'if these things were true;' that he does not recollect to have said that Colonel Burr ought to be punished, without stating at the same time, 'if he were guilty.' Mr. Morrison was suspended for further examination.
Yates S. Conwell had formed and expressed an opinion, from the reports he had heard, that Colonel Burr must be guilty of high treason. He was accordingly set aside.
Jacob Beeson declared that he had for some time past formed an opinion, as
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well from newspaper publications as from the boats which had been built on the Ohio, that Colonel Burr was guilty; and that he himself had borne arms to suppress this insurrection. He was therefore set aside as incompetent.

William Prince declared he had nearly the same impressions as Mr. Beeson; that he too had borne arms, as well on Blennerhassett's Island as on descending the river in search of Blennerhassett. He was set aside in like manner.

Nimrod Saunders declared that he had expressed an opinion previously to his being summoned on the jury, that the prisoner had been guilty of treason. He was therefore set aside as incompetent.

Thomas Creel had no declaration to make, and he was challenged for cause. Upon being interrogated, he stated that he had never asserted that the prisoner ought to be punished; that he had said that he was a sensible man, and if there were any hole left he would creep out of it; that he had conceived that Colonel Burr had seduced Blennerhassett into some acts that were not right; that he had never positively said that Colonel Burr was guilty; that he had said that Blennerhassett was the most blamable, because he was in good circumstances and well off in life, whereas Colonel Burr's situation was desperate, and that he had little to lose; that he had not said that Colonel Burr had directly misled Mr. Blennerhassett, but through the medium of Mrs. Blennerhassett; in short, that there was no determinate impression on his mind respecting the guilt of the prisoner.

The CHIEF JUSTICE did not think that this was sufficient to set him aside, and suspended his case for further examination.

Anthony Buckner had freqnently said that the prisoner deserved to be hung. He was therefore set aside.

David Creel had formed an opinion from the statements in the newspapers, and if these were true the prisoner was certainly guilty. He had expressed a belief that he was guilty of the charges now brought against him, and that he ought to be hanged. He was therefore rejected.

The above named jurors were all from Wood county.

Jurors from the body of the district:

John Horace Upshaw declared that he conceived himself to stand there as an unprejudiced juryman, for he was ready to attend to the evidence; but that as he had formed opinions hostile to the prisoner, (if opinions they can be called which are formed from newspaper testimony,) and had, he believed, frequently expressed them, that he was unwilling to subject himself to the imputation of having prejudged the cause.

Mr. Burr.--We challenge Mr. Upshaw for cause.

Mr. Hay.--Then, sir, I most seriously apprehend that we shall have no jury at all. I solemnly believe Mr. Upshaw is an intelligent and upright man, and can give a correct verdict on the evidence; and I will venture to assert, (whatever credit my friends on the other side will allow to my assertion,) that I myself could do justice to the accused. I believe that any man can who is blessed with a sound judgment and integrity. We might as well enter at once a nolle prosequi, if he is to be rejected.

Mr. Wickham.--Then according to the gentleman's doctrine, any honest man, no matter what his impressions may be, is a competent juryman. Is this agreeable to the principles of law? Does the gentleman mean to insinuate that when we object to a juryman it is for his want of honesty? No, sir, every man is subject to partialities and aversions, which may unconsciously sway his

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judgment. Mr. Upshaw does no doubt deem himself an impartial juryman; but Mr. Upshaw may be deceived.

After some desultory argument between Messrs. Hay and Wickham, Mr. Wirt proceeded to ask Mr. Upshaw whether he had understood him to say that notwithstanding the hostile impressions he had taken up from newspaper reports, these impressions had not received that determinate character which might entitle them to the name of opinions? Answer. I have received impressions hostile to Colonel Burr, and have expressed them with some warmth, but my impressions have not been induced by anything like evidence They were predicated on the deposition of General Eaton and the communications of General Wilkinson, to the president of the United States. I had conceived that the prisoner had been guilty of some criminal act against the public, and ought to be punished; and I believe, also, that I went on further to vindicate the conduct of those gentlemen who would appear as the principal witnesses against him, and also of the government in the measures which it had taken to suppress his plans. After some further and animated discussion on this point, Mr. Upshaw's case was suspended for subsequent examination.

William Pope declared that his impressions ***79** were nearly the same with those of the gentleman who had preceded him; that he had thought at first, from newspaper representations, that it was Colonel Burr's intention to make his fortune in the west by the settlement of lands; that when he had afterwards understood that he had formed a union with Wilkinson to proceed to Mexico, he had regarded the prisoner's conduct in such a light that, if he had proceeded to Mexico, he would have considered it as an excusable offence; but when he had afterwards understood that there was treason mixed with his projects, it was impossible for him to view his conduct without the deepest indignation. If these impressions could be called prejudices, he trusted that he should always retain them. What other sentiments could he feel against such a crime, perpetrated against the very best government on the surface of the earth? But Mr. Pope declared that from his heart he believed that he could divest himself of these unfavorable impressions, and give Colonel Burr a fair and honorable trial. He would add that, in pursuance of the spirit manifested by the constitution which required two witnesses to an overt act of treason, he should think it necessary that the evidence for the United States should be so strong as to make the scale preponderate.

Mr. Wickham.--You will not misunderstand me, Mr. Pope, when I ask you whether you have not been a candidate for your county, and whether you be not now a delegate? Answer. Yes. Question. In canvassing among the people, have you not declared that the government had acted properly in commencing this prosecution? Answer. Yes; I believe I have said generally that I thought Colonel Burr was guilty of high treason. Mr. Pope was therefore set aside.

Peyton Randolph declared that it had never been his wish or intention to shrink from the discharge of a public duty, but that he had peculiar objections to serve on this occasion, one of which only he should state. He had been enrolled and was qualified as a lawyer in this court; and he would submit it to the court whether this did not exempt, if not disqualify, him from serving?

The CHIEF JUSTICE admitted Mr. Randolph's privilege, unless there were an express interposition on the part of the prisoner to retain him and others of the venire who had privileges; for this would call a conflicting privilege into operation.

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Mr. Burr said that he should be passive.
John Bowe did not recolleck to have said that the prisoner was guilty of treason, but of something hostile to the peace and happiness of the United States. Upon being interrogated, he observed that he was a delegate from the county of Hanover, that there had been a competition at the last election, that he had had occasion to speak at that time of the views of the prisoner, but had always done it cautiously; had never asserted that he ought to be hung, but that he was guilty of something unfriendly to the peace of the United States.
Mr. Wickham.--You have said that the prisoner was guilty? Answer. Yes.
The CHIEF JUSTICE.--Did you ever make up an opinion about his levying troops and making war against the United States? Answer. Yes; but I have never expressed it.
Mr. Burr.--Take the whole together, and it amounts to an opinion of treason. Mr. Bowe has said that Colonel Burr was guilty; and of what? Of that which in Mr. Bowe's mind amounts to the definition of treason. He was therefore set aside.
John Roberts had thought and declared, from the reports in the public newspapers, that the prisoner was guilty of treason, though he had no doubt that his opinion might be changed by the production of other testimony. He was set aside as incompetent.
Joshua Chaffin excused from indisposition.
7. Jervis Storrs observed that the state of his mind was like that of the gentleman who had gone before him, (Mr. Bowe;) he was in the habit of reading newspapers, and could not but examine their statements relative to those transactions. If he could believe General Eaton's assertion, that the prisoner had threatened to turn congress out of doors, and assassinate the president, he had said, and would still say, that Colonel Burr was guilty of treason. If General Wilkinson's letter were true, he had surely been guilty of something in the West that was hostile to the interest of the United States. He did not know whether in the multifarious conversations he had had on this subject he had always expressed this opinion of his guilt with that reservation. He had very often communicated his impressions, that he was plotting some hostile designs against the United States. Mr. Storrs confessed that he might be prejudiced against the prisoner, and that he might be judging too highly of his own mind to entertain the belief that he could divest himself of all his impressions; and upon the whole, he expressed a wish not to serve. He was then rejected.
8. Miles Selden declared that it was impossible not to have entered into the frequent conversations which had occurred on this topic, and to have declared some opinion; that he had always said that Colonel Burr was guilty of something, and that if he was guilty of treason against such a government as that of the United States, he would deserve to be hung; that he could not assert that he had always accompanied his opinions with this reservation, but that he was not afraid to trust himself in the rendering of a verdict. Upon being interrogated, he said that he had frequently jested on this subject, and particularly recollected to have said in a sportive conversation with Colonel Mayo, that this was a Federal plot, and that Burr had been set on by the

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Federalists. Colonel Selden was therefore suspended for further consideration.

9. Lewis Truehart had said that if the reports were correct, Colonel Burr had been *80 guilty of something inimical to the country, and that he always qualified his opinions in that manner.

Colonel Tinsley was then called in as a witness, who stated that from a conversation with Mr. Truehart, he thought that he had discovered that he had a general prepossession against Colonel Burr. He did not expect to be called on, and had no very distinct recollection of the particulars; that this was before any of the proceedings of the trial; and when he heard that he was summoned as one of the venire, he then recollected their conversation and happened casually to mention it. Mr. Truehart suspended.

William Yancey had expressed an opinion on newspaper testimony that Colonel Burr was guilty; that he had frequently said that he would believe the statements of newspapers till the contrary was proved, but that he had no doubt he should entertain a different sentiment, if other testimony were produced. He was set aside.

Thomas Prosser was next called. He said that he had made numberless declarations about Colonel Burr; that he had believed him to be guilty of a treasonable intention, but not of the overt act; on this point he had suspended his opinion, but he was rather inclined to believe that he had not committed it.

Mr. Martin.--Can this gentleman be considered as an impartial juryman, when he thus comes with his mind made up on one half of the guilt? He was suspended for further consideration.

John Staples had been under the same impressions which had been described by others; that he dared to say that he had said Colonel Burr was guilty of levying troops and making war upon the United States. He was set aside.

Edward C. Standard acknowledged that his prejudices against Colonel Burr had been deep-rooted; that he had no doubt of the criminality of his motives, but that he had doubts of the commission of an overt act; he regretted that a man of his talents and energetic mind should be lost to his country. Upon being interrogated, he observed that he had doubts as to the overt act, because he believed him to be a man of such deep intrigue as never to jeopardize his own life till thousands fell before him. He was rejected.

Richard B. Goode was then called. I have never seen, neither do I believe that I have heard correctly, the evidence in this prosecution. From common report and newspaper information I have formed an opinion has vorable to Colonel Burr. That opinion has been strengthened by what I have heard from the lips of Colonel Burr in this court; but without arrogating to myself more virtue than belongs to other men, if I know myself, I have formed no opinion which cannot be altered by the evidence.

Mr. Baker.--Did you not endeavor to displace Mr. Heth as captain of the Manchester cavalry, for becoming the bail of Colonel Burr? Answer. I never did. (Here sundry witnesses were directed to be called.)

Mr. Goode.--I will state the circumstance to which you allude, unless you prefer to prove it.

THE COURT.--Do so, if you please.

Mr. Goode.--On the 4th of July, 1806, I was a member of a committee with Captain Heth, appointed to prepare toasts to be drunk on that day by the Manchester cavalry. I profess to be attached to the present administration of

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the general government, and wished to express such a sentiment. Captain Heth declared that he had not confidence in the executive, and rather than express such a sentiment he would resign his commission. At that time, I thought Captain Heth and myself differed only as to measures, and not as to principles; and that it was an honest opinion. But in a few months after, when I understood that Captain Heth had become bail for Colonel Burr, and was his zealous friend, with whom he was neither connected nor acquainted, but a stranger, who, three years ago, would have been consigned to the grave by Captain Heth, and those thinking with him upon political subjects, and when I recollected the charge preferred against Colonel Burr, I confess that the declaration and conduct of Captain Heth made such impressions upon my mind, that I refused to trust my person with him as a military commander, and I would do it again.

Colonel Burr.--Pray, sir, did you not write a letter to Captain Heth? Answer. I did; and I have reasons to believe that that letter is in your possession, or in the possession of your counsel. You are at liberty to show it to the court, or I will repeat that part of it which relates to Captain Heth and yourself.

THE COURT.--Do, sir.

Mr. Goode.--A few weeks past, I received a letter from Captain Heth, commanding me to appear at a certain time and place, in order to take my proper command in the troop. I wrote him, in answer, that my post as a soldier would never be abandoned, and that my duty as a citizen forbade that I should silently approve of the conduct of those who had extended a favor to a traitor, which the justice of my country denied to an unfortunate debtor, or words to that effect.

Mr. Goode was then rejected.

Nathaniel Selden stated he had formed an opinion, particularly from General Eaton's deposition, that the intentions of the prisoner were hostile to the United States, but that he had also said he had seen no evidence to satisfy him that he had been guilty of an overt act. He was suspended for further consideration.

16. Esme Smock declared that he had formed and expressed an opinion that Colonel Burr had treasonable designs.

CHIEF JUSTICE.--To what time did your opinion relate?

Mr. Smock.--I formed my opinion from newspaper publications and common report;

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**UNITED STATES of America**
**v.**
**John M. POINDEXTER.**

**No. Cr. No. 88-0080-01 (HHG).**

United States District Court,
District of Columbia.

Oct. 24, 1989.

Defendant, charged with obstruction of Congress and violation of general federal false statement law, filed number of pretrial motions, including motions to dismiss indictment. The District Court, Harold H. Greene, J., held that: (1) indictment was not duplicitous so as to require dismissal; (2) National Security Council was "public office" for purposes of statute prohibiting destruction of records deposited in "public office"; (3) indictment sufficiently charged offense of obstruction of Congress; and (4) certain terms in indictment would be stricken on grounds of prejudice.

So ordered.

See also 719 F.Supp. 6.

**[1] COURTS ⚿ 99(1)**
106k99(1)
Law of case doctrine requires that, absent extraordinary and compelling circumstances, rulings made in earlier phase of particular litigation are binding in later phases of same lawsuit.

**[2] INDICTMENT AND INFORMATION ⚿ 125(2)**
210k125(2)
Ordinarily two or more distinct offenses may not be charged in single count.

**[3] INDICTMENT AND INFORMATION ⚿ 125(19.1)**
210k125(19.1)
Formerly 210k125(19)
Despite contention of defendant that first count of indictment charged one conspiracy to make false statements and destroy documents, another to obstruct congressional inquiries, and a third to obstruct other congressional inquiries, count charged but one single conspiracy to defeat congressional inquiries by various means, and thus, was permissible method of charging conspiracy.

**[4] CONSPIRACY ⚿ 48.1(1)**
91k48.1(1)
Existence of single conspiracy or multiple conspiracies is primarily question of fact for jury.

**[5] CONSPIRACY ⚿ 24(2)**
91k24(2)
For purposes of determining whether single count of indictment charges several conspiracies, neither number of objects nor number of means to effectuate those objects transforms single conspiracy into several such agreements.

**[6] INDICTMENT AND INFORMATION ⚿ 125(1)**
210k125(1)
Fact that different proof may be required for each of offenses alleged as objectives of conspiracy does not render indictment charging conspiracy duplicitous.

**[6] INDICTMENT AND INFORMATION ⚿ 127**
210k127
Fact that different proof may be required for each of offenses alleged as objectives of conspiracy does not render indictment charging conspiracy duplicitous.

**[7] RECORDS ⚿ 22**
326k22
"Public office" within meaning of statute prohibiting person from willfully and unlawfully concealing, removing, mutilating, or destroying records, paper or documents filed in any "public office" is not limited to those offices to which public customarily comes; rather, term includes those offices not accessible to public where normally more important and vital governmental records are kept. 18 U.S.C.A. § 2071(b).

See publication Words and Phrases for other judicial constructions and definitions.

**[8] RECORDS ⚿ 22**
326k22
National Security Council was "public office" within meaning of statute prohibiting destruction of documents filed or deposited in any "public office." 18 U.S.C.A. § 2071(b).

**[9] RECORDS ⚿ 22**

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326k22
Statute prohibiting destruction, mutilation or concealment of documents filed in "public office" applies only to unlawful destruction or removal of official records, and as such does not impact upon functioning of presidency when applied to National Security Council. 18 U.S.C.A. § 2071(b).

**[10] RECORDS ⇐ 22**
326k22
"Custodians" under statute prohibiting custodian of records filed in public office from concealing, removing or destroying those records does not apply only to those who are custodians of records in technical sense, such a clerks or librarians, but rather, includes others working in government agency who have access to sensitive documents. 18 U.S.C.A. § 2071(b).

See publication Words and Phrases for other judicial constructions and definitions.

**[11] INDICTMENT AND INFORMATION ⇐ 71.2(2)**
210k71.2(2)
Defendant must be advised by indictment of specific charge against him in order to enable him to prepare defense and to protect him against double jeopardy. U.S.C.A. Const.Amend. 5.

**[11] INDICTMENT AND INFORMATION ⇐ 71.2(4)**
210k71.2(4)
Defendant must be advised by indictment of specific charge against him in order to enable him to prepare defense and to protect him against double jeopardy. U.S.C.A. Const.Amend. 5.

**[12] INDICTMENT AND INFORMATION ⇐ 60**
210k60
Indictment is sufficient if it contains elements of offense in enough detail to apprise defendant of particular offense with which he is charged. U.S.C.A. Const.Amend. 5; Fed.Rules Cr.Proc.Rule 7(c)(1), 18 U.S.C.A.

**[13] OBSTRUCTING JUSTICE ⇐ 11**
282k11
Charge that defendant knowingly and corruptly obstructed due and proper exercise of power of inquiry under which investigations were being held by congressional committees, to wit, consideration of proposed resolution by committees in question, by making and causing to be made false statements and representations to committees, for purposes of concealing material matters, together with other factual allegations contained in indictment, adequately apprised defendant of factual basis for charge of obstruction of Congress. 18 U.S.C.A. § 1505.

**[14] OBSTRUCTING JUSTICE ⇐ 11**
282k11
Indictment furnished sufficient information to defendant about letters upon which obstruction of Congress charge was based to enable defendant to prepare defense and to protect against double jeopardy, where indictment referred to years letters were sent and made reference to author of letters and to previous information provided in another paragraph of indictment. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 1505.

**[15] OBSTRUCTING JUSTICE ⇐ 1**
282k1
Alleged informality of congressional inquiries did not protect defendant from charge of obstruction of Congress; obstruction of Congress statute protects preliminary and informal inquiries against obstruction as well as formal proceedings. 18 U.S.C.A. § 1505.

**[16] UNITED STATES ⇐ 23(3)**
393k23(3)
Congressional inquiries were "due and proper" exercises of power of inquiry of Congress, despite contentions that Congressional committees violated their own rules and those of House of Representatives. 18 U.S.C.A. § 1505.

**[17] CONSTITUTIONAL LAW ⇐ 68(1)**
92k68(1)
Political question doctrine does not leave it to President to determine whether member of his staff has violated criminal law, nor does it protect members of any branch of government from revelations of wrongdoing or ignorance.

**[18] OBSTRUCTING JUSTICE ⇐ 8**
282k8
Despite contention of defendant that crux of obstruction of Congress allegation was statement made on behalf of and after consultation with

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President, and that foreign policy and national security were implicated, defendant charged with obstruction of Congress could not assert political question defense; adjudication of foreign policy issues was not involved, but rather, all that was involved was question of whether defendant had violated laws proscribing obstruction of Congress. 18 U.S.C.A. § 1505.

**[19] OBSTRUCTING JUSTICE ⇦ 1**
282k1
Obstruction of Congress statute prohibits an endeavor to obstruct as well as a completed obstruction. 18 U.S.C.A. § 1505.

**[20] OBSTRUCTING JUSTICE ⇦ 11**
282k11
Failure of indictment to allege that statements made by defendant had actual effect of impeding congressional inquiry did not render indictment charging obstruction of Congress insufficient. 18 U.S.C.A. § 1505.

**[21] INDICTMENT AND INFORMATION ⇦ 125(4.1)**
210k125(4.1)
Formerly 210k125(4)
Two or more acts which could be charged as separate offenses may be charged as single count if these acts can legitimately be characterized as part of single, continuing scheme or course of conduct.

**[22] FRAUD ⇦ 68.10(3)**
184k68.10(3)
General federal false statements law applies to statements made in response to congressional committee inquiries. 18 U.S.C.A. § 1001.

**[23] FRAUD ⇦ 68.10(3)**
184k68.10(3)
General federal false statements law is applicable to unsworn statements communicated by executive branch official to member of committee of Congress in informal circumstances. 18 U.S.C.A. § 1001.

**[24] FRAUD ⇦ 68.10(1)**
184k68.10(1)
General federal false statements law does not punish expressions of differences of opinions between representatives of two branches on policy issues, but only statements that are proven to be false. 18 U.S.C.A. § 1001.

**[25] FRAUD ⇦ 68.10(1)**
184k68.10(1)
President's unquestioned rule in constitutionally assigned functions of foreign affairs and national security may allow his advisor to be "less than forthcoming" about prospective foreign policy initiative; however, it does not allow such advisor to make false statements to Congress in violation of general federal false statements law. 18 U.S.C.A. § 1001.

**[26] FRAUD ⇦ 68.10(4)**
184k68.10(4)
Materiality of false statement is essential element of offense in prosecution under general federal false statement statute. 18 U.S.C.A. § 1001.

**[27] FRAUD ⇦ 68.10(4)**
184k68.10(4)
Test of materiality of false statement for purposes of general federal false statement statute is whether false statement has natural tendency to influence, or was capable of influencing, decision of tribunal in making determination required to be made. 18 U.S.C.A. § 1001.

**[28] FRAUD ⇦ 68.10(1)**
184k68.10(1)
Actual reliance by agency, department or committee to whom false statement was made is not element of offense under general federal false statement statute. 18 U.S.C.A. § 1001.

**[29] FRAUD ⇦ 68.10(1)**
184k68.10(1)
Despite defendant's contention that members of executive branch so commonly made false statements when required to provide information to Congress, particularly with respect to sensitive activities, without being prosecuted for their acts, that he was justified in believing that such action was not criminal, defendant charged with obstruction of Congress and violation of general false statement law was provided with sufficient fair notice that his conduct was criminal. 18 U.S.C.A. §§ 1001, 1505.

**[29] OBSTRUCTING JUSTICE ⇦ 1**
282k1
Despite defendant's contention that members of executive branch so commonly made false statements when required to provide information to

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Congress, particularly with respect to sensitive activities, without being prosecuted for their acts, that he was justified in believing that such action was not criminal, defendant charged with obstruction of Congress and violation of general false statement law was provided with sufficient fair notice that his conduct was criminal. 18 U.S.C.A. §§ 1001, 1505.

**[30] CONSTITUTIONAL LAW ⚿ 265**
92k265
Due process does not require that Government cite litigated fact pattern directly on point as prerequisite to institution of criminal proceedings. U.S.C.A. Const.Amend. 5.

**[31] CRIMINAL LAW ⚿ 13.1(1)**
110k13.1(1)
Prior litigation is prerequisite to prosecution for violation of statute only if particular law is ambiguous or fails to give to world in language that common world will understand notice of what law intends to do if certain line is passed.

**[32] WITNESSES ⚿ 16**
410k16
Defendant charged with obstruction of Congress and violation of general federal false statements law would be allowed subpoena duces tecum for specific, relevant documents in custody of former President or Archivist of United States on former President's behalf, where there was sufficient likelihood that, if claims made in defendant's proffer were correct, documents sought from former President would be material to defendant's defense. 18 U.S.C.A. §§ 1001, 1505.

**[33] CONSTITUTIONAL LAW ⚿ 72**
92k72
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

**[33] CRIMINAL LAW ⚿ 627.5(1)**
110k627.5(1)
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

**[33] CRIMINAL LAW ⚿ 1222.1**
110k1222.1
Formerly 110k1222
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

**[34] WITNESSES ⚿ 16**
410k16
Defendant charged with obstruction of Congress and violation of general federal false statements law would be denied subpoena duces tecum for vice presidential papers, even though defendant asserted that vice president knew about various activities relevant to case, where defendant did not and could not point to any vice presidential authorization for his activities, and even assuming authorization would be valid defense, papers appeared to be largely cumulative.

**[35] RECORDS ⚿ 31**
326k31
Provision of Classified Information Procedures Act which requires defendant to notify prosecution prior to trial of all classified information defense expects to use at trial is not unconstitutional. Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.; U.S.C.A. Const.Amends. 5, 6.

**[36] CRIMINAL LAW ⚿ 393(1)**
110k393(1)

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Classified Information Procedures Act, which requires that defendant notify prosecution prior to trial of all classified information defense expects to use at trial, does not impermissibly infringe defendant's Fifth Amendment right to be silent and right to testify in his own defense; statute does not require defendant to specify whether he will testify or what he will testify about, but rather, requires merely general disclosure as to what classified information will be used. Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 5.

**[36] RECORDS ⚿ 31**
326k31
Classified Information Procedures Act, which requires that defendant notify prosecution prior to trial of all classified information defense expects to use at trial, does not impermissibly infringe defendant's Fifth Amendment right to be silent and right to testify in his own defense; statute does not require defendant to specify whether he will testify or what he will testify about, but rather, requires merely general disclosure as to what classified information will be used. Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 5.

**[37] CRIMINAL LAW ⚿ 662.1**
110k662.1
Classified Information Procedures Act, which requires defendant to notify prosecution prior to trial of all classified information defense expects to use at trial, does not violate defendant's Sixth Amendment right to confront witnesses against him; statute requires defendant merely to identify universe of classified information he intends to use, it does not require that defendant attribute any particular piece of information to cross-examination of any particular witness. U.S.C.A. Const.Amend. 6; Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.

**[38] INDICTMENT AND INFORMATION ⚿ 121.1(7)**
210k121.1(7)
Defendant was not entitled to bill of particulars, where particulars defendant requested went essentially only to evidentiary details and Government's legal theory.

**[39] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Terms "among other things," "among others," "among," "at least," "including," "included, but not limited to," "in part," and "various" could indicate to jury that defendant was charged with offenses and conduct in addition to those actually listed in indictment, and thus, terms would be stricken from indictment.

**[40] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Term "lethal" in relation to supplies being shipped to contras and description of military supplies as consisting of "millions of rounds" and "hundreds of thousands of pounds" in indictment arising out of Iran-contra affair would not be stricken; quantities described were apparently those involved, at least according to Government, and throughout relations between United States and contras, distinction between lethal and humanitarian assistance had been made.

**[41] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Despite defendant's contention that term "enterprise" was term of art well known under Racketeer Influenced and Corrupt Organization Act, and that therefore use of term in indictment arising out of Iran-contra affair might suggest racketeering, term "enterprise" would not be stricken as prejudicial; term "enterprise" is fairly neutral description of activities of alleged conspirators, and if term means anything other than business to most individuals, it most likely evokes starship or space shuttle.

**[42] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Term "coverup" was inflammatory, especially in context of alleged criminal activity arising out of Iran-contra affair, and thus, term would be stricken from indictment.

**[43] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
References, in indictment arising out of Iran-contra affair, to defendant's original codefendants and to

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press reports about shipments to Iran would not be stricken as irrelevant descriptive recitals; references to codefendants were relevant to obstruction of Congress and false statements charges, and press report references were necessary to understanding of background of congressional inquiries into activities of defendant with respect thereto. 18 U.S.C.A. §§ 1001, 1505.

**[44] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Reference, in indictment arising out of Iran-contra affair, to codefendant's discharge from his position and fact that defendant himself resigned from his position would be stricken as irrelevant; inclusion of facts could be taken by jury as objective indications of fault or of administration's determinations of fault, and thus, were prejudicial without any special relevance.

**[45] INDICTMENT AND INFORMATION ⚿ 137(1)**
210k137(1)
Reference in obstruction of Congress indictment to Boland Amendment would not be stricken, despite defendant's contention that amendment had relevance, if at all, only to defendant's state of mind; amendment's restrictions were focus of congressional inquiries at issue, as well as of defendant's allegedly false and misleading statements, and thus, were relevant to indictment. 18 U.S.C.A. § 1505.

**[46] INDICTMENT AND INFORMATION ⚿ 144.1(1)**
210k144.1(1)
Alleged prejudicial pretrial publicity arising out of Iran-contra affair did not establish grounds for dismissal of indictment charging obstruction of Congress and violation of general federal false statement statute. 18 U.S.C.A. §§ 1001, 1505.

**[47] CRIMINAL LAW ⚿ 126(2)**
110k126(2)
Alleged pretrial publicity did not warrant change of venue of prosecution for obstruction of Congress and violation of general false statement statute in connection with Iran-contra affair; not only was publicity not especially prejudicial to defendant, but publicity regarding Iran-contra affair, like that accompanying many other governmental white-collar criminal cases, was national rather than local. 18 U.S.C.A. §§ 1001, 1505.

**[48] CRIMINAL LAW ⚿ 700(1)**
110k700(1)
Dismissal for failure to follow policies of Department of Justice of indictment charging violation of general federal false statement statute and obstruction of Congress was not warranted; very nature of independent counsel's responsibilities suggest that it may not always be possible for him to follow the policies of Department of Justice. 28 U.S.C.A. § 594(f); 18 U.S.C.A. §§ 1001, 1505.

**[49] CRIMINAL LAW ⚿ 700(1)**
110k700(1)
United States attorney's manual, by its own language, creates no rights in any party, and thus, failure of independent counsel to follow policy set forth in manual did not require dismissal of indictment charging obstruction of justice and violation of general federal false statement law in connection with Iran-contra affair. 18 U.S.C.A. §§ 1001, 1505.

**[50] CRIMINAL LAW ⚿ 700(1)**
110k700(1)
Independent counsel's failure to present exculpatory evidence to grand jury did not require dismissal of indictment arising out of Iran-contra affair.

***17** Lawrence Walsh, Washington, D.C., for plaintiff.

Richard Beckler, Washington, D.C., for defendant.

OPINION

***18** HAROLD H. GREENE, District Judge.

[1]Defendant has filed a number of pretrial motions, the government has filed oppositions, and the Court has received replies and voluminous appendices. In general, the motions will be denied. Several of them are subject to denial on a fairly summary basis, either because Judge Gesell of this Court ruled on the issues adversely to defendant while the Poindexter matter was still pending before him, and the rulings are therefore the "law of the case," [FN1] or because there is direct appellate precedent in point contrary to the position taken by

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defendant.

FN1. The law of the case doctrine requires that, absent extraordinary and compelling circumstances, rulings made in earlier phases of particular litigation are binding in later phases of the same lawsuit. See International Union, UAW v. Donovan, 756 F.2d 162, 165 (D.C.Cir 1985); Laffey v. Northwest Airlines, Inc. 642 F.2d 578, 585 (D.C.Cir.1980); Laffey v. Northwest Airlines, Inc. 740 F.2d 1071, 1082-83 (D.C.Cir.1984) United States v. Eilberg, 553 F.Supp. 1, 3 (D.D.C.1981).

Notwithstanding these preliminary obstacles, the Court has subjected all of defendant's motions to careful analysis. Where it has concluded that a particular position taken by defendant is contrary to the law of the case or appellate precedent, it has nevertheless considered the merits, at least to the extent of satisfying itself that an injustice would not be done, in the context of this case, by following the previous rulings, or that some distinction did not exist between the situation here and that presented by the precedents. Other motions were of course considered under broader criteria. Not yet decided is defendant's motion pursuant to Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) with respect to which a number of issues are being set down for oral argument.

## I
## Count One

Defendant has moved to dismiss Count One of the indictment, which charges him with a violation of 18 U.S.C. § 371 by participation in a conspiracy, on two grounds: (1) that it alleges not one but several conspiracies and is therefore multiplicious; and (2) that to the extent that Count One incorporates Count Sixteen of the original indictment it fails to state an offense. The motion lacks merit and will be denied.

### A. Multiplicity

[2] Defendant contends that Count One charges one conspiracy to make false statements and destroy documents which theoretically could have started in August 1985; another, to obstruct congressional inquiries, which began on July 25, 1986 and ended August 6, 1986; and a third, to obstruct other congressional inquiries, which began in November 1986; and that on this basis the count is fatally multiplicious. [FN2]

FN2. Ordinarily two or more distinct offenses may not be charged in a single count. 1 C. Wright, Federal Practice and Procedure: Criminal, § 142 (2d ed. 1982); but see, Part III--E infra.

[3][4][5][6] However, the Court concludes that Count One charges but a single conspiracy to defeat congressional inquiries into the defendants' Iran-contra activities by a variety of means, as necessary to conceal the conspirators' activities, and that this is a permissible and not multiplicious method of charging a conspiracy. [FN3] Neither a number of objects nor a numbers of means to effectuate those objects transforms a single conspiracy into several such agreements. See Braverman v. United ***19** States, 317 U.S. 49, 53-54, 63 S.Ct. 99, 101-02, 87 L.Ed. 23 (1942), where the Supreme Court stated that "[w]hether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one ... [On this basis, the] allegation in a single count of a conspiracy to commit several crimes is not duplicitous....". See also, United States v. Treadwell, 760 F.2d 327, 336 (D.C.Cir.1985); United States v. Addonizio, 451 F.2d 49, 59-60 (3rd Cir.1972). [FN4] In fact, a single conspiracy count which includes allegations of several objects, several means, and several overt acts is more typical of criminal litigation in the federal courts--as, for example, in indictments charging violations of the drug laws--than the segmented charges defendant claims to be the only ones warranted by law. [FN5]

### B. Incorporation of Count Sixteen

FN3. Contrary to defendant's contention (Reply Brief at 2-3, 7), there is no reason why a single conspiracy could not have as its object the obstruction of several legislative inquiries not overlapping as to time, into the same or of related subjects. As the Court of Appeals said in United States v. Tarantino, 846 F.2d 1384, 1391 (D.C.Cir.1988), the existence of a single conspiracy or multiple conspiracies is primarily a question of fact for the jury. Defendant's attempt to distinguish Tarantino on the basis that the indictment here

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charges multiple conspiracies simply assumes the result.

FN4. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the famous spokes-of-the-wheel case and the only decision cited by defendant with even marginal relevance to the issue, involved a series of totally unrelated offenses tied together only through a "common key figure." That description does not fit the charges here.

FN5. For similar reasons, Count One is not duplicitous or multiplicitous in the sense that different proof may be required for each of the offenses alleged as objectives, inasmuch as the evidence would go toward establishing a single offense. See United States v. Hubbard, 474 F.Supp. 64, 71-72 (D.D.C.1979) (single conspiracy although the 59 overt acts constituting the means and objectives "can logically be grouped into separate categories"); United States v. Recognition Equipment, 711 F.Supp. 1, 7-9 (D.D.C.1989) (conspiracy charge included allegations of a kickback scheme, a scheme to replace the Postmaster General, theft of USPS property, mail and wire fraud, and corruption of USPS operations, but the court held that the indictment properly charged a single conspiracy to violate statutes and to impede the lawful functions of the USPS "by multiple and interrelated means" for the ultimate purpose of securing the contract for the defendant).

Count One, as narrowed by the government in August 1989, retains as one of its objects the violation by Poindexter's then codefendant Oliver North of 18 U.S.C. § 2071(b), as alleged in Count Sixteen of the original indictment. Count Sixteen, in turn, charged that North altered or caused to be altered certain memoranda of the National Security Council (NSC) that were in his custody. Defendant argues, first, that there could be no violation because the NSC is not a "public office" within the meaning of the statute, and second, that North did not have "custody" of the papers he allegedly falsified and destroyed. These arguments are likewise without merit.

[7] It is defendant's theory that a "public" office is only one to which the public customarily comes, as, for example, a Post Office window or a welfare office. To be sure, the term "public" office could conceivably be construed to mean just that; however, it could also be taken to mean a governmental office, as distinguished from a private one. There is not the slightest reason to suppose that, when Congress sought to protect governmental documents from destruction, concealment, or mutilation, it meant to single out those offices that are customarily visited by members of the public, while leaving unprotected those offices not accessible to the public where normally the more important and vital government records are kept.

It is accordingly not surprising that the reported decisions do not bear out defendant's theory. In Coplon v. United States, 191 F.2d 749 (D.C.Cir.1951), the Court of Appeals for this Circuit upheld the espionage conviction of a Department of Justice employee who had concealed and removed highly secret FBI reports located in Department of Justice offices not accessible to the public. In a similar vein, in McInerny v. United States, 143 F. 729 (1st Cir.1906), the First Circuit, discussing the categories of records protected by the predecessor statute of section 2071, mentioned such documents as the "report of a commanding general as to the operations of an army, or of a naval commander" [that when] "deposited or filed in the proper office, would clearly enough in the sense of ***20** the statute be so far a record of the events to which it relates as to render a person responsible who takes it from its public place and destroys it." 143 F. at 133. [FN6]

FN6. The same conclusion was reached in United States v. North, 708 F.Supp. 364, 369 n. 3 (D.D.C.1988). Defendant's reliance to the contrary on Davidson v. United States, 292 F. 750 (3rd Cir.1923) is misplaced, for in that case not only was the conviction affirmed, but the records were truly not public records; they were the records of a bankrupt, title to which remained with the trustee, which had merely been left with the bankruptcy referee, but had not even filed in the bankruptcy proceeding.

[8][9] These cases only acknowledge the obvious. Even if there were no such decisions, the Court would not lightly hold, absent compelling legislative history, that Congress intended to restrict the statute to the protection of the often relatively unimportant documents found in areas where the public has access while withholding that protection from the documents of the National Security Council [FN7]

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in whose integrity the public and the government have the highest interest. [FN8]

FN7. The Court also rejects defendant's argument that application of section 2071 to NSC documents would intrude upon the constitutionally-based doctrine of executive privilege. Defendant's Memorandum at 16-17. That statute, of course, applies only to the unlawful destruction or removal of official records, and as such it does not impact the functioning of the Presidency. See Nixon v. Administrator of General Services, 433 U.S. 425, 439-55, 97 S.Ct. 2777, 2788-96, 53 L.Ed.2d 867 (1977), where the Supreme Court held that even the required processing of Presidential papers, with no claim of criminality, did not improperly invade Executive power.

FN8. See also, 44 U.S.C. §§ 2201-2207, Presidential Records Act of 1978, whose purpose it was "to establish public ownership of records created by future Presidents and their staff in the course of discharging their official duties." (emphasis added) H.R.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.Code Cong. & Adm.News 5732, 5733. The government has asserted that it will prove at trial that NSC staff members were informed that documents in the central files of the NSC were official governmental records that could not be destroyed or otherwise tampered with.

[10] Defendant's argument regarding "custody" suffers from similar artificiality. There is no warrant for supposing, and no legislative history suggesting, that Congress meant to subject to punishment under section 2071 only those who are the custodians of records in the technical sense, such as clerks or librarians, but to permit others working in a government agency who have access to sensitive documents to destroy or alter them with impunity. The obvious purpose of the statute is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them, and no court has ever held to the contrary. See generally, Coplon, supra, where the defendant was found to have custody of classified documents to which she gained access in the course of her employment as an attorney in the Internal Security Section of the Department of Justice. Not only was she not the official "custodian" of the records, but she had specifically been told that she no longer had routine access to them.

The motion to dismiss Count One is denied.

II
Counts Two and Three

Count Two of the indictment alleges that from July 21 to August 6, 1986, defendant obstructed and endeavored to obstruct inquiries being had by several committees of the House of Representatives in violation of 18 U.S.C. § 1505. This obstruction is alleged to have occurred basically in two ways: (1) by the dispatch of letters to the committees on July 21, 1986 which were false, and (2) by making arrangements for a meeting between House members and Oliver North in the course of which North made a number of false statements. Both of these activities are alleged to have been intended to obstruct the inquiry of the House committees. According to defendant, Count Two fails to state an offense on various grounds.

A. Failure to Inform Defendant of the Offense

[11][12] A defendant must, of course, be advised by the indictment of the specific ***21** charge against him in order to enable him to prepare a defense and to protect him against double jeopardy. Hamling v. United States, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-2908, 41 L.Ed.2d 590 (1974); United States v. Conlon, 628 F.2d 150, 155-56 (D.C.Cir.1980); United States v. Shorter, 608 F.Supp. 871, 874 n. 2 (D.D.C.1985), aff'd. 809 F.2d 54 (D.C.Cir.1987); United States v. Madeoy, 652 F.Supp. 371, 374 (D.D.C.1987). An indictment is sufficient in this regard if it contains the elements of the offense and enough detail to apprise the defendant of the particular offense with which he is charged. Conlon, id. at 155. See also, Fed.R.Crim.P. 7(c)(1). The indictment in this case meets these requirements.

[13] Paragraph 11 of Count Two clearly details the elements of the offense of obstruction of Congress: that Poindexter knowingly and corruptly obstructed the due and proper exercise of the power of inquiry under which investigations were being had by congressional committees, to wit, the consideration of a proposed resolution by the committees in question, and that he did so by making and causing to be made false statements and

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representations to these committees, for the purpose of concealing material facts.

It may be that this paragraph is by itself adequate to protect Count Two against a claim of insufficient notice of the charges. In any event, the count contains additional specificity, for while the factual allegations contained therein are somewhat disjointed, they adequately apprise the defendant of the factual basis for the charge against which he must defend.

[14] Defendant's claim focuses on paragraphs 7 through 10 of Count Two. Paragraph 7 states that defendant's July 21 letters, which referred to 1985 letters, were false and misleading because, as defendant "well knew and believed, the 1985 letters ... would not have been a truthful response to the 1986 inquiries." It is defendant's position that, because Count Two does not identify the 1985 letters further or specify in what manner they were false, the allegation is vague and does not permit him properly to prepare for trial on this charge. However, the reference to "the 1985 letters" in paragraph 7, together with the reference to Robert C. McFarlane in paragraph 5 (the author of the letters), and that to previous information "provided by this office" in paragraph 6, furnish sufficient information to defendant about "the 1985 letters" to enable him to prepare his defense and to protect him against double jeopardy. [FN9]

> FN9. The Court also takes note that the 1985 letters were identified in considerable detail in Counts Five through Seven of the original indictment in this case.

Defendant further claims that paragraphs 8 through 10 fail to allege any additional acts of obstruction with the requisite specificity. [FN10] Paragraph 8 states that, in response to a request from the Chairman of the House intelligence committee, and "in accordance with arrangements made and approved by the defendant POINDEXTER," Oliver North met with members and staff of the committee to answer questions relating to the Iran-contra affair. Paragraph 9 goes on to allege that in the course of the meeting, North made numerous specified false and misleading statements intended to obstruct the Committee's inquiry. Finally, paragraph 10 avers that following that meeting, Poindexter, knowing that North's representations had been false, nevertheless sent a message to him stating, "Well done."

> FN10. It is not clear that defendant's motion would prevail even if he were correct in that claim, for Count Two would charge an offense even if it did not contain paragraphs 8 through 10.

The precise discussions between Poindexter and North prior to the meeting on August 6 are not averred. However, the relevant paragraphs, in conjunction with the "Well Done" congratulation following the false statements at the meeting--about which Poindexter knew--make clear that Poindexter is alleged to have arranged for North to lie to the committee members and staff so as to obstruct their inquiry. To the extent that it might be argued that the language did not adequately inform defendant of the alleged criminality, this was ***22** certainly done by the juxtaposition of these factual charges with paragraph 11 which relates the facts to an obstruction. The Court concludes that paragraphs 8 through 11 as well as paragraph 7 provide the defendant with enough factual detail to enable him to prepare his defense.

B. Due and Proper Inquiry

[15] Defendant contends next that the congressional inquiries at issue in Counts Two and Three were insufficiently formal to be protected against obstruction, and that they lacked the necessary compulsion. It is established, however, that the statute protects preliminary and informal inquiries against obstruction as well as formal proceedings. United States v. Mitchell, 877 F.2d 294 (4th Cir.1989); United States v. North, 708 F.Supp. 385, 386 (D.D.C.1988); see also, Rice v. United States, 356 F.2d 709, 712 (8th Cir.1966); United States v. Fruchtman, 421 F.2d 1019 (6th Cir.1970). Defendant's reliance to the contrary on McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927) is misplaced. That case holds only that Congress may use compulsory process to exercise its power of inquiry, not that all other means for exercising that power are invalid.

[16] In a related argument, defendant claims that the committees violated their own rules and those of the House of Representatives, and that for that reason the inquiries in question were not "due and proper" exercises of the power of inquiry. [FN11]

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However, to the extent that defendant cites authority for that claim, it stands only for the proposition that a witness from whom a committee seeks to compel answers has a right to insist that the proper procedures be followed. See, e.g., Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963); Liveright v. United States, 347 F.2d 473 (D.C.Cir.1965). What the cases do not hold is that, when a congressional committee is engaged in a less formal inquiry--as committees frequently do, in advance or in lieu of formal, sworn hearings--the witnesses are free to lie and otherwise to obstruct the body without fear of the law of obstruction. The Court of Appeals for this Circuit said in Shimon v. United States, 352 F.2d 449, 450 (D.C.Cir.1965), that "Congress' concern with the obstruction of justice may not be avoided by such empty technicalities;" and the Fourth Circuit recently reiterated

> FN11. Among the rules allegedly violated was House Rule XI which requires committee meetings to be open to the public, compels the committees to keep a complete record of their proceedings, requires the chairman to announce the subject of the investigation at the start of any hearing, and allows each witness to obtain a transcript of the proceedings.

> The question of whether a given congressional investigation is a 'due and proper exercise of the power of inquiry' for purposes of § 1505 can not be answered by a myopic focus on formality. Rather, it is properly answered by a careful examination of all the surrounding circumstances. If it is apparent that the investigation is a legislative exercise of investigative authority by a congressional committee in an area within the committee's purview, it should be protected by § 1505.

Mitchell, 877 F.2d at 300-01; see also, United States v. Sutton, 732 F.2d 1483, 1490 (10th Cir.1984). [FN12]

> FN12. The questions raised by the committees must of course be within their jurisdiction--as they were here.

C. Political Question

Defendant next contends that a scrutiny of his letters would be equivalent to a scrutiny of the President's conduct and pronouncements, and that on this basis Count Two presents a political question beyond the competence of the Judiciary under the separation of powers, Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), particularly since foreign policy and national security were implicated. Haig v. Agee, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981); C. & S. AirLines v. Waterman Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948). More specifically, he asserts that "the crux of the obstruction of Congress allegation is a statement made on behalf of ***23** and after consultation with the President ... [that] expressed the President's belief that the Administration was in compliance" [with the Boland Amendment]. Defendant's Memorandum at 24. Defendant goes on to say that, since the President had declared through his spokesmen that the NSC staff had not been in violation of either the spirit or the letter of the law, to pursue Count Two would be "to call into question" the "presidential pronouncements.... The clear implication of a guilty verdict on.... Count two would be either that President Reagan lied on these other occasions or that he had no grasp of what he was talking about in the area of foreign affairs. Either way, a showing of an absolute lack of respect for the President would result." Defendant's Memorandum at 26-27.

[17] The Court does not know at this juncture whether the defendant made his statements "after consultation with the President" nor does the Court know whether these statements represented the President's views. That may or may not have been so; at this time we have only defendant's version of his discussion with President Reagan. But see, Part V-B infra. In any event, the political question doctrine does not leave it to the President to determine whether a member of his staff has violated the criminal law, nor does it protect members of any branch of government from revelations of wrongdoing or ignorance.

[18] Nothing in this case would require the Court to adjudicate foreign policy issues, a subject plainly beyond its competence; all that is involved is the question whether one particular individual--this defendant--has violated the laws proscribing obstruction of Congress, a subject not beyond the Court's jurisdiction. The Supreme Court has instructed the lower courts that it would be "error to

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suppose that every case or controversy that touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. at 211, 82 S.Ct. at 707; see also, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 227, 106 S.Ct. 2860, 2864, 92 L.Ed.2d 166 (1986); United States v. Nixon, 418 U.S. 683, 694, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). The political question defense is therefore rejected.

D. Count Three

[19][20] Defendant claims that Count Three is based on false statements alone, and that on this basis, under United States v. Griffin, 589 F.2d 200, 205 (5th Cir.1979), the indictment should have alleged that the statements had the actual effect of impeding a congressional inquiry. See also, United States v. Perkins, 748 F.2d 1519 (11th Cir.1984). The short answer to that contention is that the obstruction statute prohibits an "endeavor to" obstruct as well as a completed obstruction. See, United States v. Russell, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921); United States v. Jackson, 513 F.2d 456, 460 (D.C.Cir.1975). [FN13] It follows that an obstructive effect is not a prerequisite to a violation.

> FN13. Moreover, Griffin, the precedent principally relied on by defendant, was recently rejected by the Fifth Circuit which had authored that decision. See United States v. Williams, 874 F.2d 968, 980-81 (5th Cir.1989).

Beyond that, Count Three is not premised solely on false statements; several additional acts of obstruction are charged. According to the indictment, the House and Senate intelligence committees began to inquire in early November 1986 into reports that the government was selling arms to Iran, and they decided to seek the testimony of defendant Poindexter, in addition to CIA Director William J. Casey, on that issue. Arrangements were made for a meeting with Poindexter on November 21, 1986 and, in anticipation of that meeting, defendant directed his subordinates, including Oliver North, to prepare a chronology of events leading to the arms shipments, to be used at the meeting. The final version of the chronology, it is claimed, deliberately misrepresented the time the government first learned of the shipment of Hawk missiles to Iran, and in his appearances Poindexter made false statements to the congressional ***24** delegation corresponding to the chronology.

Additionally, defendant allegedly sought to obstruct the committees by deleting stored messages from his files in the NSC computer system that would have revealed his activities in relation to the Iran initiative and in the provision of assistance to the Contras. All these actions are said to have been taken with the specific purpose of obstructing the inquiries of the congressional committees and of concealing facts that were material to these inquiries and that would have prolonged them had they been truthfully disclosed. In short, the allegations in Count Three go beyond false statements; the indictment alleges that defendant committed other acts of obstruction as well, and on that basis, too, the argument based on Griffin must be rejected.

E. Duplicity

[21] Defendant finally contends with respect to Counts Two and Three that they are each impermissibly duplicitous because he is charged in each count with obstructing more than one congressional committee by more than one method. Accordingly, says the defendant, these counts must be either dismissed or modified. However, it does not follow that, because a count alleges several acts, each of which could constitute a separate offense, each such act must be charged as a separate count or be dismissed for duplicity. On the contrary, as discussed in Part I supra, two or more acts which could be charged as separate offenses may be charged as a single count if these acts can legitimately be characterized as part of a single, continuing scheme or course of conduct. See United States v. Mangieri, 694 F.2d 1270, 1282 (D.C.Cir.1982); United States v. Shorter, 809 F.2d 54, 56 (D.C.Cir.1987). Indeed, a contrary rule would risk unfairness to the defendant who might otherwise be subjected to multiple punishments for a single criminal episode. Any dangers presented by the prosecution of a defendant by way of a single count with more than one allegation of criminal conduct--such as the possibility that the jury would render a guilty verdict without unanimity regarding the events in question--can be more than adequately controlled through instructions to the jury.

III

Counts Four and Five

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Count Four of the indictment charges defendant with violation of 18 U.S.C. § 1001, in that he allegedly falsely told members of the Senate and House intelligence committees (1) that he did not learn until January 1986 that Hawk missiles had been shipped to Iran two months earlier, and (2) that he had not learned until November 20, 1986 that anyone in the United States government had prior knowledge of the shipment of such missiles to Iran in November 1985. The allegation is that defendant had, in fact, been advised by Oliver North by November 20, 1985 that such a shipment was about to take place, and in November and December 1985 that a shipment of Hawk missiles had occurred.

Count Five of the indictment charges a violation of 18 U.S.C. § 1001, in that defendant allegedly falsely told members of the Senate intelligence committee that he had not learned until January 1986 that Hawk missiles had been shipped to Iran in November 1985, when in fact Oliver North had advised him in November and December 1985 that such a shipment was about to take place, and he was further advised by North that such a shipment had taken place.

Defendant requests that these counts be dismissed for failure to state offenses under section 1001; that the statute may not be applied to unsworn statements by an Executive Branch official; that the statute does not provide fair notice to him that his conduct was prohibited by law; and that the false statements he allegedly made were not material.

A. Statements made to Congress

[22] Defendant contends most broadly that section 1001--the general federal false statements law--does not apply to statements made with respect to the non-administrative ***25** functions of the Legislative Branch. While conceding that no case has ever carved out such an exception, he urges that, inasmuch as the courts have held that the statute does not apply to the adjudicative functions of the Judicial Branch, this Court should, on the same basis, hold that the law does not apply to the Congress (except for its administrative functions).

It is quite correct that several courts have decided that a person may not be convicted under section 1001 for statements made in the course of judicial proceedings. See United States v. Rodgers, 466 U.S. 475, 483 n. 4, 104 S.Ct. 1942, 1948 n. 4, 80 L.Ed.2d 492 (1984), for a collection of the relevant cases; and in this jurisdiction see, Morgan v. United States, 309 F.2d 234, 237 (D.C.Cir.1962). Even if this Court were inclined to draw the parallel defendant invites it to draw between the Judicial and the Legislative Branches in this respect--and it is not [FN14]--the Court of Appeals for this Circuit has determined that section 1001 applies to congressional committee inquiries.

> FN14. To do so would, inter alia, result in an interpretation of the law that punished the deception of Congress in trivial "administrative" contexts, while permitting deceptions that affect the core functions of the Legislative Branch. Moreover, the court in Morgan rested its decision on the problems that would arise in the judicial context were the statute applied to "traditional trial tactics," 309 F.2d at 237--a consideration that does not apply to statements made to the Congress.

In United States v. Hansen, 772 F.2d 940, 943-44 (D.C.Cir.1985), that court, speaking through Judge (now Justice) Scalia explicitly and unambiguously held that a House committee is a "department" for purposes of section 1001, since that term "was meant to describe the executive, legislative and judicial branches of the Government" (citing Bramblett infra ). [FN15] It further expressly held that the term "jurisdiction" encompasses an investigation by a congressional committee. Id. In other words, Hansen has authoritatively decided that a congressional investigation is "a ... matter within the jurisdiction of any department of the United States." That, of course, ends the matter as far as this Court is concerned.

> FN15. Defendant's effort to characterize the Hansen case as one which, unlike the instant case, involves only housekeeping functions, is unavailing, for three reasons. First, the Hansen court did not suggest any distinction between congressional housekeeping and legislative functions, so as to include the former and exempt the latter. Second, it hardly makes sense to classify a congressional investigation of Hansen, a Member of Congress, as "housekeeping," while regarding an inquiry into the behavior of Executive officials, such as defendant, as legislative. Third, inquiries that begin as housekeeping matters frequently have the potential to result in legislative investigations--which is

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precisely what happened in Hansen--thus rendering impractical the distinction defendant seeks to draw. In addition to Hansen, see also, United States v. Bramblett, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); United States v. D'Amato, 507 F.2d 26 (2d Cir.1974); United States v. Diggs, 613 F.2d 988 (D.C.Cir.1979); North, 708 F.Supp. at 383-84.

B. Unsworn and Informal Communications to Congress

[23] Defendant contends next that section 1001 may not properly be applied to an unsworn statement communicated by an Executive Branch official to a member or a committee of Congress in informal circumstances.

As discussed in Part II above, Poindexter, who was not under subpoena to meet with the members of the intelligence committees, nevertheless agreed to meet with some of these members and their staffs at the White House. According to his motion, the purpose of the meeting was to provide policy background prior to the taking of the sworn testimony of CIA Director Casey; Poindexter himself was not to appear for the actual hearings; the White House conference did not include the trappings of a formal committee meeting; he was not placed under oath; and no verbatim transcript was maintained. In short, the meeting partook of none of the formalities of a full-fledged congressional hearing.

Defendant predicts that the application of the false statements statute in that kind of setting would have a chilling effect on communications between the two branches of government. As he notes, "[o]fficials in ***26** the Executive Branch routinely communicate with Congress concerning an enormous range of subjects relating to the business of government, including proposed legislation, matters under investigation by Congress, actions taken or contemplated by the Executive Branch, Congress's oversight of the Executive Branch, budget requests, treaties, and presidential appointments. Such communications may be written or oral, formal or informal, and may involve individuals at any level of the Executive Branch and either members of Congress or other staffs." Defendant's Memorandum at 19. In this view, the situation is aggravated by the fact that section 1001 prohibits false statements in the broadest sense. [FN16]

FN16. Section 1001 has been held to prohibit not only false statements concerning objective facts but also false statements concerning intent. See Corcoran v. United States, 229 F.2d 295 (5th Cir.1956). It has been held to prohibit not only statements that are false but also those that fail to disclose a material fact. See United States v. Mattox, 689 F.2d 531, 533 (5th Cir.1982). It has also been held to reach statements not only made directly to the federal government but also statements submitted to nonfederal agencies receiving federal funds. See United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir.1983). And it has been held applicable even to false statements in records subject to government inspection. See Gonzales v. United States, 286 F.2d 118 (10th Cir.1960).

The Court is not unsympathetic to these considerations. It may indeed be that the application of section 1001 to statements made by Executive officials in the course of informal contacts with congressional officers would complicate future relationships between the two branches and thus could disrupt the orderly functioning of government. At a minimum, it could eventuate that the Executive officials would be more stilted and careful and less forthcoming than they might otherwise be.

[24] On the other hand, it cannot be gainsaid that the chill defendant forecasts between the Executive and the Legislative Branches on account of false statement prosecutions may be nothing more than the natural consequence of the deterrent effect of the criminal law. After all, section 1001 does not punish expressions of differences of opinion between representatives of the two branches on policy issues, but only statements that are proven to be false. Moreover, as the government notes, at this juncture it is only speculation that enforcement of section 1001, as in the instant case, would damage communications between Congress and the Executive. Should such damage occur, the appropriate forum for a policy-driven exception to the statute would be the political branches, not the Judiciary.

[25] In any event, here again, the Court is not writing on a clean slate. In Marzani v. United States, 168 F.2d 133 (D.C.Cir.), aff'd by an equally

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divided Court, 335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431 (1948), the Court of Appeals upheld a conviction of a government employee who had lied about his past Communist connections. The court took note of the defendant's objection

> ... that the statements were not under oath and were not stenographically transcribed; that the interview was at appellant's request; that there were only two participants in the conference; that they addressed each other by their first names, and that they discussed a variety of topics.

Id. at 141-42. But, said the court, the statute

> ... does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, ... in any matter with the jurisdiction of any department or agency of the United States.'

Id. at 142. This Court is of course bound by that determination and will follow it. [FN17]

> FN17. Nor would the Court be justified in drawing the distinction defendant asks it to draw between ordinary citizens and officials of the Executive Branch. In our free, constitutional system, such a distinction would be proper only if it were clearly required by a mandate of the policymaking branches of government. No such mandate is present here. On a similar basis, the Court rejects defendant's argument that the application of section 1001 to communications from the President's advisor on foreign affairs and national security would be improperly to invade the Presidential prerogatives in these two areas. The President's unquestioned role in these constitutionally assigned functions may allow his advisor to be "less than forthcoming about prospective foreign policy initiatives," Defendant's Memorandum at 23; it does not allow such an advisor to make false statements to the Congress.

***27** C. Materiality

[26][27] Defendant also argues that the allegedly false statements he made were not material to the committees' inquiries. Materiality is an essential element of the offense in a prosecution such as this. Freidus v. United States, 223 F.2d 598, 601 (D.C.Cir.1955); Weinstock v. United States, 231 F.2d 699, 701 (D.C.Cir.1956). The test of materiality is "whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." Weinstock at 701-02; see also, Hansen, supra.

Defendant contends that the element of materiality is lacking here because the indictment does not allege that element and the government cannot prove actual reliance by the committees on his allegedly false statements. Neither claim is justified.

[28] The indictment alleges both in Count Four and in Count Five that defendant "unlawfully, willfully, and knowingly made and caused to be made material false, fictitious, and fraudulent statements and representations ..." (emphasis added). Insofar as proof is concerned, defendant's formulation represents a mistaken view of the law. The Court of Appeals has plainly said that "proof of actual reliance is not required; the Government need only make a reasonable showing of its potential effects." Hansen, 772 F.2d at 949; see also, United States v. Diggs, 613 F.2d 988, 999 (D.C.Cir.1979). This formulation of the appropriate standard by the Court of Appeals does not include the element defendant claims to be critical: that of actual reliance. See also, United States v. Quirk, 167 F.Supp. 462, 464 (E.D.Pa.), aff'd, 266 F.2d 26 (3d Cir.1959). In any event, it will be for those who evaluate the trial evidence to decide whether the government has proved materiality.

Defendant claims, more directly, that representations regarding his personal knowledge of the Hawk shipment to Iran were not material; that the committees were inquiring far more broadly into the participation of the United States government as such in sales of weapons to that country. That, again, is too cramped a view of the scope of congressional inquiries and of the concept of materiality. To be sure, the committees were investigating the issue of United States government involvement in sales of arms to Iran. But it was plainly material to that inquiry when the defendant--the President's principal advisor on national security and the senior official of the NSC, the body identified with the Iran initiative--first learned of government involvement in the shipment of arms to that country.

The motion to dismiss Counts Four and Five of the indictment is denied.

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IV
Fair Notice Under Statute

Defendant contends, in a separate motion, that sections 1001 and 1505 of Title 18 failed to provide him with fair notice that his conduct was criminal, and that this vice infects Counts Two through Five. He does not, he cannot, argue that these statutes are impermissibly vague as not providing notice to one and all that it is a crime knowingly to make false statements to congressional bodies, as to other government agencies, or that it is a crime to deliberately obstruct investigations or inquiries by such entities. Both sections have been applied and sustained too many times for that argument to be seriously made.

[29] Defendant's point is both narrower and broader: it is that members of the Executive Branch so commonly make false statements when required to provide information to Congress, particularly with respect to sensitive activities, without ever having been prosecuted for their acts, that ***28** he was justified in believing that such action was not criminal. Defendant's Memorandum at 2-3, 8, 12-14. The Court rejects this notion for several reasons.

[30][31] First, it is simply not true that no Executive official had ever been prosecuted prior to the Iran-contra affair on the charge of lying to a congressional committee. See United States v. Lavelle, 751 F.2d 1266 (D.C.Cir.1985). Second, due process does not require that the government cite a "litigated fact pattern directly on point" as a prerequisite to the institution of criminal proceedings. United States v. Mallas, 762 F.2d 361, 364 (4th Cir.1985). It would therefore be irrelevant if Executive officials had not previously been prosecuted for false statements to Congress. [FN18] Third, Congress made it clear by enactment of the Hughes-Ryan Amendment, 50 U.S.C. § 413, which imposes substantial reporting requirements on the Executive Branch relating to intelligence activities, that it expects Executive officials to tell the truth when reporting to Congress with respect to such activities. Thus, if, as defendant claims, there is a pattern of lying by Executive officials when reporting to the Congress, [FN19] the proper response under Hughes-Ryan would be to end that practice rather than to sanction it by accepting it as a defense to a criminal charge. Finally, as Judge Gesell stated in North, it would come as no surprise to an ordinary citizen that section 1001 prohibits the making of false statements to a government agency; nor should it come as a surprise to a high government official. 708 F.Supp. at 368.

FN18. Prior litigation is a prerequisite only if the particular law is ambiguous or fails to give "to the world in language that the common world will understand [notice] of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

FN19. The Court of course has neither the ability nor the jurisdiction to make a judgment on that issue.

Defendant's motion to dismiss Counts II through V for lack of fair notice is denied.

V
Subpoenas Duces Tecum

Defendant has moved under F.R.Crim.P. Rule 17(c) for an order setting a pretrial return date at least sixty days before trial for subpoenas duces tecum. The government opposes the motion as premature and nonspecific. Defendant has also requested the production of documents from former President Reagan and former Vice President Bush. [FN20]

FN20. In order to minimize confusion, the Court will generally refer herein to President George Bush as Vice President Bush--the position he occupied at the time of the events which are the subject of this criminal action--and to former President Ronald Reagan as President Reagan.

A. General

Defendant argues that the pretrial production of documents by way of subpoena is necessitated by the large volume of papers known to exist relating to a variety of critical issues--evidentiary materials in the possession of government officials, including members of Congress and Presidents Reagan and Bush; highly sensitive intelligence reports relevant, inter alia, to a demonstration of knowledge and approval of defendant's activities and those of his alleged co-conspirators; documents relevant and

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necessary to prepare for the cross-examination of government witnesses; and documents relating to the issue of defendant's intent. Defendant's Motion at 2-3. This list is disquieting, for it parallels in substantial part the discovery motion defendant has filed and which the Court ruled on in detail under date of September 11, 1989. [FN21]

> FN21. This disquiet is not significantly alleviated by defendant's observation that, to the extent that the government complies with its obligation to produce documents in the possession of Executive Branch agencies, some, but not all of this evidence will not be sought by subpoena. Defendant's Motion at 3 note 2.

On that basis, the Court cannot but concur with the government's observation that pretrial return dates ought not be used improperly as blank checks for the use of ***29** trial subpoenas duces tecum as a supplemental discovery device. See United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); United States v. Ferguson, 37 F.R.D. 6 (D.D.C.1965). The government also suggests that, under established law, the Court should delay dates and make rulings only on specific subpoenas to specific witnesses calling for the production of specific, identified materials.

The Court appreciates that, with respect at least to some documents, the litigation of such issues as privilege may take some time, and that an early return date is for that reason warranted. On the other hand, the Court is not prepared to hand to defendant a blank check for the issuance of wide-ranging subpoenas to government officials and others, either to duplicate discovery already allowed or to secure discovery that the Court rejected. In order to accommodate the various legitimate interests, the Court will order a return date forty days in advance of the trial, that is, December 13, 1989, with respect to specific subpoenas for clearly identified, relevant evidence, after application therefor is made.

B. Presidential and Vice Presidential Documents

On September 11, 1989, in ruling upon defendant's discovery requests, the Court stated with respect to a demand for notes and diaries maintained by and for President Reagan and Vice President Bush, that it would defer a decision thereon, pending the filing of (1) legal memoranda from both parties on the question whether the Independent Counsel could be required to produce documents maintained by President Reagan, in view of the Presidential Records and Materials Preservation Act, 44 U.S.C.A. § 2101 et seq.; and (2) a more specific proffer from defendant as to the involvement of these two high officials in the events which led to his indictment. These papers have now been submitted.

First. The issue of the method of securing access to the Reagan documents has been resolved. The Independent Counsel submitted a memorandum which concluded that the Presidential Records Act grants to former President Reagan and to the Archivist of the United States, but not to counsel for the government, access to and control over these papers. Defendant responded by stating that, while he did not necessarily agree with the Independent Counsel's legal conclusions, he was willing to forgo production through that official by means of Rule 16, F.R.Crim.P., but would instead seek to access the Presidential and Vice Presidential documents by means of a subpoena duces tecum pursuant to Criminal Rule 17. Not only does this agreement settle the issue of the method of production; it is also preferable from the point of view of clarity. If any claims of privilege are advanced, they may be made directly, in response to the subpoena, rather than through the circuitous route of an objection made to the Independent Counsel who would then, in turn, pass such claims on to defendant and the Court.

Second. Defendant's more specific proffer concerning the materiality of the Presidential and Vice Presidential documents was submitted in camera (to avoid the disclosure of possibly privileged documents) and ex parte (to avoid revelation of defense strategy to the prosecution in advance of trial). The memorandum embodying that proffer, with various exhibits, was carefully examined by the Court.

According to that proffer, President Reagan met with Poindexter daily, frequently alone; [FN22] they routinely had conversations with regard to national security matters, including, among other things, the Iran initiative and the Contra support program; assistance to the Contras by third countries; the role of Richard Secord as a

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middleman in the transfer of arms to Iran; private and third country fundraising for the Contras; the depth of the Administration's commitment to the Contras and its desire to continue to provide military support ***30** to them; the Administration's view of the relationship between the Boland Amendment and the National Security Council, and the application of that statute to the NSC; the Administration's view of the resolution of inquiry under consideration by the House Foreign Affairs Committee and on the accuracy of the chronology prepared by Oliver North and reviewed by Poindexter.

FN22. This is in sharp contrast to the relationship between President Reagan and Oliver North, who may have never seen the President on a one-to-one basis.

[32] On a number of these issues, it is claimed, President Reagan formulated the Administration's position for the guidance of Poindexter (and sometimes others). On other issues, Mr. Reagan allegedly entertained Poindexter's plans without voicing any objection. It appears that notes were taken by the President and others on these conversations and, according to defendant, these notes or Presidential diary entries made pursuant thereto would support his defense to the charges in the various counts of the indictment.

If the claims made in defendant's proffer are correct--a matter which the Court of course cannot and does not evaluate at this stage of the proceedings [FN23] but, in view of the specificity of defendant's proffer, [FN24] accepts as true for present purposes--there is "a sufficient likelihood" that the documents sought from President Reagan would be material to the Poindexter defense. [FN25] Accordingly, if the defendant submits to the Court subpoenas duces tecum for specific, relevant documents in the custody of former President Reagan or of the Archivist of the United States on his behalf, with a return date sixty days in advance of trial, that is, November 23, 1989, the Court will authorize their issuance.

FN23. Only the papers themselves can provide the answer.

FN24. To preserve the in camera character of the proffer, its details are discussed herein only to the extent necessary for an explanation of the rationale underlying the Court's ruling.

FN25. United States v. Nixon, 418 U.S. 683, 700, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1973). The Court concludes that the defendant has made the showing required by Rule 17(c): (1) that the documents appear to be evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that he cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." Id.

[33][34] Third. The situation is different as concerns Vice President Bush. Although defendant asserts that the then Vice President knew about various activities relevant to this case, he does not and could not point to a Vice Presidential authorization of his activities as a defense--assuming for present purposes that authorization by a superior would be a valid defense--for the Vice President had no operational authority with respect to Poindexter. Regarding other subjects, e.g., the claimed knowledge by high officials of defendant's activities, it appears to the Court, at least on the present showing, that the Vice Presidential papers may be largely cumulative. Therefore, based on that showing, and because of the deference due the incumbent President, [FN26] the Court denies defendant's request for the Bush papers at this time. [FN27]

FN26. No individual, whatever his position, is exempt from the obligation inherent in our laws to provide evidence, especially where such evidence is sought by a defendant in a criminal case in the exercise of his constitutional right to mount a defense to serious charges against him. However, respect for the Chief Executive and head of a branch of government co-equal to the Judiciary dictates that the production of evidence from a sitting President not be coerced, by subpoena or otherwise, unless such evidence is necessary to the defense and a just resolution of the cause.

FN27. The Court's decision on this issue is obviously without prejudice to its reevaluation in the event that the defendant is able at a later point to

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make the case for a more pressing need for the documents in his defense against the charges.

Fourth. The Independent Counsel apparently has in his possession copies of an notes based upon some Presidential documents, Memorandum, at 16 and n. 7, and defendant requests the production of these papers. There is, however, a question of privilege at least as to some of the notes prepared by Independent Counsel attorneys. In any event, inasmuch as the Court ***31** has stated that it may authorize a subpoena for the originals, it will defer a ruling on defendant's separate request for copies and notes at this time, without prejudice to a renewal of the request if the demand for the original documents is frustrated or unduly delayed.

## VI
## Constitutionality of CIPA

[35] Defendant contends that, as applied to him, section 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C.App. IV § 5(a) is unconstitutional. Section 5 of CIPA requires a defendant to notify the prosecution prior to trial of all classified information the defense expects to use at trial. According to defendant, this requirement violates his Fifth Amendment right to remain silent; his Fifth and Sixth Amendment rights to testify in his own defense; his Sixth Amendment right to the effective assistance of counsel; his right to cross examine witnesses against him; and his right to due process of law. In the opinion of this Court, these contentions exaggerate the effects of the CIPA requirements, and they will be rejected. [FN28]

FN28. The government also argues that a decision on this issue would be premature because defendant is not yet being required to do anything pursuant to the statute. While that observation is technically accurate, nothing would be gained by the brief delay in adjudication that would follow from the Court's deferral in accordance with the government's argument.

### A. General

Congress enacted CIPA as a means for coping with the so-called "graymail" problem--the problem of defendants in criminal cases threatening to introduce classified information at trial, thus confronting the government with the choice between permitting highly sensitive national security information to become publicly known, on the one hand, and capitulating to the graymail by dismissing the charges, on the other. H.R.Rep. No. 96-831, Pt. 1, 96th Cong., 2d Sess. (1980); S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980) U.S.Code Cong. & Admin.News p. 4294. As may be imagined, both alternatives are unpalatable to the prosecuting authorities and presumably to the public. CIPA seeks to resolve this difficulty by giving the trial judge the opportunity to rule on questions of admissibility of classified information in advance of its use as evidence in open court.

Under the CIPA procedures, as defendant correctly states, the defense is required (by section 5) to notify the Court and the prosecutor of its intention to disclose particular classified information at trial. Section 6(a) permits the prosecution thereafter to request an in camera hearing for a determination of the use, relevance, and admissibility of this proposed defense evidence. If the Court makes an affirmative finding with respect thereto, the government may move for, and the Court may authorize, the substitution of unclassified facts or a summary of the classified information in the form of an admission by the government. Under section 6(e)(2) if the government prevents a defendant from disclosing classified information at trial, the Court may find against the prosecution on any issue to which the excluded information relates; it may strike or preclude the testimony of particular government witnesses; and it may dismiss the indictment or specific counts thereof.

As this summary of the provisions of CIPA suggests, the law establishes a carefully balanced framework for consideration of the difficult issue of the use of classified information by the defense. In addition, although the statute in terms speaks only of a defense obligation to disclose the classified information it intends to use at trial, this Court has also required the government to present all the classified documents it intends to introduce as part of its case-in-chief, [FN29] and the government must, in fact, do so before the defense makes its disclosure. [FN30]

FN29. That is also the procedure adopted in the North case.

FN30. The government claims that it has already

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complied with this obligation.

*32 Moreover, the protection of the rights of defendant is paramount under the statutory scheme: if the Attorney General files an affidavit objecting to the disclosure of the classified material, [FN31] and the Court determines that other remedies, including satisfactory unclassified substitutes providing defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information," cannot be fashioned, [FN32] it must provide relief, including, where appropriate, by a dismissal of the indictment.

FN31. Section 6(e) of CIPA.

FN32. Section 6(c)(1) of CIPA.

This Court is fully mindful of its obligation, stemming from the Constitution itself, as well as from the statute, not to deprive the defendant of the ability to defend himself against the criminal charges brought against him. As between that obligation, on the one hand, and the various governmental interests involved, on the other, [FN33] the Court does not intend to relegate defendant's constitutional rights to second place.

FN33. These interests include the continued prosecution of the defendant as well as the need to safeguard classified materials.

In conformity with the statute, the Court expects to make a substantial effort, with the assistance of the parties, to fashion equivalent substitutes for highly sensitive documents where these documents cannot be revealed in their original form due to the potential damage to national security. [FN34] If for some reason a substitute cannot be fashioned for reasons other than a defense failure to cooperate in good faith, and the document or documents in question are clearly material, the Court will not hesitate to grant the appropriate relief to the defendant, if necessary by a dismissal of the charges. [FN35]

FN34. The Court assumes that, as in North, the government will not prevent the defendant from use as evidence in his defense documents which, whatever their technical classification, would not harm national security if disclosed, and further, that documents actually used in the North trial will be disclosed here as well, without objection.

FN35. However, both parties are on notice that the Court will neither honor the designation by the defendant of documents that are plainly not material and where the principal aim is to generate a dismissal, nor will it countenance government refusals to cooperate with the publication of documents which would not be harmful to national security.

In connection with defendant's assertion that the burdens imposed on him by CIPA are onerous while "no burden whatsoever" is imposed on the government, Reply Memorandum at 5, not only is that claim disproved by the discussion supra, but it must also be remembered that, in addition to its CIPA burdens, the government has discovery obligations not incurred by a criminal defendant. These include the duty to furnish to a criminal defendant in advance of trial: (1) documents that are material to the preparation of the defense, (2) documents the government intends to introduce in its case-in-chief; (3) documents that were obtained from or belong to the defendant; (4) all written or recorded statements of the defendant; (5) a copy of defendant's prior criminal record; (6) reports of physical or mental examinations and scientific tests or experiments; (7) all exculpatory evidence; and (8) all prior statements of government witnesses. In short, defendant's complaint that he is laboring under burdens not shouldered by the government is simply untrue.

It is not surprising, therefore, that every court that has passed on the constitutionality of CIPA has upheld it. See United States v. Wilson, 750 F.2d 7, 9-10 (2d Cir.1984); United States v. Wilson, 721 F.2d 967, 976 (4th Cir.1983); United States v. Collins, 720 F.2d 1195, 1200 (11th Cir.1983); United States v. Jolliff, 548 F.Supp. 229, 231 (D.Md.1981); U.S. v. North, 708 F.Supp. 399 (D.D.C.1988).

To be sure, defendant correctly states that, because of his previous position as National Security Advisor and because of the nature of the charges, these proceedings may be extraordinary in the breadth of the classified information involved. [FN36] *33 However, the Court is not prepared to hold that, for this reason alone, the congressionally-mandated CIPA process will not be applied. If

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defendant's suggestion constituted the proper rule, public officials in high national security positions would in practical effect be immune from the operation of the criminal laws with respect to criminal excesses in the exercise of their authority: in the absence of the CIPA tool provided by Congress for dealing with the classified information dilemma, prosecutions instituted on account of such derelictions by such officials would inevitably have to be aborted. That is not, that cannot be, the law. No court has so held, and this Court will not set such a precedent.

FN36. However, as the Court noted in its September 11, 1989 Opinion, much of that information is relevant and material only indirectly, as part of the defendant's purpose to demonstrate lack of motive and hence lack of criminal intent.

The Court will now turn to defendant's specific constitutional arguments.

B. Fifth Amendment

[36] Defendant's principal contention is that, inasmuch as CIPA requires him to divulge to the government what classified information he may personally testify to at trial, the statute impermissibly burdens his Fifth Amendment right to be silent and his right to testify in his own defense. This contention is erroneous on several grounds.

In the first place, section 5 of CIPA does not require a defendant to specify whether he will testify or what he will testify about. The statute requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed. In other words, defendant need not reveal what he will testify about or whether he will testify at all.

Moreover, it is of course hardly a novel proposition that defendants in criminal cases may be required to disclose elements of their defenses in advance of trial. Examples of such requirements are Fed.R.Crim.P. 12.1 (alibi defense); Fed.R.Crim.P. 12.2 (insanity defense); Fed.R.Crim.P. 12.3 (public authority defense); Fed.R.Crim.P. 16 (medical and scientific tests, and tangible objects, and certain documents). Provisions requiring the revelation of such defenses in advance of trial have consistently been held to be constitutional. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); [FN37] Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); and see, e.g., United States v. Fitts, 576 F.2d 837 (10th Cir.1978); United States v. Buchbinder, 796 F.2d 910 (7th Cir.1986); United States v. Duggan, 743 F.2d 59 (2d Cir.1984). [FN38]

FN37. Defendant attempts to distinguish Williams principally on the ground that the Florida statute there before the Court excluded the defendant's own testimony from the notice requirement. However, there is no indication that the Supreme Court's decision depended on that fact. Other than simply to quote the language of the statute, the Court did not even refer to the provision defendant here regards as critical. And none of the decisions interpreting and passing on the federal notice provisions make the distinction defendant proposes.

FN38. Defendants have also been required to reveal their defenses in additional circumstances, such as the relation of particular testimony to evidence the defendant intends to present. See, e.g., United States v. Mitchell, 385 F.Supp. 1190, 1192-93 (D.D.C.1974); United States v. Ismaili, 828 F.2d 153, 161-62 (3rd Cir.1987); United States v. Trenary, 473 F.2d 680, 682 (9th Cir.1973).

Defendant relies for the contrary proposition primarily upon Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). However, the state statute there at issue, unlike the federal immunity law, required the defendant to testify at the outset of the presentation of his case or to forego testifying altogether. It was that feature of the statute, and none other, that caused the Supreme Court to find a constitutional violation. But here, as noted above, there is no compulsion on the defendant to reveal as to when he will testify, or even whether he will testify. All he is required to do under CIPA is to identify the classified information on which his side intends to rely in the course of its overall presentation, not who will disclose it as a part of any particular testimony. In short, it is simply not true that, as defendant asserts, he, "like the defendant in Brooks, ***34** is compelled to choose ... whether he will testify at trial." Defendant's Memorandum at 6. [FN39] The leap from the requirement of disclosure--similar to the

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disclosure of an alibi or an insanity defense--to a violation of defendant's right to testify or not to testify, is too wide to be justified.

> FN39. To buttress the point that he could not be required to provide notice of the classified information he intends to use at trial, defendant notes that in the North case, Judge Gesell did not require the defendant to notice his anticipated classified testimony. Memorandum at 11 n. 8. That is correct only in a technical sense. Judge Gesell ruled that There will be no review of defendant North's testimony in advance. When and if he is about to testify, his counsel will advise the Court if it then appears the testimony will involve classified national security disclosures beyond those then authorized under prior rulings of the Court and, again, a specific further ruling will be obtained. 698 F.Supp. at 322. Moreover, by that time, Judge Gesell had already required North to disclose pursuant to section 5 of CIPA (1) each classified document he intended to use at trial (orders of July 8, 1988, August 5, 1988, and October 19, 1988) and (2) all classified documents or other classified testimonial information not covered by previous CIPA orders that North reasonably expected to use at trial (orders of November 23, 1988 and December 22, 1988).

Defendant further seeks to distinguish the precedents by pointing to the important interests present in the decided cases on the government's side of the equation. E.g., Defendant's Memorandum at 9 (importance of rules designed to assure fairness and reliability). However, as the Supreme Court has noted, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307, 101 S.Ct. 2766, 2782, 69 L.Ed.2d 640 (1981). CIPA serves that interest by providing a mechanism for protecting both the unnecessary disclosure of sensitive national security information and by helping to ensure that those with significant access to such information will not escape the sanctions of the law applicable to others by use of the graymail route. S.Rep. No. 96-823, 96th Cong., 2d Sess. at 3 (1980) U.S.Code Cong. & Admin.News pp. 4294, 4296.

C. Counsel, Confrontation, and Due Process

Similar, if not identical, considerations dispose of defendant's arguments which assert a denial of effective assistance of counsel, the failure to afford confrontation, and a denial of due process.

Defendant's claim that his Sixth Amendment right to counsel is violated when he is required to testify before his counsel has the opportunity to make an educated decision on whether to have defendant take the stand is merely the Fifth Amendment argument discussed above in another garb. See also, Lakeside v. Oregon, 435 U.S. 333, 341, 98 S.Ct. 1091, 1096, 55 L.Ed.2d 319 (1978).

[37] Likewise without substance is the complicated argument that CIPA violates defendant's "Sixth Amendment right to confront the witnesses against him by forcing him to notify the prosecution pretrial of all the classified information that he expects to elicit from prosecution witnesses on cross-examination and all such information that will be disclosed in defense counsel's questions to those witnesses." Defendant's Memorandum at 13, 15. This argument assumes that defendant has an unqualified right to undiminished surprise with respect to his cross-examination, and that if there is any impairment of the element of surprise, however slight, cross-examination must be regarded as per se ineffective. [FN40]

> FN40. Of course, CIPA does not "eviscerate[ ] the right [to cross examination] altogether." Defendant's Memorandum at 14-15. The statute requires a defendant merely to identify the universe of the classified information he intends to use; he need not attribute any particular piece of information to the cross examination of any particular witness.

However, as the Supreme Court said in Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original). See also, United States v. ***35** Owens, 484 U.S. 554, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988); Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987); United States v. Tarantino, 846 F.2d 1384, 1405 (D.C.Cir.1988); United States v. Anderson, 881 F.2d 1128, 1137 (D.C.Cir.1989). Finally, as concerns the claim that

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the disclosure requirements of CIPA violate the Due Process Clause by imposing a "one-sided burden" on him, it also lacks merit. As discussed at some length above, the CIPA burdens are not one-sided, but they are carefully balanced, [FN41] and there is therefore no basis for a due process complaint. United States v. Collins, 720 F.2d 1195 (11th Cir.1983).

FN41. If, as in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), there were no balance, the relevant statute could not stand.

## VII
## Surplusage

[38] Defendant has moved pursuant to Fed.R.Crim.P. 7(d) to strike surplusage from the indictment. [FN42] It is clear (1) that with respect to surplusage the Court has wide discretion, [FN43] and (2) that the standard under Rule 7(d) is exacting. [FN44] It is also settled that a defendant is entitled to have language stricken only if it is both irrelevant and prejudicial, see, e.g., United States v. Jordan, 626 F.2d 928, 930 n. 1 (D.C.Cir.1980), and the Rule has been construed as not favoring the striking of surplusage. Id.

FN42. Defendant's related motion, that for a bill of particulars, is not well taken. As discussed in Parts I through IV, supra, the indictment adequately apprises defendant of the charges against him. The particulars defendant requests go essentially only to the evidentiary details and the government's legal theory, and they therefore need not be spread upon the record by a bill of particulars. See United States v. Pollack, 534 F.2d 964, 970 (D.C.Cir.1976). The request is especially ill founded in view of the government's uncontradicted claim that it has furnished to defendant hundreds of thousands of pages of materials, including copies of all the documents it intends to offer in its case-in-chief. (The government has also provided further particulars as part of its Memorandum filed September 8, 1989). In short, defendant has ample notice of the facts needed to prepare his defense. See also, the November 8, 1988 Order in North.

FN43. The Rule provides that the court "may" strike surplusage.

FN44. See C. Wright, Federal Practice and Procedure: Criminal 2d § 127 at 426 (1982).

[39] First. Defendant requests that the Court strike from the indictment the terms "among other things," "among others," "among," "at least," "including," "included, but not limited to," "in part," and "various," the contention being that this language will lead the jury to speculate that defendant was guilty of or responsible for actions in addition to those charged in the indictment. The government points to the fact that Judge Gesell declined to strike this type of language in North, and that in several contexts its use is innocuous.

The Court does not agree. It indicated in United States v. Whitehorn, 710 F.Supp. 803, 819 (D.D.C.1989) that similar terms could improperly indicate to a jury that the defendants were charged with offenses and conduct in addition to those actually listed in the indictment, and on this basis it ordered them stricken. Similar reasoning and a similar result apply here. Accordingly, the Court hereby orders all such language stricken. [FN45]

FN45. Of course, as in Whitehorn, the government will not be precluded by this ruling from introducing relevant and material evidence tending to prove the conspiracy charged in Count One, and the manner and means by which it was to be achieved. See 710 F.Supp. at 819.

Second. Defendant claims that certain language in the indictment is needlessly inflammatory. However, with respect to most of the terms to which defendant objects, the language is necessary, neutrally descriptive, or both.

[40] For example, defendant objects to use of the term "lethal" in relation to supplies being shipped to the Contras. However, through much of the history of the relations between the United States and the Contras, a distinction has been made between lethal and humanitarian assistance, and there is no reason why those ***36** properly descriptive terms should be excluded from the indictment. [FN46]

FN46. Defendant's objection to the description of military supplies as consisting of "millions of rounds" and "hundreds of thousands of pounds," is likewise not well taken, since those were apparently the quantities involved, at least according to the government.

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[41] Similar reasoning causes the Court to deny defendant's objection to the terms "Enterprise," "divert," "diversion," and "clandestine." Indeed, the term "Enterprise," which defendant has particularly emphasized, is a fairly neutral description of the activities of the alleged conspirators. [FN47] Defendant contends to the contrary that the jury might relate the term to racketeering, on the basis that "the word 'enterprise' is a well-known term of art under the RICO statute." Defendant's Memorandum at 10. There may be a few dozen lawyers in this country to whom this "term of art" is well known and who will immediately think of RICO when the word "enterprise" is mentioned; to most individuals, if that term means anything other than a business, it more likely evokes a starship or a space shuttle.

FN47. In fact, one of the defendants, Secord, apparently used the term in that context before the Iran-contra congressional committee.

[42] However, the Court agrees with defendant that use of the term "cover up" is inflammatory, especially in the context of the kind of criminal activity that is at issue here. Further, inasmuch as the term is used in the indictment in tandem with the word "conceal," it is not necessary, and it is therefore hereby ordered to be stricken.

[43] Third. Insofar as defendant's category of "irrelevant descriptive recitals" are concerned, the Court will, once again, retain some terms and strike others. The references in Counts Two, Three, and Four to Poindexter's original co-defendants Secord and Hakim are relevant to the obstruction and false statement claims, and they will not be stricken. On the same basis, the Court will not require the elimination of references to press reports about shipments to Iran, as they are necessary to an understanding of the background of the congressional inquiries and the activities of the defendants with respect thereto. See United States v. Langella, 776 F.2d 1078, 1081 (2d Cir.1985).

[44] On the other hand, there is no valid reason for allegations in the indictment that Oliver North was discharged and that Poindexter resigned from their respective positions. Inclusion of these facts could be taken by the jury as objective indications of fault or of Reagan Administration determinations of fault; they are thus prejudicial without having any special relevance. These particular allegations are therefore ordered to be stricken.

[45] Fourth. Defendant contends that the references in the indictment to the Boland Amendment improperly suggest to the jury that he violated that statute, and that on this basis all such references should be stricken. The request is denied. It is defendant's theory that references to the Boland Amendment have relevance, if at all, only to his state of mind. Defendant's Memorandum at 15. That, however, is not a justified assumption. To be sure, "the defense contends" that this statute was inapplicable to the NSC staff and, according to defendant, the "evidence in this case will establish" that it was not intended to apply to that staff and could not constitutionally have been applied to that staff's activities. Defendant's Memorandum at 15 and n. 14. However, obviously the relevance of the Boland Amendment to this case is not to be measured by defendant's contentions alone.

The Boland Amendment restrictions were the focus of the congressional inquiries at issue here, as well as of defendant's allegedly false and misleading statements. [FN48] To eliminate from the indictment ***37** references to the Boland Amendment would be the equivalent of performing "Hamlet" without the Prince of Denmark. [FN49]

FN48. Defendant's claim is that this case is "virtually identical" to United States v. Mandel, 415 F.Supp. 997, 1008-09 (D.Md.1975), in that there, as here, the defense contended that certain subjects were inapplicable to the defendant. However, the Code of Ethics in Mandel was merely one of many possible indicia of an intent to deceive, and the Mandel decision questioned whether the prosecution would even be able to demonstrate the Code's relevance at trial. Because of the Boland Amendment's crucial position in the instant case, no such question exists here.

FN49. W. Scott, The Talisman, introduction.

Similar reasoning applies to defendant's request that the Court strike the background paragraphs in Count One--those that describe the relationship between the United States and Iran, the fact that hostages were held in Lebanon, the seizure of the American embassy in Iran, and the like. These

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paragraphs are not only not prejudicial but they are relevant in the sense that it would be difficult, if not impossible, for the jury to understand defendant's allegedly false statements and obstruction without that background. See United States v. Langella, supra.

As concerns, finally, the incorporation by reference in Counts Two through Five of the allegations in Count One regarding Secord and Hakim, Poindexter's co-defendants at the time the indictment was returned, here again, the activities of the Enterprise, of which these two defendants were allegedly members, were among the very subjects of the false statements and the obstruction with which Poindexter is charged. The request to strike them is therefore likewise denied.

VIII

Publicity, Department of Justice Policies, and Abuse of Grand Jury

The remaining motions require only relatively brief discussion.

A. Pretrial Publicity

[46] Defendant has moved to dismiss the indictment, or in the alternative, for a change of venue, because of prejudicial pretrial publicity.

As concerns the defense request for a dismissal, there does not appear to be a single precedent anywhere in the federal court system granting so drastic a remedy, no matter how widespread or prejudicial the publicity. [FN50] No reason has been advanced for establishing such a precedent here.

> FN50. United States v. Sweig, 316 F.Supp. 1148 (S.D.N.Y.1970), cited by defendant, merely suggested that dismissal might be warranted where prosecutorial misconduct contributed to prejudicial publicity that influenced a grand jury. Even that dicta however, was rejected by the Second Circuit. See United States v. Curcio, 712 F.2d 1532, 1544-45 (2d Cir.1983). Similarly, in Delaney v. United States, 199 F.2d 107 (1st Cir.1952), the other case relied on by defendant, the court upheld a trial judge's decision to deny a motion to dismiss, questioning whether a dismissal on account of prejudicial pretrial publicity would ever be appropriate. 199 F.2d at 111-12.

[47] Moreover, even a change of venue is not warranted, for several interrelated reasons.

In United States v. Haldeman, 559 F.2d 31, 60, 63-64 (D.C.Cir.1976), the Court of Appeals for this Circuit held that an appropriate voir dire of potential jurors was preferable to a transfer to another venue as a means for dealing with pretrial publicity. [FN51] At a time when this case was still joined with that of Oliver North, Judge Gesell denied a similar motion without prejudice, observing that "[e]xperience here again in this city with high profile cases engendering publicity such as Watergate ... strongly suggest that a completely impartial jury can be seated." United States v. North, 713 F.Supp. 1444 (D.D.C.1989). Following the voir dire, the Court reiterated that view, stating that it was "entirely satisfied that the jurors eventually selected are unbiased ...". North, 713 F.Supp. at 1445. The verdict in North--a conviction on some counts and an acquittal on most others--has validated that judgment.

> FN51. In that case, relied on by defendant, Memorandum at 16, it was the court's decision that the "District Court was correct to follow this circuit's well established procedure by refusing appellants' pre-voir dire requests for a continuance or a change of venue." 559 F.2d at 63-64 (citations omitted).

In the event, both in Watergate and in the North case, it was found possible to assemble an impartial jury notwithstanding publicity that was far more widespread than in the instant case.

***38** Moreover, what publicity there has been has not been especially prejudicial to Poindexter. This is not a case, such as one involving a rape, the large-scale distribution of drugs, murder under revolting circumstances, or the like, that causes widespread and near-unanimous revulsion against the accused. See Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). To the contrary. Media coverage and public opinion have been divided, with some regarding the Iran-contra defendants as deserving of public opprobrium while others consider them to be national heroes. [FN52] See,

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United States v. Moreno Morales, 815 F.2d 725, 736 (1st Cir.1987).

FN52. President Reagan himself expressed that view, widely reported in the press, with respect to Oliver North. Washington Post, March 26, 1989 at p. A1.

Defendant argues that the publicity that followed the verdict in the North case was damaging to him, in that Judge Gesell and others made comments that could be construed as referring to Oliver North's superiors as being as guilty as or more guilty than North. However, to the extent that there was such comment, it appears to have been directed not at this defendant but at President Reagan and others better known to the public than Poindexter. [FN53] In any event, just as the Court of Appeals found in Haldeman that the Watergate defendants received a fair trial notwithstanding widespread publicity, so can this defendant. [FN54]

FN53. To be sure, as defendant points out, one of the North jurors did refer to Poindexter by name. Washington Post, May 6, 1989 at p. A7. But that comment, and what publicity it received, was isolated. Indeed it is found in the thirty-third paragraph of a thirty-four paragraph article.

FN54. It is not apparent, in any event, what a change of venue would accomplish. The publicity regarding the Iran-contra affair, like that accompanying many "governmental," white collar criminal cases, and unlike those involving common law offenses, has been national rather than local.

B. Failure to Follow Department of Justice Policies

[48] There is likewise no merit to the motion to dismiss the indictment for failure to follow the policies of the Department of Justice. The very nature of the Independent Counsel's responsibilities suggests that it may not always be possible for him to follow those policies, [FN55] and it is for that very reason that the Independent Counsel statute explicitly provides that he is required to follow Department of Justice policies only "to the extent possible." See 28 U.S.C. § 594(f). [FN56] On this basis, defendant's contentions--that the Independent Counsel should have secured the permission of the Attorney General before prosecuting him as one who received a grant of immunity, or that he should have secured an Attorney General determination as to whether prosecution would lead to excessive disclosure of classified information [FN57]--border on the frivolous. The Independent Counsel, as the very name suggests, is to be independent of the Attorney General.

FN55. See also, North, Order of November 10, 1988 at 18 n. 1.

FN56. See also, S.Rep. No. 123, 100th Cong., 1st Sess. 24, reprinted in 1987 U.S.Code Cong. & Adm.News 2150, 2173.

FN57. As for defendant's related claim that his prosecution by the Independent Counsel risks the revelation of national secrets, the short answer is that it would be the intelligence agencies, not defendant, that would have cause for complaint. See Attorney General's Guidelines for Prosecutions Involving Classified Information at 7.

[49] Moreover, much of defendant's argument rests on alleged departures from guidelines set forth in the U.S. Attorney's Manual--a document that, by its own language, creates no rights in any party. U.S. Attorney's Manual § 1-1.00 (1984); United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir.1987); see also United States v. Caceres, 440 U.S. 741, 749-55, 99 S.Ct. 1465, 1470-73, 59 L.Ed.2d 733 (1979).

C. Prosecutorial Abuse of Grand Jury

There is no merit whatever to the claim that the Independent Counsel in several ways abused the grand jury process.

***39** [50] First. Defendant asserts that the Independent Counsel failed to present exculpatory evidence to the grand jury, and that this so tainted the process that the indictment should be dismissed. In the first place, it is the majority view in the federal courts that the prosecution has no duty to present exculpatory evidence to the grand jury. See generally, United States v. Ismaili, 828 F.2d 153, 165 n. 13 (3d Cir.1987). Furthermore, the only specific evidence cited in support of defendant's claim is the alleged failure of the Independent Counsel to present to the body President Reagan's response to written interrogatories. However, not

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only is it not established that the President's views would have been exculpatory, but his answers to the written interrogatories were, in fact, presented to the grand jury. North, 713 F.Supp. at 1450. Finally on this issue, the Court notes the Supreme Court's admonition in Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956) that a defendant has no right to "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

Second. Defendant asserts that the presence of Associate Independent Counsel before the grand jury was improper, in that section 594(c) of the Ethics in Government Act unconstitutionally empowers the Independent Counsel to appoint associates or other assistants. The Supreme Court held the Independent Counsel provisions of the Ethics in Government Act to be constitutional just last year in Morrison v. Olson, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)--a decision nowhere mentioned in defendant's papers. In another decision directly on point but not referred to by defendant--In re Sealed Case, 829 F.2d 50, 57-59 (D.C.Cir.1987)--the Court of Appeals for this Circuit specifically determined that Associate Independent Counsel may conduct grand jury investigations.

Third. The final claim of alleged prosecutorial misconduct are that the Independent Counsel, a former federal judge, was at times referred to before the grand jury as "Judge Walsh," and that he improperly expressed his appreciation to the grand jury and otherwise sought to create the impression that the grand jury and those presenting evidence to it were engaged in a joint enterprise. With respect to the first claim, Judge Gesell advised counsel in open court as long ago as June of last year that complete disclosure had been made to the grand jury of Mr. Walsh's nonjudicial status. North, 708 F.Supp. at 372. As concerns the second, the Court concludes that the statements quoted by defendant are so innocuous as to render inappropriately extravagant his call for the use of this Court's supervisory power to curb a "pattern of extensive prosecutorial misconduct." Defendant's Memorandum at 19. [FN58]

FN58. It should also be noted that, when this defendant's case was still before him, Judge Gesell reviewed the grand jury transcripts and found no evidence of abuse.

IX
Kastigar Issues

The parties' submissions are not sufficiently developed on various key points to permit the Court to render a decision at this time on the issues arising under Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), regarding the relationship between this prosecution and the immunity granted to Poindexter with respect to his testimony in Congress. [FN59] Accordingly, the Court will hold a non-evidentiary hearing on Kastigar issues on October 27, 1989, at 10:00 a.m. Among the issues to be discussed at that hearing will be the question of the right of the defendant to a dismissal on account of taint from immunized testimony, or to an evidentiary ***40** hearing with respect thereto, for the following four separate categories of persons: (1) grand jurors, (2) grand jury witnesses, (3) Independent Counsel attorneys, and (4) prospective trial witnesses.

FN59. For example, while the government's memorandum relies on various legal principles, it does not always make it clear how these principles apply to the facts of this case. Thus, the memorandum states (at p. 19) that the prosecution "may rely on the testimony of witnesses who have been exposed to immunized testimony," but it does not attempt to explicate the breadth of the exposure of the trial witnesses, the period when it occurred, or its impact on the witnesses' independent knowledge, if any.

With respect to witnesses, the parties are invited to address the subject both with respect to those whose names and the substance of their testimony were memorialized in sealed submissions to the Chief Judge of this Court or otherwise, prior to the taking of immunized testimony in Congress; and with respect to those whose names and testimony were not known or fixed before that testimony was taken. With respect to Independent Counsel attorneys, the parties are invited to distinguish between attorneys who were subjected to the procedures Mr. Walsh testified to before Judge Gesell in April 1988, and those who became involved in the Independent Counsel's Iran-contra effort after that time. The parties may also wish to discuss what type of pretrial evidentiary hearing, if any, would be appropriate or required. One hour will be allocated to each side.

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Trial Date

Upon consideration of the pretrial work that must still be done by the parties and the Court, as well as the tasks to be performed by the so-called Interagency Group with respect to the identification of classified materials in connection with the CIPA process, the Court is setting January 22, 1990 as the date for the start of the trial.

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FOIA # 57720 (URTS 16326) DocId: 70105306 Page 168

Paul M. BRANZBURG, Petitioner,
v.
John P. HAYES, Judge, etc., et al.
In the Matter of Paul PAPPAS, Petitioner.
UNITED STATES, Petitioner,
v.
Earl CALDWELL.

Nos. 70--85, 70--94, 70--57.

Argued Feb. 22, 23, 1972.
Decided June 29, 1972.

Certiorari was granted to review judgment of the United States Court of Appeals for the Ninth Circuit, 434 F.2d 1081, upholding refusal of newsman to appear and testify before grand jury with respect to confidential sources, and judgments of the Court of Appeals of Kentucky, at 461 S.W.2d 345 and in an unreported case, and the Supreme Judicial Court of Massachusetts, 358 Mass. 604, 266 N.E.2d 297, rejecting claimed rights of newsmen to refuse to testify before grand juries with respect to confidential sources. The Supreme Court, Mr. Justice White, held that requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment; and that a newsman's agreement to conceal criminal conduct of his news sources, or evidence thereof, does not give rise to any constitutional testimonial privilege with respect thereto.

Judgment at 434 F.2d 1081 reversed; judgments at 461 S.W.2d 345 and 266 N.E.2d 297, and in unreported Kentucky case, affirmed.

Mr. Justice Powell filed concurring opinion; Mr. Justice Douglas dissented and filed opinion, see 92 S.Ct. 2686; Mr. Justice Stewart dissented and filed opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

[1] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment. U.S.C.A.Const. Amend. 1.

[2] FEDERAL COURTS ⇦ 508
170Bk508
Constitutional claim to newsman's privilege was properly preserved for review by certiorari where it was presented to state court, though newsman in state court relied primarily upon state statute creating a newsman's privilege and though the state court considered that such reliance constituted abandonment of the constitutional claim and did not consider the latter claim. U.S.C.A.Const. Amend. 1; K.R.S. 421.100.

[3] GRAND JURY ⇦ 36.2
193k36.2
Formerly 193k36
News reporters have the same obligation as other citizens to respond to grand jury subpoenas and to answer questions relevant to an investigation into the commission of crime. U.S.C.A.Const. Amend. 1.

[4] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Neither the First Amendment nor any other constitutional provision protects citizens from disclosing to a grand jury information that they have received in confidence. U.S.C.A.Const. Amend. 1.

[4] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 410k196
Neither the First Amendment nor any other constitutional provision protects citizens from disclosing to a grand jury information that they have received in confidence. U.S.C.A.Const. Amend. 1.

[5] CONSTITUTIONAL LAW ⇦ 90(3)
92k90(3)
The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. U.S.C.A.Const. Amend. 1.

[6] CONSTITUTIONAL LAW ⇦ 90(3)
92k90(3)
The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. U.S.C.A.Const. Amend. 1.

[7] GRAND JURY ⇦ 26
193k26

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Grand jury has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

[8] CONSTITUTIONAL LAW ⇦ 265
92k265
Indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[9] GRAND JURY ⇦ 36.1
193k36.1
Formerly 193k36
The public has a right to every man's evidence before a grand jury except for those persons protected by a constitutional, common law, or statutory privilege.

[10] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Only where a reporter's news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.

[11] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
When a newsman is subpoenaed to testify before a grand jury, the First Amendment does not protect his agreement to conceal the criminal conduct of a news source, or evidence thereof. U.S.C.A.Const. Amend. 1.

[12] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Public interest in possible future news about crime from undisclosed, unverified sources does not take precedence over public interest in pursuing, by grand jury investigation, and prosecuting those crimes reported to the press by informants, and in thus deterring the commission of such crimes in the future. U.S.C.A.Const. Amend. 1.

[13] GRAND JURY ⇦ 25
193k25
The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

[14] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Any indirect burden on First Amendment rights imposed by calling newsmen to testify before a grand jury where it is likely that they can supply information to aid in determination of whether illegal conduct has occurred and whether there is sufficient evidence to return an indictment is justified by the fundamental governmental role of the grand jury in securing the safety of the person and property of the citizen by the investigation of crime; the governmental interest in such role is compelling and paramount and calling newsmen in such circumstances bears a reasonable relationship to the achievement of the governmental purpose. U.S.C.A.Const. Amend. 1.

[15] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
It is not necessary under the First Amendment that, before a newsman may be called to testify before a grand jury with respect to information obtained from confidential sources, it be shown that a crime has been committed and that the newsman possesses relevant information not available from other sources. U.S.C.A.Const. Amend. 1.

[16] CONSTITUTIONAL LAW ⇦ 90(2)
92k90(2)
Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals. U.S.C.A.Const. Amend. 1.

[17] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Grand juries must operate within the limits of the First Amendment as well as the Fifth and may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources. U.S.C.A.Const. Amends. 1, 5.

[17] GRAND JURY ⇦ 33
193k33
Grand juries must operate within the limits of the First Amendment as well as the Fifth and may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources. U.S.C.A.Const. Amends. 1, 5.

[18] CONSTITUTIONAL LAW ⇦ 90.1(3)

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92k90.1(3)
There is no First Amendment newsman's testimonial privilege, either qualified or absolute, arising from receipt of confidential information, to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. U.S.C.A.Const. Amend. 1.

[19] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Newsman had no constitutional privilege to refuse to appear before a grand jury until the government demonstrated some compelling need for his testimony. U.S.C.A.Const. Amend. 1.

[20] WITNESSES ⇦ 196.1
410k196.1
Formerly 410k196
Where newsman had observed violations of state narcotics laws, he had no privilege to refuse to answer questions that directly related to the criminal conduct. U.S.C.A.Const. Amend. 1; K.R.S. 218.010(14), 218.210.

[21] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Newsman had duty to appear before grand jury and answer questions put to him, subject to supervision of presiding judge as to the propriety, purposes and scope of the grand jury inquiry and of the pertinence of the probable testimony.

****2648 *665** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 2655--2670.

No. 70--85, 461 S.W.2d 345, and Kentucky Court of Appeals judgment in unreported ****2649** case of Branzburg v. Meigs; and No. 70--94, 358 Mass. 604, 266 N.E.2d 297, affirmed; No. 70--57, 434 F.2d 1081, reversed.

On Writ of Certiorari to the Court of Appeals of Kentucky.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Edgar A. Zingman, Louisville, Ky., for petitioner Paul M. Branzburg in No. 70--85; Robert C. Ewald, Louisville, Ky., on the briefs.

E. Barrett Prettyman, Jr., Washington, D.C., for petitioner, the Commonwealth of Mass. in No. 70--94; William H. Carey, New Bedford, Mass., on the briefs.

Solicitor Gen., Erwin Griswold for the United States in No. 70--57; David A. Wilson, Jr., Peterson, Asst. Attys. Gen., William Bradford Reynolds, Beatrice Rosenberg, and Sidney M. Glazer, Washington, D.C., on the briefs.

***666** Edwin A. Schroeting, Jr., Louisville, Ky., for respondents John P. Hayes and others in No. 70--85; W. C. Fisher, Jr., Louisville, Ky., on the brief.

Joseph J. Hurley, First Asst. Atty. Gen., for respondent, Commonwealth of Mass., in No. 70--94; Robert H. Quinn, Atty. Gen., Walter H. Mayo III, Asst. Atty. Gen., and Lawrence T. Bench, Deputy Asst. Atty. Gen., on the brief.

Anthony G. Amsterdam, Washington, D.C., for respondent Earl Caldwell in No. 70--57; Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, New York City, and William Bennett Turner, San Francisco, Cal., on the brief.

William Bradford Reynolds, Washington, D.C., for the United States as amicus curiae urging affirmance in Nos. 70--85 and 70--94; Sol. Gen.

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Erwin Griswold, Asst. Atty. Gen., David B. Wilson, Jr., and Beatrice Rosenberg, Washington, D.C., on the brief.

Briefs of amici curiae urging affirmance in No. 70--57 and reversal in Nos. 70--85 and 70--94 were filed by Alexander M. Bickel, New Haven, Conn., Lawrence J. McKay, Floyd Abrams, Daniel Sheehan, Corydon B. Dunham, Clarence Fried, Alan J. Hruska, New York City, Robert S. Rifkind, Washington, D.C., Anthony A. Dean, and Edward C. Wallace, New York City, for New York Times Co., Inc., and others; by Don H. Reuben, Lawrence Gunnels, Steven L. Bashwiner, and Thomas F. Ging., Chicago, Ill., for Chicago Tribune Co.; by Arthur B. Hanson, Washington, D.C., for American Newspaper Publishers Assn.; and by Irving Leuchter, Newark, N.J., for American Newspaper Guild, AFL-CIO, CLC.

John T. Corrigan, Cleveland, Ohio, filed a brief for the National District Attorneys Association urging reversal in No. 70--57 and affirmance in No. 70--94.

Briefs of amici cruiae urging affirmance in No. 70--57 were filed by Irwin Karp, New York City, for Authors League of America, Inc.; by W. Theodore Pierson and J. Laurent *667 Scharff, Washington, D.C., for Radio Television News Directors Assn.; and by Earle K. Moore and Samuel Rabinove, New York City, for Office of Communication of the United Church of Christ and others.

Briefs of amici curiae in No. 70--57 were filed by Leo P. Larkin, Jr., Stanley Godofsky, and John J. Sheehy, New York City, for Washington Post Co. and others; by Richard M. Schmidt, Jr., for American Society of Newspaper Editors and others; by Roger A. Clark, New York City, for National Press Photographers Assn.; and by Melvin L. Wulf, New York City, Paul N. Halvonik, San Francisco, Cal., A. L. Wirin, Fred Okrand and Lawrence R. Sperber, Los Angeles, Cal., for American Civil Liberties Union and others.

Opinion of the Court by Mr. Justice WHITE, announced by THE CHIEF JUSTICE.

[1] The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech **2650 and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70--85, Branzburg v. Hayes and Meigs, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to *668 reveal the identity of the two hashish makers. [FN1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana. [FN2] A state trial court judge [FN3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky.Rev.Stat. s 421.100 (1962), [FN4] the First Amendment of the United States Constitution, or ss 1, 2 and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. Branzburg v. *669 Pound, 461 S.W.2d 345 (1970), as modified on denial of rehearing, Jan. 22, 1971. It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky.Rev.Stat. s 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information, but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

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FN1. The article contained the following paragraph: "I don't know why I'm letting you do this story,' (one informant) said quietly. 'To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed.' App. 3--4.

FN2. The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: '#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On Novebmer 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?' App. 6.

FN3. Judge J. Miles Pound. The respondent in this case, Hon. John P. Hayes, is the successor of Judge Pound.

FN4. Ky.Rev.Stat. s 421.100 provides: 'No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.'

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Kentucky. The article reported that in order to provide a comprehensive survey of the 'drug scene' in Frankfort, petitioner had 'spent two weeks interviewing several dozen drug users in the capital city' and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury 'to testify in the matter of violation of statutes concerning **2651 use and sale of drugs,' petitioner Branzburg moved to quash the summons; [FN5] the motion was denied, although *670 an order was issued protecting Branzburg from revealing 'confidential associations, sources or information' but requiring that he 'answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by (him).' Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky.Rev.Stat. s 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished Caldwell v. United States, 434 F.2d 1081 (CA9 1970), and it also announced its 'misgivings' about that decision, asserting that it represented 'a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.' It characterized petitioner's fear that his ability to obtain *671 news would be destroyed as 'so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States.'

FN5. Petitioner's Motion to Quash argued: 'If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby vitally hampered in their ability to cover the views and activities of those involved in the drug culture. 'The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's apearance before the Grand Jury. It is insufficient merely to protect Mr.

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Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences.' App. 43--44.

[2] Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ. [FN6] 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109 (1971).

FN6. After the Kentucky Court of Appeals' decision in Branzburg v. Meigs was announced, petitioner filed a rehearing motion in Branzburg v. Pound suggesting that the court had not passed upon his First Amendment argument and calling to the court's attention the recent Ninth Circuit decision in Caldwell v. United States, 434 F.2d 1081 (1970). On Jan. 22, 1971, the court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S.W.2d 345, at 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky.Rev.Stat. s 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase 'source of any information' in Ky.Rev.Stat. s 421.100. The passage that the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows: 'Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature.' Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common-law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase 'source of any information' were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Kentucky Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in Branzburg v. Pound was properly preserved for review.

*672 In re Pappas, No. 70--94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3 p.m. **2652 [FN7] He then asked for and received permission to re-enter the area. Returning at about 9 o'clock, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid, which Pappas, 'on his own,' was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had occurred in the store while he was there. Two months later, petitioner was summoned before the Bristol *673 County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer

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any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the grand jury and 'to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth before . . . the Grand Jury.' His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts. [FN8] The record there did not include a transcript of the hearing **2653 on the motion to quash, nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury's securing the information it sought from petitioner by other means. [FN9] The *674 Supreme Judicial Court, however, took 'judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts.' 358 Mass. 604, 607, 266 N.E.2d 297, 299 (1971). The court then reaffirmed prior Massachusetts holdings that testimonial privileges were 'exceptional' and 'limited,' stating that '(t)he principle that the public 'has a right to every man's evidence" had usually been preferred, in the Commonwealth, to countervailing interests. Ibid. The court rejected the holding of the Ninth Circuit in Caldwell v. United States, supra, and 'adhere(d) to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.' [FN10] 358 Mass., at 612, 266 N.E.2d, at 302--303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only 'indirect, theoretical, and uncertain.' Id., at 612, 266 N.E.2d, at 302. The court concluded that '(t)he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries.' Id., at 612, 266 N.E.2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding *675 judge, who had the duty 'to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation,' ibid., to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress. [FN11] The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U.S. 942, 91 S.Ct. 1619, 29 L.Ed.2d 110 (1971).

FN7. Petitioner's news films of this event were made available to the Bristol County District Attorney. App. 4.

FN8. The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass.Gen.Laws, c. 278, s 30A and Mass.Gen.Laws, c. 231, s 111 (1959). The Supreme Judicial Court's decision appears at 358 Mass. 604, 266 N.E.2d 297 (1971).

FN9. 'We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what likelihood there is of being able to obtain that testimony from persons other than news gatherers.' 358 Mass., at 606--607, 266 N.E.2d, at 299 (footnote omitted).

FN10. The court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. Id., at 612 n. 10, 266 N.E.2d, at 303 n. 10.

FN11. The court noted that 'a presiding judge may consider in his discretion' the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work

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product, id., at 614 n. 13, 266 N.E.2d, at 304 n. 13, and cautioned that: 'We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge.' Id., at 614 n. 14, 266 N.E.2d, at 304 n. 14.

United States v. Caldwell, No. 70--57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena duces tecum was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities **2654 of that organization. [FN12] Respondent objected to the scope *676 of this subpoena, and an agreement between his counsel and the Government attorneys resulted in a continuance. A second subpoena, served on March 16, omitted the documentary requirement and simply ordered Caldwell 'to appear . . . to testify before the Grand Jury.' Respondent and his employer, the New York Times, [FN13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and 'suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants.' App. 7. Respondent argued that 'so drastic an incursion upon First Amendment freedoms' should not be permitted 'in the absence of a compelling governmental interest--not shown here--in requiring Mr. Caldwell's appearance before the grand jury.' Ibid. The motion was supported by amicus curiae memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S.C. s 871 (threats against the President), 18 U.S.C. *677 s 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. s 231 (civil disorders), 18 U.S.C. s 2101 (interstate travel to incite a riot), and 18 U.S.C. s 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that '(w)e will kill Richard Nixon' and that this threat had been repeated in three subsequent issues of the Party newspaper. App. 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that '(i)n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns,' and quoting the Chief of Staff of the Party as declaring that: 'We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle (sic).' App. 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U.S.C. s 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

FN12. The subpoena ordered production of '(n)otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel, and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt.' App. 20.

FN13. The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. Application of Caldwell, 311 F.Supp. 358, 359 (ND Cal. 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an amicus curiae brief, however.

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**2655 On April 6, the District Court denied the motion to quash, Application of Caldwell, 311 F.Supp. 358 (NDCal.1970), on the ground that 'every person within the jurisdiction of the government' is bound to testify upon being properly summoned. Id., at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent had to divulge *678 whatever information had been given to him for publication, he 'shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.' The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until there had been 'a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means.' Id., at 362.

Subsequently, [FN14] the term of the grand jury expired, a new grand jury was convened, and a new subpoena ad testificandum was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and, by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

FN14. Respondent appealed from the District Court's April 6 denial of his motion to quash on April 17, 1970, and the Government moved to dismiss that appeal on the ground that the order was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without opinion.

*679 Respondent Caldwell appealed the contempt order, [FN15] and the Court of Appeals reversed. Caldwell v. United States, 434 F.2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that, absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition for certiorari. [FN16] 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109 (1971).

FN15. The Government did not file a cross-appeal and did not challenge the validity of the District Court protective order in the Court of Appeals.

FN16. The petition presented a single question: 'Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles.'

II

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary **2656 to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless *680 forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter

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should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to overide the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, [FN17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is 'compelling' or 'paramount,' [FN18] and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact ***681** on protected rights of speech, press, or association. [FN19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information. [FN20]

FN17. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986, 18 L.Ed.2d 1094 (1967) (opinion of Harlan, J.); New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); Talley v. California, 362 U.S. 60, 64--65, 80 S.Ct. 536, 538--539, 4 L.Ed.2d 559 (1960); Bridges v. California, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941); Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936); Near v. Minnesota, 283 U.S. 697, 722, 51 S.Ct. 625, 633, 75 L.Ed. 1357 (1931).

FN18. NAACP v. Button, 371 U.S. 415, 439, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963); Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945); DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 829, 86 S.Ct. 1148, 1151, 16 L.Ed.2d 292 (1966); Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960); Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939); NAACP v. Alabama, 357 U.S. 449, 464, 78 S.Ct. 1163, 1173, 2 L.Ed.2d 1488 (1958).

FN19. Freedman v. Maryland, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965); NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed.2d 325 (1964); Martin v. City of Struthers, 319 U.S. 141, 147, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943); Elfbrandt v. Russell, 384 U.S. 11, 18, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321 (1966).

FN20. There has been a great deal of writing in recent years on the existence of a newsman's constitutional right of nondisclosure of confidential information. See, e.g., Beaver, The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence, 47 Ore.L.Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw.U.L.Rev. 18 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Comment, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif.L.Rev. 1198 (1970); Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand.L.Rev. 667 (1971).

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not quality for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions ****2657** upon speech or assemby, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from ***682** any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

[3][4] The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune

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from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. [FN21] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

> FN21. 'In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. '. . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.' 8 J. Wigmore, Evidence s 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confidence. See Bulstrod v. Letchmere, 2 Freem. 6, 22 Eng.Rep. 1019 (1676); Lord Grey's Trial, 9 How.St.Tr. 127 (1682).

[5] It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite ***683** the possible burden that may be imposed. The Court has emphasized that '(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB, 301 U.S. 103, 132--133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192--193, 66 S.Ct. 494, 497--498, 90 L.Ed. 614 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946). Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news-gathering and disseminating organization. Cf. Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 276, 55 S.Ct. 182, 184, 79 L.Ed. 356 (1934); Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969); Lorain Journal Co. v. United States, 342 U.S. 143, 155--156, 72 S.Ct. 181, 187--188, 96 L.Ed. 162 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. ****2658** 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, ***684** 279--280, 84 S.Ct. 710, 725--726, 11 L.Ed.2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147, 87 S.Ct. 1975, 1987, 18 L.Ed.2d 1094 (1967) (opinion of Harlan, J.,); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed.2d 35 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377--378, 67 S.Ct. 1249, 1255--1256, 91 L.Ed. 1546 (1947).

[6] It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Zemel v. Rusk, 381 U.S. 1, 16--17, 85 S.Ct. 1271, 1280--1281, 14 L.Ed.2d 179 (1965); New York Times Co. v. United States, 403 U.S. 713, 728--730, 91

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S.Ct. 2140, 2148--2149, 29 L.Ed.2d 822 (1971), (Stewart, J., concurring); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 885 (CA3 1958); In the Matter of United Press Assns. v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In Zemel v. Rusk, supra, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'render(ed) less than wholly free the flow of information concerning that country.' 381 U.S., at 16, 85 S.Ct., at 1281. The ban on travel was held constitutional, for '(t)he right to speak and publish does not carry with it the unrestrained right to gather information.' Id., at 17, 85 S.Ct., at 1281. [FN22]

FN22. 'There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.' 381 U.S., at 16--17, 85 S.Ct., at 1281.

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or ***685** disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' Id., at 358, 359, 86 S.Ct., at 1520. '(T)he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.' Id., at 361, 86 S.Ct., at 1521. See also Estes v. Texas, 381 U.S. 532, 539--540, 85 S.Ct. 1628, 1631--1632, 14 L.Ed.2d 543 (1965); Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a ****2659** criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, e.g., Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); Clein v. State, 52 So.2d 117 (Fla.1950); In re Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Adams v. Associated Press, 46 F.R.D. 439 (SD Tex. 1969); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D.C.Mass.1957). See generally Annot., 7 A.L.R.3d 591 (1966). In 1958, a news gatherer asserted for the first time that the First Amendment ***686** exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, Garland v. Torre, 259 F.2d 545 (CA2), cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then although there are occasional dicta that, in circumstances not presented here, a newsman might be excused. In re Goodfader, 45 Haw. 317, 367 P.2d 472 (1961); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. Buchanan, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905, 88 S.Ct. 2055, 20 L.Ed.2d 1363 (1968); Murphy v. Colorado (No. 19604 Sup.Ct.Colo.), cert. denied, 365 U.S. 843, 81 S.Ct. 802, 5 L.Ed.2d 810 (1961) (unreported, discussed in In re Goodfader, supra, 45 Haw., at 366, 367 P.2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses.

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The opinions of the state courts in Branzburg and Pappas are typical of the prevailing view, although a few recent cases, such as Caldwell, have recognized and given effect to some form of constitutional newsman's privilege. See State v. Knops, 49 Wis.2d 647, 183 N.W.2d 93 (1971) (dictum); Alioto v. Cowles Communications, Inc., C.A. No. 52150 (ND Cal.1969); In re Grand Jury Witnesses, 322 F.Supp. 573 (ND Cal.1970); People v. Dohrn, Crim.No. 69--3808 (Cook County, Ill., Cir.Ct.1970).

[7][8][9] The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded ***687** criminal prosecutions. [FN23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and 'its constitutional prerogatives are rooted in long centuries of Anglo-American history.' Hannah v. Larche, 363 U.S. 420, 489--490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960). (Frankfurter, J., concurring in result). The Fifth Amendment provides that '(n)o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' [FN24] The adoption ****2660** of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming ***688** majority of the States. [FN25] Because its task is to inquire into the Existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.' Blair v. United States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, id., at 279--281, 39 S.Ct., at 470--471, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950); Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375 (1932); 8 J. Wigmore, Evidence s 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings. [FN26]

FN23. 'Historically, (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.' Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962) (footnote omitted).

FN24. It has been held that 'infamous' punishments include confinement at hard labor, United States v. Moreland, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700 (1922): incarceration in a penitentiary, Mackin v. United States, 117 U.S. 348, 6 S.Ct. 777, 29 L.Ed. 909 (1886); and imprisonment for more than a year, Barkman v. Sanford, 162 F.2d 592 (CA5), cert. denied, 332 U.S. 816, 68 S.Ct. 155, 92 L.Ed. 393 (1947). Fed.Rule Crim.Proc. 7(a) has codified these holdings: 'An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.'

FN25. Although indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment, Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions he initiated by indictment. Spain, the Grand Jury, Past and Present: A Survey, 2

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Am.Crim.L.Q. 119, 126--142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. Ibid.

FN26. Jeremy Bentham vividly illustrated this maxim: '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. . . . 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 halfpennyworth 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.' 4 The Works of Jeremy Bentham 320--321 (J. Bowring ed. 1843). In United States v. Burr, 25 Fed.Cas. pp. 30, 34 (No. 14,692d) (C.C.Va.1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

***689** A number of States have provided newsmen a statutory pvivilege of varying breadth, [FN27] but the majority have not ****2661** done so, and none has been provided by federal statute. [FN28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution ***690** is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. [FN29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant ***691** questions put to them in the course of a valid grand jury investigation or criminal trial.

FN27. Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources: Ala.Code, Tit. 7, s 370 (1960); Alaska Stat. s 09.25.150 (Supp.1971); Ariz.Rev.Stat.Ann. s 12--2337 (Supp.1971--1972); Ark.Stat.Ann. s 43--917 (1964); Cal.Evid.Code s 1070 (Supp.1972); Ind.Ann.Stat. s 2--1733 (1968), IC 1971, 34--3--5--1; Ky.Rev.Stat. s 421.100 (1962); La.Rev.Stat.Ann. ss 45:1451--45:1454 (Supp.1972); Md.Ann.Code, art. 35, s 2 (1971); Mich.Comp.Laws s 767.5a (Supp.1956), Mich.Stat.Ann. s 28.945(1) (1954); Mont.Rev.Codes Ann. s 93--601--2 (1964); Nev.Rev.Stat. s 49.275 (1971); N.J.Rev.Stat. ss 2A:84A--21, 2A:84A--29 (Supp.1972--1973); N.M.Stat.Ann. s 20--1--12.1 (1970); N.Y.Civil Rights Laws, McKinney's Consol.Laws, c. 6, s 79--h (Supp.1971--1972); Ohio Rev.Code Ann. s 2739.12 (1954); Pa.Stat.Ann., Tit. 28, s 330 (Supp.1972--1973).

FN28. Such legislation has been introduced, however. See, e.g., S. 1311, 92d Cong., 1st Sess. (1971); S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, H.R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, H.R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Sentate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

FN29. The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as 'so many derogations from a positive general rule (that everyone is obligated to testify when properly summoned)' and as 'obstacle(s) to the administration of justice.' 8 J. Wigmore, Evidence s 2192 (McNaughton rev. 1961). His criticism that 'all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced,' id., at s 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, Foreward, Model Code of Evidence 22--30 (1942); 2 Z. Chafee, Government and Mass

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Communications 496--497 (1947); Report of ABA Committee on Improvements in the Law of Evidence, 63 A.B.A. Reports 595 (1938); C. McCormick, Evidence 159 (2d ed. 1972); Chafee, Privileged Communications: Is justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L.J. 607 (1943); Ladd, Privileges, 1969 Law & the Social Order 555, 556; 58 Am.Jur., Witnesses s 546 (1948); 97 C.J.S. Wtinesses s 259 (1957); McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (CA2 1937) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) has included a newsman's privilege.

[10] This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing **2662 information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert--and no one does in these cases--that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immume, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring *692 that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition

> 'Is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing.' Toledo Newspaper Co. v. United States, 247 U.S. 402, 419--420, 38 S.Ct. 560, 564, 62 L.Ed. 1186 (1918). [FN30]

FN30. The holding in this case involved a construction of the Contempt of Court Act of 1831, 4 Stat. 487, which permitted summary trial of contempts 'so near (to the court) as to obstruct the administration of justice.' The Court held that the Act required only that the conduct have a 'direct tendency to prevent and obstruct the discharge of judicial duty.' 247 U.S., at 419, 38 S.Ct., at 564. This view was overruled and the Act given a much narrower reading in Nye v. United States, 313 U.S. 33, 47--52, 61 S.Ct. 810, 815--817, 85 L.Ed. 1172 (1941). See Bloom v. Illinois, 391 U.S. 194, 205--206, 88 S.Ct. 1477, 1484--1485, 20 L.Ed.2d 522 (1968).

[11] Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are

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not.

*693 There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data **2663 indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, [FN31] but the evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and *694 to a great extent speculative. [FN32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees. [FN33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that *695 relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

FN31. Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash, which detail the experiences of such journalists after they have been subpoenaed. Appendix to No. 70--57, pp. 22--61.

FN32. Cf. e.g., the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, supra, n. 20. A number of editors of daily newspapers of varying circulation were asked the question, 'Excluding one-or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate.' Answers varied significantly, e.g., 'Virtually innumerable,' Tucson Daily Citizen (41,969 daily circ.), 'Too many to remember,' Los Angeles Herald-Examiner (718,221 daily circ.), 'Occasionally,' Denver Post (252,084 daily circ.), 'Rarely,' Cleveland Plain Dealer (370,499 daily circ.), 'Very rare, some politics,' Oregon Journal (146 403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

FN33. In his Press Subpoenas: An Empirical and legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 6--12, Prof. Vince Blasi discusses these methodological

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problems. Prof. Blasi's survey found that slightly more than half ot the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. Id., at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. Id., at 53.

[12] Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if **2664 they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, *696 it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. [FN34] Misprision of a felony--that is, the concealment of a felony 'which a man knows, but never assented to . . . (so as to become) either principal or accessory,' 4 W. Blackstone, Commentaries, *121, was often said to be a common-law crime. [FN35] The first Congress passed a statute, 1 Stat. 113, s 6, as amended, 35 Stat. 1114, s 146, 62 Stat. 684, which is still in effect, defining a federal crime of misprision:

FN34. See Statute of Westminster First, 3 Edw. 1, c. 9, p. 43 (1275); Statute of Westminster Second, 13 Edw. 1, c. 6, pp. 114--115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, s 8(1); 4 W. Blackstone, Commentaries *293--295; 2 W. Holdsworth, History of English Law 80--81, 101--102 (3d ed. 1927); 4 id., at 521--522.

FN35. See, e.g., Scrope's Case, referred to in 3 Coke's Institute 36; Rex v. Cowper, 5 Mod. 206, 87 Eng.Rep. 611 (1969); Proceedings under a Special Commission for the County of York, 31 How.St.Tr. 965, 969 (1813); Sykes v. Director of Public Prosecutions, (1961) 3 W.L.R. 371. But see Glazebrook, Misprision of Felony--Shadow or Phantom?, 8 Am.J.Legal Hist. 189 (1964). See also Act 5 & 6 Edw. 6, c. 11 (1552).

'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be (guilty of misprision).' 18 U.S.C. s 4. [FN36]

FN36. This statute has been contrued, however, to require both knowledge of a crime and some affirmative act of concealment or participation. Bratton v. United States, 73 F.2d 795 (CA10 1934); United States v. Farrar, 38 F.2d 515, 516 (Mass.), aff'd on other grounds, 281 U.S. 624, 50 S.Ct. 425, 74 L.Ed. 1078 (1930); United States v. Norman, 391 F.2d 212 (CA6), cert. denied, 390 U.S. 1014, 88 S.Ct. 1265, 20 L.Ed.2d 163 (1968); Lancey v. United States, 356 F.2d 407 (CA9), cert. denied, 385 U.S. 922, 87 S.Ct. 234, 17 L.Ed.2d 145 (1966). Cf. Marbury v. Brooks, 7 Wheat. 556, 575, 5 L.Ed. 522 (1822) (Marshall, C.J).

*697 It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First

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Amendment that they override all other public interests. As Mr. Justice Black declared in another context, '(f)reedom of the press from governmental **2665 interference under the First Amendment does not sanction repression of that freedom by private interests.' Associated Press v. United States, 326 U.S., at 20, 65 S.Ct., at 1425.

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed *698 law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

> '(t)he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. Roviaro v. United States, supra, at 60--61, 62, 77 S.Ct. at 627--628, 629; McCray v. Illinois, 386 U.S. 300, 310, 87 S.Ct. 1056, 1062, 18 L.Ed.2d 62 (1967); Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968); Alford v. United States, 282 U.S. 687, 693, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection *699 for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press. [FN37]

> FN37. Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, e.g., Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36--37; G. Bird & F. Merwin, The Press and Society 592 (1971). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md.Ann.Code Art. 35, s 2 (1971).

It is said that currently press subpoenas have multiplied, [FN38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching **2666 interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

> FN38. A list of recent subpoenas to the news media is contained in the appendix to the brief of amicus New York Times in No. 70--57.

[13] The argument for such a constitutional privilege rests heavily on those cases holding that

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the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19, supra. We do not deal, however, with a governmental institution that has abused ***700** its proper function, as a legislative committee does when it 'expose(s) for the sake of exposure.' Watkins v. United States, 354 U.S. 178, 200, 77 S.Ct. 1173, 1185, 1 L.Ed.2d 1273 (1957). Nothing in the record indicates that these grand juries were 'prob(ing) at will and without relation to existing need.' DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 829, 86 S.Ct. 1148, 1151, 16 L.Ed.2d 292 (1966). Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed, cf. NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed.Rule CrimProc. 6(e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. Costello v. United States, 350 U.S. 359, at 364, 76 S.Ct. 406, at 409, 100 L.Ed. 397 (1956).

[14] The requirements of those cases, see n. 18, supra, which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' Bates v. Little Rock, supra, 361 U.S. at 525, 80 S.Ct. at 417. If the test is that the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,' Gibson v. Florida Legislative Investigation Committee, ***701** 372 U.S. 539, 546, 83 S.Ct. 889, 894, 9 L.Ed.2d 929 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others--because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

[15] Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of offective law enforcement necessarily includes an investigatory function with respect to determining ****2667** whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' Wood v. Georgia, 370 U.S. 375, 392, 82 S.Ct. 1364, 1374, 8 L.Ed.2d 569 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v. Stone, 249 F.2d 138, 140 (C.A.2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. Costello v. United States, 350 U.S., at 362, 76 S.Ct., at 408. It is ***702** only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

> 'It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted.' Hale v. Henkel, 201 U.S. 43, 65, 26 S.Ct. 370, 375, 50 L.Ed. 652 (1906).

See also Hendricks v. United States, 223 U.S. 178,

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32 S.Ct. 313, 56 L.Ed. 394 (1912); Blair v. United States, 250 U.S., at 282--283, 39 S.Ct., at 471, 63 L.Ed. 979. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. [FN39] For ****2668** them, it would appear that only an absolute privilege would suffice.

> FN39. 'Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege.' Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 341 (1970). In re Grand Jury Witnesses, 322 F.Supp. 573 (ND Cal.1970), illustrates the impact of this ad hoc approach. Here, the grand jury was, as in Caldwell, investigating the Black Panther Party, and was 'inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U.S.C. s 1751), to free him from threats (18 U.S.C. s 871), to protect our armed forces from unlawful interference (18 U.S.C. s 2387), conspiracy to commit the foregoing offenses (18 U.S.C. s 371), and related statutes prohibiting acts directed against the security of the government.' Id., at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalist's privilege. The District Court entered a protective order, allowing them to refuse to divulge confidential information until the the Government demonstrated 'a compelling and overriding national interest in requiring the testimony of (the witnesses) which cannot be served by any alternative means.' Id., at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts that the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify: 'The whole point of the investigation is to identify persons known to the (witnesses) who may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged unlawful activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court." Id., at 577. Another illustration is provided by State v. Knops, 49 Wis.2d 647, 183 N.W.2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an 'underground' newspaper, the Madison Kaleidoscope, printed a front-page story entitled 'The Bombers Tell Why and What Next--Exclusive to Kaleidoscope.' An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: '(Appellant) faces five very narrow and specific questions, all of which are founded on

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information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks.' 49 Wis.2d, at 658, 183 N.W.2d, at 98--99.

***703** [16] We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege ***704** would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. In re Grand Jury Witnesses, 322 F.Supp. 573, 574 (ND Cal.1970). Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' Lovell v. City of Griffin, 303 U.S. 444, 450, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). See also Mills ***705** v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); Murdock v. Pennsylvania, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury. [FN40]

FN40. Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. New York Times Co. v. Sullivan, 376 U.S. 254, at 269--270, 84 S.Ct. 710, at 720--721, 11 L.Ed.2d 686; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 689, 79 S.Ct. 1362, 1365, 3 L.Ed.2d 1512 (1959); Winters v. New York 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948); Thomas v. Collins, 323 U.S. 516, at 537, 65 S.Ct. 315, at 326, 89 L.Ed. 430. By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

****2669** In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in ***706** distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving

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state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true--that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries--prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection *707 with subpoenaing members of the press to testify before grand juries or at criminal trials. [FN41] These rules are a major step in the direction the reporters **2670 herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

FN41. The Guidelines for Subpoenas to the News Media were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that: 'The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice' and that: 'The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.' The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is 'sufficient reason to believe that the information sought (from the journalist) is essential to a successful investigation,' and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in 'emergencies and other unusual situations,' subpoenas may be issued which do not exactly conform to the Guidelines.

[17] Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. [FN42] Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship *708 with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

FN42. Cf. Younger v. Harris, 401 U.S. 37, 49, 53--54, 91 S.Ct. 746, 753, 754--755, 27 L.Ed.2d 669 (1971).

III

[18][19] We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in United States v. Caldwell, No. 70--57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is a fortiori true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some 'compelling need' for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

[20] The decisions in No. 70--85, Branzburg v. Hayes and Branzburg v. Meigs, must be affirmed. Here, petitioner refused to answer questions that

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directly related to criminal conduct that he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute, Ky.Rev.Stat. s 218.010(14) (1962), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky.Rev.Stat. s 218.210 (1962). It held that petitioner 'saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish,' in Branzburg v. Pound, 461 S.W.2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story that forms the basis of the subpoena in Branzburg v. Meigs. In both cases, if what petitioner wrote was true, *709 he had direct information to provide the grand jury concerning the ommission of serious crimes.

[21] The only question presented at the present time in In re Pappas, No. 70--94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as 'meager,' and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to 'the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony.' 358 Mass., at 614, 266 N.E.2d, at 303--304.

So ordered.

Judgment at 434 F.2d 1081 reversed; judgments at 461 S.W.2d 345 and 266 N.E.2d 297 affirmed.

**2671 Mr. Justice POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice STEWART's dissenting opinion, that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.' The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media--properly free and untrammeled in the fullest sense of these terms--were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will *710 be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [FN*]

FN* It is to be remembered tha tCaldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a 'balancing' of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court--when called upon to protect a newsman from improper or prejudicial questioning--would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting

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> opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

***725** Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While Mr. Justice POWELL'S enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the ****2672** long run, harm rather than help the administration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's ***726** protection of a free press, Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660; New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, [FN1] because the guarantee is 'not for the benefit of the press so much as for the benefit of all of us.' Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456. [FN2]

FN1. We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press. See, e.g., Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278; Smith v. California, 361 U.S. 147, 153, 80 S.Ct. 215, 218, 4 L.Ed.2d 205.

FN2. As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants. 'The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationship. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by trong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.' Note, 80 Yale L.J. 317, 343 (1970) (footnotes omitted) (hereinafter Yale Note).

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, [FN3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment *727 by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . ..' Estes v. Texas, 381 U.S. 532, 539, 85 S.Ct. 1628, 1631, 14

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L.Ed.2d 543; Mills v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484; Grosjean, supra, 297 U.S. at 250, 56 S.Ct. at 449. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

FN3. See generally Z. Chafee, Free Speech in the United States (1941); A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. Grosjean, supra, at 250, 56 S.Ct. at 449; New York Times, supra, 376 U.S. at 270, 84 S.Ct. at 720.

A corollary of the right to publish must be the right to gather news. The **2673 full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, a right to distribute information, see, e.g., Lovell v. Griffin, 303 U.S., 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Grosjean, supra, and a right to receive printed matter, Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398.

*728 No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179. [FN4] Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971). As Madison wrote: 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.' 9 Writings of James Madison 103 (G. Hunt ed. 1910).

FN4. In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the 'weightiest considerations of national security' and we concluded that the 'right to speak and publish does not carry with it the unrestrained right to gather information.' Id., at 16--17, 85 S.Ct. at 1281 (emphasis supplied). The necessary implication is that some right to gather information does exist.

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality--the promise or understanding that names or certain aspects of communications will be kept off the record--is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power--the absence of a constitutional right protecting, in any way, a confidential relationship from compulsary process--will either deter sources from divulging information or deter reporters from gathering and publishing information.

*729 It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called 'news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of 'newsmakers.' [FN5]

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FN5. In Caldwell v. United States, 434 F.2d 1081, the Government claimed that Caldwell did not have to maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But, as the Court of Appeals for the Ninth Circuit correctly observed: '(I)t is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view. 'The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.' Citing Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013; Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093. Id., at 1084--1085.

****2674** It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox ***730** views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. Talley v. California, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559; Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488. [FN6]

FN6. As we observed in Talley v. California, 362 U.S 60, 80 S.Ct. 536, 4 L.Ed.2d 559, 'Anonymous pamphlets, leaflets, brochures and even books have played an important rule in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.' Id., at 64--65, 80 S.Ct., at 538. And in Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398, we recognized the importance to First Amendment values of the right to receive information anonymously.

In Caldwell, the District Court found that 'confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news.' [FN7] Commentators and individual reporters have repeatedly noted the importance of confidentiality. [FN8] ***731** And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news gathering. [FN9]

FN7. Application of Caldwell, 311 F.Supp. 358, 361.

FN8. See, e.g., F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74--75 (1969); H. Klurfeld, Behind the Lines: The World of Drew Pearson 50, 52--55 (1968); A. Krock, Memoris: Sixty Years on the Firing Line 181, 184--185 (1968); E. Larsen, First with the Truth 22--23 (1968); R. Ottley, The Lonely Warrior--The Life and Times of Robert S. Abbott 143--145 (1955); C. Sulzberger, A Long Row of Candles; Memoirs and Diaries 241 (1969). As Walter Cronkite, a network television reporter, said in an affidavit in Caldwel: 'In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events.' App. 52.

FN9. See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources,

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64 Nw.U.L.Rev. 18 (1969); V. Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20--29 (hereinafter Blasi).

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship.' Smith v. California, 361 U.S. 147, 149--154, 80 S.Ct. 215, 216--219, 4 L.Ed.2d 205; New York Times Co. v. Sullivan, 376 U.S., at 279, 84 S.Ct., at 725. The uncertainty arises, of course, because the **2675 judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965). See also Part II, infra.

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a *732 subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [FN10] and impairing his resourcefulness as a reporter if he discloses confidential information. [FN11]

FN10. The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: '(N)ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies.' G. Bird & F. Merwin, The Press and Society 592 (1971).

FN11. Obviously, if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36--37.

Again, the commonsense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in Caldwell. [FN12] Individual reporters [FN13] and commentators [FN14] have noted such effects. Surveys have verified that an unbridled subpoena power will substantially *733 impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting. [FN15] And the Justice Department has recognized that 'compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment right.' [FN16] No evidence **2676 contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioner in Caldwell or by the respondents in Branzburg and Pappas.

FN12. The court found that 'compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news.' Application of Caldwell, 311 F.Supp., at 361.

FN13. See n. 8, supra.

FN14. Recent commentary is nearly unanimous in urging either an absolute or qualified newsman's privilege. See, e.g., Goldstein, Newsmen and Their Confidential Sources, New Republic, Mar. 21, 1970, pp. 13--14; Yale Note, supra, n. 2; Comment, 46 N.Y.U.L.Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand.L.Rev. 667 (1971); Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971); Comment, 4 U.Mich.J.L.Ref. 85 (1970); Comment, 6 Harv.Civ.Rights-Civ.Lib.L.Rev. 119

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(1970); Comment, The Newsman's Privilege; Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif.L.Rev. 1198 (1970). But see the Court's opinion, ante, at 2660 n. 29. And see generally articles collected in Yale Note, supra, n. 2. Recent decisions are in conflict both as to the importance of the deterrent effects and, a fortiori, as to the existence of a constitutional right to a confidential reporter-source. relationship. See the Court's opinion, ante, at 2658--2659, and cases collected in Yale Note, at 318 nn. 6--7.

FN15. See Blasi 6--71; Guest & Stanzler, supra, n. 9, at 43--50.

FN16. Department of Justice Memo. No. 692 (Sept. 2, 1970).

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationship do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or ***734** impairment of First Amendment activity), and (2) whether the effect would occur with some regularity, i.e., would not be de minimis. See, e.g., Grosjean v. American Press Co., 297 U.S., at 244--245, 56 S.Ct., at 446--447; Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098; Sweezy v. New Hampshire, 354 U.S. 234, 248, 77 S.Ct. 1203, 1210, 1 L.Ed.2d 1311 (plurality opinion); NAACP v. Alabama, 357 U.S., at 461--466, 78 S.Ct., at 1171--1174; Smith v. California, 361 U.S., at 150--154, 80 S.Ct., at 217--219; Bates v. City of Little Rock, 361 U.S., at 523--524, 80 S.Ct., at 416--417; Talley v. California, 362 U.S., at 64--65, 80 S.Ct., at 538--539; Shelton v. Tucker, 364 U.S. 479, 485--486, 81 S.Ct. 247, 250--251, 5 L.Ed.2d 231; Cramp v. Board of Public Instructions, 368 U.S. 278, 286, 82 S.Ct. 275, 280, 7 L.Ed.2d 285; NAACP v. Button, 371 U.S. 415, 431--438, 83 S.Ct. 328, 337--341, 9 L.Ed.2d 405; Gibson v. Florida Legislation Investigation Committee, 372 U.S. 539, 555--557, 83 S.Ct. 889, 898--899, 9 L.Ed.2d 929; New York Times Co. v. Sullivan, 376 U.S., at 277--278, 84 S.Ct., at 724--725; Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649; DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; Elfbrandt v. Russell, 384 U.S. 11, 16--19, 86 S.Ct. 1238, 1240--1242, 16 L.Ed.2d 321. And, in making this determination, we have shown a special solicitude towards the 'indispensable liberties' protected by the First Amendment, NAACP v. Alabama, supra, 357 U.S., at 461, 78 S.Ct. at 1171; Bantam Books, inc. v. Sullivan, ,372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584, for '(f)reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' Bates, supra, 361 U.S., at 523, 80 S.Ct., at 416. [FN17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether ***735** there is an unconstitutional infringement of First Amendment freedoms.

FN17. although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws, or nondiscriminatory taxation, ante, at 2657, these decisions were concerned 'only with restraints on certain business or commercial practices' of the press. Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148. And due weight was given to First Amendment interests. For example, 'The First Amendment, far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary.' Associated Press v. United States, 326 U.S., at 20, 65 S.Ct., at 1424.

For example, in NAACP v. Alabama, supra, we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP 'is

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likely to affect **2677 adversely the ability (of the NAACP) and its members to pursue their . . . beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.' Id., at 462--463, 78 S.Ct., at 1172. In Talley, supra, we held invalid a city ordinance that forbade circulation of any handbill that did not have the distributor's name on it, for there was 'no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.' Id., 362 U.S., at 64, 80 S.Ct., at 538. And in Burstyn, Inc., supra, we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. Id., 343 U.S., at 503, 72 S.Ct., at 781.

Surely the analogous claim of deterrence here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim 'speculative.' See ante, at 2662. The deterrence may not occur in every confidential relationship between a reporter and his source. [FN18] But it will certainly *736 occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

FN18. The fact that some informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not always be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large compared to the total 'universe' of potential informants, there will remain a large number of people in 'absolute' terms who will be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal--and therefore unattainable--imprimatur from empirical studies. [FN19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships. [FN20]

FN19. Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

FN20. See, e.g., the uncontradicted evidence presented in affidavits from newsmen in Caldwell, Appendix to No. 70--57, pp. 22--61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble, Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer *737 justice fairly and effectively. The grand jury serves two important functions: 'to examine into the commission of crimes' and 'to stand between the prosecutor and the accused, and to **2678 determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.' Hale v. Henkel, 201 U.S. 43, 59, 26 S.Ct. 370, 373, 50 L.Ed. 652. And to perform these functions the grand jury must have available to it every man's relevant evidence. See Blair v. United States, 250 U.S 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979; Blackmer v. United States, 284

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U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, [FN21] the Fourth Amendment, [FN22] and the evidentiary privileges of the common law. [FN23] So it was that in Blair, supra, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that 'some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.' Id., 250 U.S. at 281, 39 S.Ct. at 471 (emphasis supplied). And in United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 844, the Court observed that any exemption from the duty to testify before the grand jury 'presupposes a very real interest to be protected.' Id., at 332, 70 S.Ct. at 731.

FN21. See Blau v. United States, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170; Quinn v. United States, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964; Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

FN22. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

FN23. See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence ss 2290--2391 (McNaughton rev. 1961).

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the *738 newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the news-gathering relationship. [FN24] Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S.Ct., at 721.

FN24. Although there is a longstanding presumption against creation of common-law testimonial privileges, United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884, these privileges are grounded in an 'individual interest which has been found . . . to outweigh the public interest in the search for truth' rather than in the broad public concerns that inform the First Amendment. Id., at 331, 70 S.Ct., at 730.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their 'delicate and vulnerable' nature, NAACP v. Button, 371 U.S., at 433, 83 S.Ct., at 338, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association. [FN25] In no previous case have **2679 we considered the extent to which the First Amendment limits the grand jury subpoena power. But the *739 Court has said that '(t)he Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press . . . or political belief and association be abridged.' Watkins v. United States, 354 U.S. 178, 188, 77 S.Ct. 1173, 1179, 1 L.Ed.2d 1273. And in Sweezy v. New Hampshire, it was stated: 'It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.' 354 U.S., at 245, 77 S.Ct., at 1209 (plurality opinion).

FN25. The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving

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police informers, see Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639; United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684; Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723; McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62, and military and state secrets, United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727.

The established method of 'carefully' circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have 'consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 341. And 'it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' Gibson v. Florida Legislative Investigation Committee, 372 U.S., at 546, 83 S.Ct., at 894 (emphasis supplied). See also DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Sweezy, supra; Watkins, supra.

Thus, when an investigation impinges on First Amendment rights, the government must not only show that *740 the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. Watkins, supra; Sweezy, supra. [FN26] They must demonstrate that it is reasonable to think the witness in question has that information. Sweezy, supra; Gibson, supra. [FN27] And they must **2680 show that there is not any means of obtaining the information less destructive of First Amendment liberties. Shelton v. Tucker, 364 U.S., at 488, 81 S.Ct., at 252; Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296--297, 81 S.Ct. 1333, 1335--1336, 6 L.Ed.2d 301. [FN28]

FN26. As we said in Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273, '(W)hen First Amendment rights are threatened, the delegation of power to the (legislative) committee must be clearly revealed in its charter.' 'It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.' Id., at 198, 201, 77 S.Ct., at 1186.

FN27. We noted in Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311: 'The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. There was nothing to connect the questioning of petitioner with this fundamental interest of the State.' Id., at 251, 77 S.Ct. at 1212 (emphasis supplied).

FN28. See generally Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

These requirements, which we have recognized in decisions involving legislative and executive investigations, serve established policies reflected in numerous First *741 Amendment decisions arising in other contexts. The requirements militate against vague investigations that, like vague laws, create uncertainty and needlessly discourage First Amendment activity. [FN29] They also insure that a legitimate governmental purpose will not be pursued by means that 'broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton, supra, 364 U.S. at 488, 81 S.Ct. at 252. [FN30] As we said in Gibson, supra, 'Of course, a legislative investigation--as any investigation--must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and

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severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights.' 372 U.S., at 557, 83 S.Ct., at 899.

FN29. See Watkins, supra, 354 U.S. at 208--209, 77 S.Ct. at 1189--1190. See generally Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460; Ashton v. Kentucky, 384 U.S. 195, 200--201, 86 S.Ct. 1407, 1410--1411, 16 L.Ed.2d 469; Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22; Smith v. California, 361 U.S., at 150--152, 80 S.Ct., at 217--218; Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Stromberg v. California, 283 U.S., at 369, 51 S.Ct., at 535. See also Note, The Chilling Effect in Constitutional Law, 69 Col.L.Rev. 808 (1969).

FN30. See generally Zwickler v. Koota, 389 U.S. 241, 249--250, 88 S.Ct. 391, 396--397, 19 L.Ed.2d 444; and cases cited therein; Coates v. Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214; Cantwell v. Connecticut, 310 U.S. 296, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213; De Jonge v. Oregon, 299 U.S., at 364--365, 57 S.Ct., at 259--260; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155; Cox v. Louisiana, 379 U.S. 559, 562--564, 85 S.Ct. 476, 479--481, 13 L.Ed.2d 487. Cf. NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405. See also Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970).

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see e.g., United States v. Rumely, ***742** 345 U.S. 41, 43, 73 S.Ct. 543, 544, 97 L.Ed. 770; Barenblatt v. United States, 360 U.S. 109, 111--112, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115, for the 'power of the Congress to conduct investigations is inherent . . . (encompassing) surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.' Watkins, supra, 354 U.S., at 187, 77 S.Ct., at 1179. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth that legislative ****2681** investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see e.g., Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771; Hendricks v. United States, 223 U.S. 178, 184, 32 S.Ct. 313, 316, 56 L.Ed. 394; United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546, and since standards of materiality and relevance are greatly relaxed. Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv.L.Rev. 590, 591--592 (1961). [FN31] For, as the United States notes in its brief in Caldwell, the ***743** grand jury 'need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless.'

FN31. In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. Carter v. United States, 9 Cir., 417 F.2d 384, cert. denied, 399 U.S. 935, 90 S.Ct. 2253, 26 L.Ed.2d 807. Nor is counsel permitted to be present to aid a witness. See In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376. See generally Younger, The Grand Jury Under Attack, pt. 3, 46 J.Crim.L.C. & P.S. 214 (1955); Recent Cases, 104 U.Pa.L.Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N.C.L.Rev. 290 (1959); Whyte, Is the Grand Jury Necessary, 45 Va.L.Rev. 461 (1959); Note, 2 Col.J.Law & Soc.Prob. 47, 58 (1966); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965); Orfield, The Federal Grand Jury, 22 F.R.D. 343.

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is

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probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; [FN32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. [FN33]

FN32. The standard of proof employed by most grand juries, federal and State, is simply 'probable cause' to believe that the accused has committed a crime. See Note, 1963 Wash.U.L.Q. 102; L. Hall et al., Modern Criminal Procedure 793--794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. Cf. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397; Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98.

FN33. Cf. Garland v. Torre, 259 F.2d 545. The Court of Appeals for the Second Circuit declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: 'It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked . . . went to the heart of the plaintiff's claim.' Id., at 549--550 (citations omitted).

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

*744 B

The crux of the Court's rejection of any newsman's privilege is its observation that only 'where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.' See ante, at 2661 (emphasis **2682 supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those 'confidential informants involved in actual criminal conduct' and those having 'information suggesting illegal conduct by others.' See ante, at 2661, 2662. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law. [FN34]

FN34. If this requirement is not met, then the government will basically be allowed to undertake a 'fishing expedition' at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful 'probable cause' requirement. See ante, at 2666--2667. As the Court states, a grand jury investigation 'may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.' Ante, at 2666. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify. The Court fails to recognize that under the guise of 'investigating crime' vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings, affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

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*745 Similarly, a reporter may have information from a confidential source that is 'related' to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the 'probable cause' and 'alternative means' requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, infra. [FN35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, *746 is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases. [FN36]

FN35. We need not, therefore, reach the question of whether government's interest in these cases is 'overriding and compelling.' I do not, however, believe, as the Court does, that all grand jury investigations automatically would override the newsman's testimonial privilege.

FN36. The disclaimers in Mr. Justice POWELL'S concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

**2683 The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great 'breathing space.' NAACP v. Button, 371 U.S., at 433, 83 S.Ct., at 338.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of a District Court that the grand *747 jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests 'until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means.' Caldwell v. United States, 434 F.2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the 'subject, direction or scope of the Grand Jury inquiry.' Id., at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the United States has not met the burden that I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18 U.S.C. s 871 (threats against the President), 18 U.S.C. s 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. s 231 (civil disorders), 18 U.S.C. s 2101 (interstate travel to incite a riot), 18 U.S.C. s 1341 (mail fraud and swindles) and other crimes that were not specified. But, with one exception, there has

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been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes. [FN37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U.S.C. s 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See In re National Window Glass Workers, D.C. 287 F. 219; United *748 States v. Dardi, 2 Cir., 330 F.2d 316, 336. [FN38] Furthermore, **2684 the record before us does not show that Caldwell probably had any information about the violation of any other federal criminal laws, [FN39] or that alternative *749 means of obtaining the desired information were pursued. [FN40]

FN37. See Blasi 61 et seq.

FN38. After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to 'set forth facts indicating the general nature of the grand jury's investigation (and) witness Earl Caldwell's possession of information relevant to this general inquiry.' In detailing the basis for the belief that a crime had probably been committed, the Government simply asserted that certain actions had previously been taken by other grand juries, and by Government counsel, with respect to certain members of the Black Panther Party (i.e., immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, the Black Panther, for which Hilliard had been indicted before Caldwell was subpoenaed.

FN39. In its affidavits, the Government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and Dec. 14). On Dec. 14, 1969, Caldwell wrote: "We are special,' Mr. Hilliard said recently 'We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.' 'In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns. 'Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles.' App. in No. 70--57, p. 13. In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicate that he probably had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an indictment had already been brought in that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs--beliefs that were readily available to the Government through other sources, like the party newspaper.

FN40. The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

In the Caldwell case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. Caldwell v. United States, 434 F.2d, at 1088. On the particular facts before it, [FN41] the court **2685 concluded that the very *750 appearance by Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public: [FN42]

FN41. In an affidavit filed with the District Court, Caldwell stated: 'I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months . . . they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive. I found that not only were the party leaders available for in-depth interviews

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but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership. 'As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country. 'The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' or 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman.' The Government did not contradict this affidavit.

FN42. 'Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences . . .. The Government characterizes this anticipated loss of communication as Black Panther reprisal . . . But it is not an extortionate threat we face. It is human reaction as reasonable to expect as that a client will leave his lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion.' Caldwell v. United States, 434 F.2d, at 1088.

'Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true--and the Government apparently has not believed it necessary to dispute it--appellant's response to the subpoena would be a barren performance-- *751 one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.
'If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here.' Id., at 1089.

I think this ruling was also correct in light of the particularized circumstances of the Caldwell case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his news-gathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles. [FN43] Since the United States has not attempted to *752 refute this assertion, the appearance of Caldwell would, on these facts, indeed be a 'barren performance.' But this aspect of **2686 the Caldwell judgment I would confine to its own facts.

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As the Court of Appeals appropriately observed: '(T) he rule of this case is a narrow one. . . .' Caldwell, supra, at 1090.

FN43. Caldwell stated in his affidavit filed with the District Court, see n. 40, supra: 'It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published.'

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70--57, United States v. Caldwell. [FN44] In the other two cases before us, No. 70--85, Branzburg v. Hayes and Meigs, and No. 70--94, In re Pappas, I would vacate the judgments and remand the cases for further proceedings not inconsitent with the views I have expressed in this opinion.

FN44. The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden that, I think, protection of First Amendment rights requires.

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John S. ATLEE et al.
v.
Richard M. NIXON, Individually and as President of the United States, Melvin Laird, Individually and as Secretary of the Department of Defense.

Civ. A. No. 71-2324.

United States District Court,
E. D. Pennsylvania.

Jan. 20, 1972.

Suit wherein it was alleged that prosecution of war in Southeast Asia violated various provisions of Federal Constitution, treaties of United States and doctrines of international law. On "suggestion," of United States attorney, who had been granted leave to intervene as amicus curiae, that suit be dismissed as to President, the District Court, Joseph S. Lord, III, Chief Judge, held that absent indication, in such suit which was brought against both President and Secretary of Defense individually and in their official capacities, that plaintiffs would be denied remedy if President were dismissed as party, President would be dismissed as party without prejudice to rights of plaintiffs if it should appear that President was indispensable party.

Ordered accordingly.

[1] UNITED STATES ⇦ 26
393k26
United States President is not completely immune from judicial process merely because he is President.

[2] INJUNCTION ⇦ 75
212k75
Executive action may be restrained indirectly by enjoining a cabinet member from enforcing an executive order found to violate the law.

[3] UNITED STATES ⇦ 26
393k26
Purpose of doctrine of executive immunity is not to serve as a shield to completely bar constitutional review of presidential action but to insure that the President is not distracted from or hindered in performance of his tasks by being called into court to defend his actions.

[4] UNITED STATES ⇦ 135
393k135
Absent indication, in suit which was brought against United States President and Secretary of Defense individually and in their official capacities, and in which it was alleged that prosecution of war in Southeast Asia violated various provisions of Federal Constitution, treaties of United States and doctrines of international law, that plaintiffs would be denied remedy if President were dismissed as party, President would be dismissed as party without prejudice to rights of plaintiffs if it should appear that President was indispensable party.

***791** David Kairys, David Rudovsky, Kairys & Rudovsky, Philadelphia, Pa., for plaintiffs.

Louis C. Bechtle, U. S. Atty., Warren D. Mulloy, John T. Thorn, Asst. U. S. Attys., Philadelphia, Pa., for defendants.

OPINION

JOSEPH S. LORD, III, Chief Judge.

The plaintiffs in this suit are citizen taxpayers who bring this action on their own behalf, and as representatives of a class consisting of all those similarly situated, pursuant to F.R.Civ.P. 23. They allege that the prosecution of the war in Southeast Asia violates various provisions of the United States Constitution, Treaties of the United States, and doctrines of international law. They seek a permanent injunction against the allocation and expenditure of funds of the United States to prosecute the war. We have jurisdiction under 28 U.S.C. § 1331.

The defendants are Richard M. Nixon, President of the United States, and Melvin Laird, Secretary of the United States Department of Defense. The United States Attorney for the Eastern District of Pennsylvania has been granted leave to intervene as amicus curiae for the purpose of making suggestions. Now pending is its "suggestion" that the instant suit be dismissed as to defendant Nixon.

[1] At the outset, we reject the notion that defendant Nixon is completely immune from judicial process because he is the President of the United States. United States v. Burr, 25 F.Cas.P. 30, No. 14,692d (C.C.A.Va.1807) (Marshall, C. J.).

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Nevertheless, at this time we have decided to dismiss the action as to defendant Nixon.

The doctrine of executive immunity from suit cannot be found in any particular provision of the United States Constitution, or in any federal law. It is a judicial creation founded in a proper respect for executive prerogative in a system of government which emphasizes a separation of powers between the various branches. This led the Court in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867) to conclude that a court has no jurisdiction of a bill to enjoin the President in the performance of his official duties. "The Congress is the Legislative Department of the government; the President is the Executive Department. Neither can be restrained in its action by the Judicial Department ***." Id. at 500.

Later decisions of the Court have strongly suggested that judicial restraint of the executive may no longer be absolutely prohibited. The doctrine of separation of powers itself may necessitate ***792** judicial action to restrain executive action which has invaded the province of Congress's lawmaking power.

[2] It is not open to doubt that executive action may be restrained indirectly by enjoining a cabinet member from enforcing an executive order found to violate the law. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). The decision in Youngstown was based on the finding that the President's executive order seizing the steel mills was not within the constitutional powers of the President. President Truman, however, was not a named party. The defendant was Secretary of Commerce Charles Sawyer who had been directed by the President to take temporary possession of the nation's steel mills. He was restrained from continuing the seizure and possession of the plants and acting under the authority of the executive order.

The question arises whether the Presidential immunity doctrine should apply in a situation 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, as Mr. Sawyer in the Youngstown case. We need not decide this difficult issue now.

In the recent case of Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), the Court held that the Speech or Debate Clause of the Constitution, Art. I, § 6, [FN1] did not serve as a bar to judicial review of the constitutionality of the House decision to exclude Mr. Powell. The action was dismissed as to Congressmen defendants, but was allowed to be maintained against House employees such as the Sergeant at Arms and the Doorkeeper of the House. In dismissing the Congressmen as defendants, the Court made clear it was not laying down any flat rule prohibiting injunctive relief against Congressmen.

> FN1. Article I, § 6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

> "Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." Id. at 506, footnote 26, 89 S.Ct. at 1956.

[3] The doctrine of executive immunity's purpose is not to serve as a shield to bar completely constitutional review of Presidential action. It does, though, serve a very important function, much like the Speech or Debate Clause.

> "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." Id. at 505, 89 S.Ct. at 1955.

Of course, we should be even more reluctant to disturb the President in the performance of his duties than we are to distract any individual legislator.

[4] In the instant case, we note that the Secretary of Defense, Melvin Laird, is also a defendant. Therefore, we have no indication at this time that plaintiffs would be denied a remedy if defendant Nixon were to be dismissed as a party. Indeed, it would be a rare situation where executive action was not participated in by any other government

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officials.

We have concluded that Richard M. Nixon should be dismissed as a party, without prejudice to the rights of plaintiffs to move at some future stage of this action that he is indeed a necessary party, if alleged prohibited conduct appears to the plaintiffs to be entirely unilateral. We of course at this time intimate no opinion as to the merits of this action.

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The MINNESOTA CHIPPEWA TRIBE et al., Plaintiffs,
v.
Frank C. CARLUCCI, etc., et al., Defendants.

Civ. A. No. 175-73.

United States District Court, District of Columbia.

April 25, 1973.

Action, inter alia, to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act, wherein case came before court on Government's suggestion for dismissal of action as to the President. The District Court, June L. Green, J., held that the action was maintainable over objection of lack of standing, inasmuch as plaintiffs were intended beneficiaries of the Indian Education Act. The Court further held that, although, under the Act, the President had discretion to choose whom to appoint, inasmuch as he apparently had no discretion to decide whether the Council should or should not be constituted, the action was not subject to dismissal on basis that it related to executive, discretionary or political acts.

Suggestion for dismissal of action as to President denied.

Appointments to the National Advisory Council on Indian Education were made by the President of the United States May 5, 1973.

In a separate order of May 8, 1973, the Court dismissed the case as moot as to the President.

[1] FEDERAL CIVIL PROCEDURE ⇦ 656
170Ak656
Complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant.

[2] FEDERAL COURTS ⇦ 195
170Bk195
Formerly 106k284(3)
Federal district court had subject matter jurisdiction of complaint seeking to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. 5 U.S.C.A. §§ 701-706; 28 U.S.C.A. §§ 1331, 1337, 1361, 1362.

[3] UNITED STATES ⇦ 26
393k26
President of United States is not completely immune from judicial process for sole reason that he is President.

[4] UNITED STATES ⇦ 26
393k26
Judiciary has jurisdiction over President of United States to compel him to perform a nondiscretionary act required by law.

[5] MANDAMUS ⇦ 23(1)
250k23(1)
Intended beneficiaries of Indian Education Act had standing to maintain action to require President of United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. Fed.Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat. 334.

[6] MANDAMUS ⇦ 76
250k76
Although, under Indian Education Act, President of United States had discretion to choose whom to appoint to National Advisory Council on Indian Education, inasmuch as he apparently had no discretion to decide if the Council should or should not be constituted, action brought to require him to appoint members of Council was not subject to dismissal on basis that the action related to executive, discretionary or political acts. Indian Education Act, § 442(a-c), 86 Stat. 334.

[7] MANDAMUS ⇦ 151(2)
250k151(2)
Where it appeared that only President of United States had been given power to appoint members of National Advisory Council on Indian Education, but he had neither made such appointments nor delegated his power to another and no implied delegation appeared, action to require President to appoint members of Council could be maintained over objection that joinder of President as party was unnecessary in that plaintiffs could be afforded complete relief by suing member of President's Cabinet. Fed.Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat.

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334.

***974** L. Graeme Bell, III, Native American Rights Fund, Washington, D. C., Thomas W. Fredericks and David H. Getches, Native American Rights Fund, Boulder, Colo., Daniel M. Rosenfelt, Eric E. Van Loon, Center for Law and Education, Cambridge, Mass., for plaintiffs.

Harold H. Titus, Jr., U. S. Atty., Arnold T. Aikens and Michael A. Katz, Asst. U. S. Attys., Washington, D. C., for defendants.

ORDER

JUNE L. GREEN, District Judge.

In this action plaintiffs seek inter alia to require the President of the United States to appoint members of the National Advisory Council on Indian Education pursuant to The Indian Education Act, Title IV of Pub.L.No.92-318, 86 Stat. 334, approved by the President June 23, 1972. [FN1] In answering the complaint, the government admitted that the President is charged with duties and responsibilities under the statute in question. The answer further admitted that the President has heretofore neither made any appointments to the Council, nor delegated his power to another.

> FN1. Part D, § 442(a) of the Act provides, "There is hereby established the National Advisory Council on Indian Education ... which shall consist of fifteen members who are Indians and Alaska Natives appointed by the President of the United States. Such appointments shall be made by the President from lists of nominees furnished, from time to time, by Indian tribes and organizations, and shall represent diverse geographic areas of the country." The complaint does not refer to any lists.

The case is before the Court on the government's "Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States". Fed.R.Civ.P. 12(h)(3) provides,

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[1] In determining whether the Court has jurisdiction over the subject matter, the Court is reminded that

> "... where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted [and not here relevant] must entertain the suit. ... Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy4)4B"B" Bell v. Hood, 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

***975** Moreover, the complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant. Caserta v. Home Lines Agency, Inc., 154 F.Supp. 356 (S.D.N.Y.1957), aff'd., 273 F.2d 943 (2d Cir. 1959).

[2] A review of the complaint and plaintiffs' jurisdictional statement indicates that the Court has subject matter jurisdiction and that this case may eventually be decided on the merits. Plaintiffs have cited several statutes, e. g., 28 U.S.C. §§ 1331, 1337, 1361, 1362 and 5 U.S.C. §§ 701-706, and the Court is satisfied on the question.

Since the government contends that any claim against the person of the President is barred by the separation of powers doctrine, the Court now addresses itself to this issue.

[3][4] The President of the United States is not completely immune from judicial process for the sole reason that he is President. Atlee v. Nixon, 336 F.Supp. 790 (E.D.Pa.1972), (dictum); cited with approval in Meyers v. Nixon, 339 F.Supp. 1388 (S.D.N.Y.1972) (dictum). Chief Justice Marshall held long ago that the judiciary has jurisdiction over the President to compel him to perform a nondiscretionary act required by law. United States v. Burr, 25 Fed.Cas. p. 30, No. 14,692d (C.C.A.Va.1807) (subpoena duces tecum against the President held proper).

Suits against the President have generally been unsuccessful for several reasons, none of which appears present in the case sub judice.

[5] The first reason is lack of standing. E. g., Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972). In the case at bar, it appears plaintiffs have a personal

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stake and interest in the outcome of the controversy and might suffer actual injury in fact. Plaintiffs are intended beneficiaries of the Indian Education Act. The National Advisory Council clearly was intended to play a key role in administration of the Act. It appears that the implementation of the Act may be impossible or impracticable unless the Council is constituted by the President. [FN2]

> FN2. The responsibilities of the Council are described in § 442(a)-(c) of the Act.

The second reason suits against the President have foundered is that they relate to "executive" or "discretionary" acts. Mississippi v. Johnson, 4 Wall (71 U.S.) 475, 18 L.Ed. 437 (1866). More recently, the Supreme Court has defined a question as "political" if it involves one of the following:

> "... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

[6] Based on the present record it appears that this case does not fall within the Baker definition, and that Mississippi is distinguishable. Plaintiffs do not pray that the Court determine whether Indians are recognized as tribes. They do not ask that the Court alter the special relationship between Indians and the United States. Their claim does not involve the President's role as Commander in Chief of our armed forces or as an architect of our foreign policy. They do not seek to enjoin the President from executing the law.

Plaintiffs' suit does not relate to ongoing supervisory acts which require the exercise of judgment, but to single specific "one-shot" acts, appointments to the Council. Although the President clearly has discretion to choose whom to appoint to the Council, he apparently has no discretion *976 to decide if the Council should or should not be constituted. The Indian Education Act, § 442(a) provides that "... appointments [to the Council] shall be made by the President. ..." (emphasis added). See McQueary v. Laird, 449 F.2d 608, 611 (10th Cir. 1971) (mandamus will issue to require the exercise of permissible discretion.)

[7] In the third place, joinder of the President as a party defendant is generally unnecessary: a plaintiff may be afforded complete relief by suing a member of the President's Cabinet. E. g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). In the instant case, however, it appears that plaintiffs' only remedy is to sue the President directly. Only the President is given the power to make appointments to the Council. As earlier noted, the President has neither made such appointments nor delegated his power to another. The record does not suggest any implied delegation.

For the foregoing reasons, it is by the Court, this 25th day of April 1973,

Ordered that the Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States, should be and the same hereby is denied.

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SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES et al., Plaintiffs,
v.
Richard M. NIXON, Individually and as President of the United States, Defendant.

Civ. A. No. 1593-73.

United States District Court, District of Columbia.

Feb. 8, 1974.

Senate committee applied for enforcement of subpoena duces tecum served on the President with respect to certain tapes. On motion of the committee for summary judgment and of the President for dismissal, the District Court, Gesell, J., held that the matter was justiciable but that the committee had not established that it was entitled at that particular time to injunction directing compliance with subpoena, in light of possible prejudicial effect of pretrial publicity with respect to pending criminal prosecutions.

Complaint dismissed without prejudice.

See also, D.C.Cir., 487 F.2d 700; D.C., 366 F.Supp. 51, D.C., 360 F.Supp. 1.

[1] CONSTITUTIONAL LAW ⇐ 68(1)
92k68(1)
Proceeding on application by Senate Committee to enforce subpoena duces tecum served on the President presented a justiciable controversy despite contention that it involved a political question.

[1] FEDERAL COURTS ⇐ 13.20
170Bk13.20
Formerly 106k281
Proceeding on application by Senate Committee to enforce subpoena duces tecum served on the President presented a justiciable controversy despite contention that it involved a political question.

[2] UNITED STATES ⇐ 23(4)
393k23(4)
On application by Senate committee to enforce subpoena duces tecum served on the President, it was the duty of the court to weigh the public interest protected by the President's claim of privilege against public interest that would be served by disclosure to the committee.

[2] UNITED STATES ⇐ 26
393k26
On application by Senate committee to enforce subpoena duces tecum served on the President, it was the duty of the court to weigh the public interest protected by the President's claim of privilege against public interest that would be served by disclosure to the committee.

[3] UNITED STATES ⇐ 23(4)
393k23(4)
President's unwillingness to submit to court, for in camera ex parte inspection, tapes sought by Senate committee pursuant to subpoena duces tecum, or to particularize in any other fashion his claim of executive privilege, precluded judicial recognition of that privilege on confidentiality grounds.

[4] UNITED STATES ⇐ 23(4)
393k23(4)
Court would not enforce subpoena duces tecum served by Senate committee on the President, seeking production of certain tapes, where committee did not demonstrate present need for the tapes in connection with further public hearings, and where nondisclosure was needed to safeguard pending criminal prosecutions from the possible prejudicial effect of pretrial publicity.

[5] UNITED STATES ⇐ 23(5.1)
393k23(5.1)
Formerly 393k23(5)
Senate committee in conducting inquest into governmental conduct may proceed only in aid of Congress' legislative function.

***521** Samuel Dash, Fred D. Thompson, James Hamilton, Ronald D. Rotunda, Washington, D. C., for plaintiffs.

J. Fred Buzhardt, James D. St. Clair, Charles Alan Wright, Robert T. Andrews, Thomas P. Marinis, Jr., Washington, D. C., for defendant.

MEMORANDUM AND ORDER

GESELL, District Judge.

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The Senate Select Committee on Presidential Campaign Activities desires access to five tape recordings made by the President of conversations between himself and John Wesley Dean, III, then Counsel to the President. These tapes are relevant to the Committee's functions and are identified by date and time. The Committee duly served a subpoena duces tecum on the President demanding production of those portions of the taped conversations which deal with "alleged criminal acts occurring in connection with the Presidential election of ***522** 1972." [FN1] The President refused to comply. Deeming the Senate's own enforcement procedures inappropriate, the Committee sought judicial enforcement of the subpoena, but the Court (Sirica, J.) ruled that it lacked jurisdiction. At the instance of the Committee, Congress then passed a statute placing special jurisdiction in this Court to enforce the Committee's subpoenas, and accordingly the issues are again presented for judicial consideration. The Committee seeks a declaratory judgment clarifying its rights and an affirmative injunction directing compliance with the subpoena.

> FN1. The Committee originally issued two subpoenas duces tecum, but enforcement of the second subpoena was denied by this Court on January 25, 1974.

The Committee has moved for summary judgment and the President, through his counsel, resists and asks for dismissal. On the basis of the voluminous papers before the Court and a transcript of the oral argument before Judge Sirica during earlier proceedings in this case, the Court has determined that no further hearings are required and the case is ripe for resolution.

[1] The President at the outset contends that the issue before the Court "constitutes a non-justiciable political question," but the decision of the United States Court of Appeals for the District of Columbia Circuit sitting en banc in Nixon v. Sirica, 487 F.2d 700 (D.C.Cir., 1973), is squarely to the contrary and no extended discussion is required. The reasoning of that Court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), establishes the tests for determining the existence of a "political question," and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable. See id. at 217, 82 S.Ct. 691. See also Powell v. McCormack, 395 U.S. 486, 518-550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

[2] Given this determination, it becomes the duty of the Court to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance. Nixon v. Sirica, supra, 487 F.2d at 716-718. This is a difficult but necessary task. The circumstances are unique in our constitutional history. To aid the final determination, the Court requested the Watergate Special Prosecutor to indicate what effect, if any, public disclosure of the subpoenaed tapes by the Committee at this juncture would have on his responsibilities in carrying forward criminal prosecutions. The Court also requested the President to particularize and to update his claim of privilege as it relates to the five tapes, since substantial time and many events have intervened since the original issuance of the subpoena. The President's response is attached. The Committee has also elaborated upon its need for the tapes in recently filed papers. The Court has carefully weighed these conflicting assertions of public interest in the light of the respective requirements of the parties.

[3][4] It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest. Conversely, the Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications, see Nixon v. Sirica, supra, at 719-720, and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds. Cf. United States v. Burr, 25 Fed.Cas. 187 (Case No. 14,694), 192 (1807).

On the other hand, both the President and the Special Prosecutor have advanced ***523** another factor bearing upon the public interest which the

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Court finds to be of critical importance-the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity.

At this juncture in the so-called Watergate controversy, it is the responsibility of all three branches of the Federal Government to insure that pertinent facts are brought to light, that indictments are fairly and promptly tried, and that any accusations involving the conduct of the President or others are considered in a dignified manner and dealt with in accordance with established constitutional processes. The President, the Congress and the Courts each have a mutual and concurrent obligation to preserve the integrity of the criminal trials arising out of Watergate. The public has been subjected to a mass of information that is both conflicting and uncertain in its implications. Clearly the public interest demands that the charges and countercharges engendered be promptly resolved by our established judicial processes. Thus the Court is compelled to weigh the effect that disclosure of the subpoenaed portions of these tapes might have upon criminal trials scheduled or soon to be scheduled on the calendar of this Court.

Three grand juries are now engaged on matters under the Special Prosecutor's jurisdiction. A number of indictments and informations have already been filed and more are expected by the end of this month. The cases will be promptly scheduled for trial. The first trial is set for April 1, with pretrial hearings later this month, at which Mr. Dean will testify. The Special Prosecutor has indicated to the Court his intention of introducing at least four of the five subpoenaed tapes into evidence at some of the trials. All five tapes are now in his possession, and at least four have been played before a grand jury.

No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial. This is, moreover, in the nature of a test case and should the Committee prevail, numerous additional demands might well be made. [FN2]

FN2. A sweeping subpoena seeking some 500 items has apparently been served on the President more recently, but it has not been brought into this litigation.

The President has a constitutional mandate to see that the laws are faithfully executed and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity. That the President himself may be under suspicion does not alter this fact, for he no less than any other citizen is entitled to fair treatment and the presumption of innocence. The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.

The Court wishes to emphasize the special circumstances of this particular case which support this conclusion. The five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement ***524** in the Watergate coverup. "[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. The President has, however reluctantly, now provided the Special Prosecutor with all of the information he requires with regard to the five conversations at issue. The tapes themselves have been delivered to the grand juries; all the President's aides participating in the conversations have been permitted to testify under oath concerning the conversations, and the President has invoked neither his Fifth Amendment nor his attorney-client privilege with regard to any of the conversations or related materials he has furnished. To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter. All of the evidence at hand is to the

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contrary.

[5] The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

Accordingly, the Court declares that, while the controversy presented is justiciable, the Select Committee has not established by a preponderance of the evidence that it is entitled at this particular time to an injunction directing the President to comply with its subpoena for the five tape recordings. The application of the President's counsel for dismissal of the complaint is granted, and the complaint is dismissed without prejudice.

So ordered.

THE WHITE HOUSE

WASHINGTON
February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

*525 As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,

s/ Richard M. Nixon

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The Honorable Gerhard A. Gesell

Judge

U. S. District Court for the District of Columbia

Washington, D. C.

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Exhibits – Pres Subpoena Memo.

# Facsimile Cover Sheet

**To:** Erik Jaso (cc: Alex Azar)
**Company:** OIC
**Phone:**
**Fax:** 501-221-8707

**From:** Rajeev Duggal
**Company:**
**Phone:** 301-907-9415
**Fax:**

**Date:** 07/04/95
**Pages including this cover page:** 12

**Comments:**

Attached is the first response from the Carter library. They seem to have misunterstood what we were looking for, so I will follow up with them on Wednesday. Let me know if you have any comments. Thanks.

Jimmy Carter Library
One Copenhill Avenue Atlanta, Georgia 30307-1498

June 29, 1995

Rajeev Duggal
5914 Wisconson Ave.
Chevy Chase, MD 20815

Dear Mr. Duggal:

In response to your telephone call, I have looked in file locations readily accessible for information on the preparation of President Carter's testimony regarding the Robert Vesco investigation. I have enclosed a computer search of the Library's open material on "Vesco." The number of pages mentioned in the search is approximately 650, the majority of which appears to be newspaper articles.

In a cursory review of the material mentioned in the search, I found little information as to President Carter's testimony. I have enclosed a newspaper article on his testimony. Also, I have included eight pages of what appear to be questions and answers on the subject; however, whether or not they were intended for President Carter's use I cannot tell as they do not include the name of the individual.

If you wish to order copies of any of the pages mentioned above, the charge is twenty-five cents per page. Please make your check payable to the National Archives Trust Fund.

Please contact us again if we may be of further assistance.

Sincerely,

Jim Herring
Archivist

enclosures



A Presidential Library Administered by the National Archives and Records Administration

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| 1 | 4 | ******* | WHITE HOUSE OFFICE OF COUNSEL TO THE PRESIDENT |
| 2 | | 48 | Vesco, Robert |
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# President Testifies on Videotape For Grand Jurors in Vesco Case

D-21
3/3/80 Vesco file

By EDWARD POUND
Special to The New York Times

WASHINGTON, March 1 — President Carter spent more than an hour answering questions on videotape last month for a Federal grand jury investigating allegations that Robert L. Vesco, the fugitive financier, attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the interview said that Mr. Carter offered no major new information about the case when he was questioned at the White House by three Federal prosecutors. His videotaped interview was shown to the grand jury on Feb. 21, the sources said.

They declined to comment on Mr. Carter's testimony other than to say that it was not damaging to anyone in his Administration, including an aide who is under investigation for possible perjury. The President, the sources said, often responded by saying that he could not recall matters about which the Government lawyers were inquiring.

It was the first time that a President had answered grand jury questions on videotape, though Mr. Carter has provided testimony in different forms at least twice before in criminal investigations.

### Carter Aide Is Reticent

Lloyd N. Cutler, the White House counsel, declined to confirm that the President had been questioned. But he said: "The President always cooperates with the proper law enforcement investigation. He has and he will cooperate with this investigation."

Government lawyers who questioned Mr. Carter refused to discuss the session. However, they were known to have focused their questioning on a meeting Mr. Carter held in the White House on Feb. 19, 1977, with Richard M. Harden, a special assistant.

The lawyers wanted the President's account of the meeting to determine whether it corroborated or contradicted Mr. Harden's testimony before the grand jury in December 1978. Sources in the Justice Department said last summer that Mr. Harden was under investigation for possible perjury in his account of his conversation with Mr. Carter and an earlier one with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests and who is a close friend of Mr. Harden.

Mr. Harden reportedly told the grand jury that he talked Mr. Lee out of continuing to represent Mr. Vesco's interests when they met on Feb. 8, 1977. He was also reported to have testified that he briefed Mr. Carter on the Vesco situation a week later and informed him that Mr. Lee was withdrawing from the arrangement.

### Some Jurors Dissatisfied

Sources close to the grand jury investigation said that jurors submitted some of the questions that were put to the President by Government lawyers. No jurors were present for the interview and, the sources said, several jurors were dissatisfied with the procedure because it prevented them from asking followup questions. They were also reportedly displeased because they believed the President should have testified in person.

Evidence in the case is being presented to the grand jury by the office of the United States Attorney here. Government lawyers have not indicated whether the investigation will continue after the grand jury's 18-month term expires in early April.

At one point, Ralph E. Ulmer, the grand jury's foreman, tried to resign, charging the Justice Department with directing a "cover-up" to protect the Carter Administration. His charges were denied by Mr. Carter's spokesmen and the Justice Department.

John T. Kotelly, deputy chief of the fraud division in the United States Attorney's office, declined to comment on the investigation.

The investigation began after R. L. Herring, a businessman in Albany, Ga., charged that Mr. Vesco wanted to bribe Carter Administration officials to resolve his legal problems. Mr. Vesco fled the United states nearly a decade ago after he was charged with defrauding stockholders of millions of dollars in an international swindle.

Mr. Herring, who was convicted on unrelated fraud and racketeering charges and is in a Federal prison in Miami, has said that he retained Mr. Lee, the Albany lawyer, to act in Mr. Vesco's behalf.

In a telephone interview yesterday, Mr. Herring said that he was scheduled to take a polygraph, or lie-detector, test on March 6 and that he planned to release the test results to the press.

# *Ex-Soviet Spy Agrees To Discuss Techniques For Press, F.B.I. Says*

By ROBERT PEAR
Special to The New York Times

WASHINGTON, March 2 — A former Soviet spy who is now working for the United States will be presented to reporters tomorrow by the Federal Bureau of Investigation, Government officials said tonight. The officials said that the agent would discuss Soviet intelligence techniques in a news conference at the bureau's headquarters here.

The scheduled appearance follows by just three days an F.B.I. official's disclosure that the United States quietly expelled five diplomats from Soviet bloc countries in the last year for alleged espionage activities. William O. Kriegar, assistant director of the F.B.I. in charge of the intelligence division, made the disclosure in an interview Friday, the day before his retirement.

President Carter praised Mr. Kriegar's integrity Thursday at a gathering of law-enforcement officials in the White House.

The recent publicity about foreign espionage activities in the United States is a departure from the normal Federal practice. The Government rarely publicizes intelligence or counter-intelligence operations. Intelligence experts suggested that the latest disclosures were personally approved and perhaps orchestrated by President Carter.

### Carter Anger Reported

A former top-ranking counter-intelligence official said he believed that President Carter had reached a point of disgust and anger with Soviet intelligence operations similar to that of the British when they expelled more than 100 Soviet diplomats in the late 1960's.

"It is the mood of the President to narrow the size of the target," said the official, suggesting that Mr. Carter wanted to focus a spotlight on the suspected Soviet agents.

Other officials said that the news conference tomorrow was a signal of an increase in the espionage war to match the recent chill in diplomatic relations between the United States and the Soviet Union.

It was not immediately possible to gauge the importance of the agent who is to appear tomorrow. An Administration official said that the disclosure "will not blow a major Soviet intelligence network in this country," although the former spy has been a "productive" asset for the United States.

### Canadian Shipping Aide Drowns

SORRENTO, Me., March 2 (AP) — Robert A. Cushman, the president of a Canadian shipping concern, drowned when his small boat capsized in the ocean near an island [illegible] off Maine, the authorities said today. Mr. Cushman, 55 years old, Pointe Claire, Quebec, was the president of Saguenay Shipping Ltd. of Montreal. He died yesterday at Ingall's Island.

From -
Press - Granum, Box 94
Folder "Vesco Files -- Reporter [?]"

FOIA # 57720 (URTS 16326) DocId: 70105306 Page 221

September 27, 1978

Well, I'm at a bit of a disadvantage in discussing what I may have said to Richard Harden and the thinking behind my note to the Attorney General since, no matter how hard I've tried, I simply don't remember the conversation.

As best my staff has been able to determine, I talked with Richard very briefly for four or five minutes in the early evening of February 15, 1977 -- a few weeks after taking office. The logs indicate that was the last appointment of a long day that began at 6:30 in the morning and included at least 18 meetings with at least 55 persons.

The Department of Justice has recently said publicly that this overall matter has been the subject of an investigation for the past several months, and I understand that it is ongoing at this time. I will cooperate in any possible way I can with the investigation, as I have with investigations in the past. I think it is inappropriate to speculate or comment on hypotheticals, especially so when an investigation by the Department of Justice is ongoing.

Q: What is the Administration now doing to secure Vesco?

A: As a matter of policy, we are pursuing every possible means to secure the return of Mr. Vesco to the United States to stand trial on the charges he faces. My own policy is clear -- even before Mr. Vesco left Costa Rica in May of this year for the Bahamas, I know of at least 5

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different times I personally encouraged efforts to secure the return of Mr. Vesco to the United States to stand trial, & my staff will be happy 2 supply more detail on those times.

I have discussed our ~~efforts~~ efforts to secure Vesco's return with the Attorney General and the Secretary of State both before and after the current news stories, but to discuss now specifics of our current efforts would be inappropriate and unwise.

Q: Why did you write such a vague note to the Attorney General, one that does not spell out any connection whatsoever with Vesco, and to be quite honest could be interpreted maliciously as far as your intentions?

A: As I've said, I have no recollection of the brief conversation, so I'm really at a disadvantage in trying to answer that question.

IF PRESSED:

I certainly understand the legitimacy of the questions. But I simply do not remember that brief conversation or writing the note. I think it would be a disservice both to you and to myself to ascribe motives for doing something I don't remember doing.

FOIA #E720(URTS 16326) DocId: 70105306 Page 223

Closed/ In any case, I have made my pos. on the note very clear — Have no 5 sec. memory else. — —

insert (B)

Q: Have you talked with Richard Harden since these stories came out?

A: No.

Q: Why did Harden come to the President of the United States instead of Lipshutz, Jordan, or the Attorney General himself?

A: I really couldn't tell -- you'll have to ask him.

Q: Have you been interviewed by the FBI?

A: No.

Q: Will you be?

A: It has always been my very firm belief, and I know it is one shared by Griffin Bell and William Webster, that every citizen has an obligation to provide any information that may be relevant in any investigation. I've given such interviews before, the requests from them have routinely gone through my Legal Counsel's office, and if there is a

request in this instance, I assume it will go to my Counsel, and I will certainly cooperate.

Q: Do you know Spencer Lee?

A: I know him as a friend of Hamilton Jordan and as a campaign worker.

B

Q. Do you believe there was a cmapaign by ~~Rhe~~ Robert Vesco to influence some of yo[I]ur clo[I]sest associates?

A. There's ~~certainly the appearance of a cmapaign.~~

A. Tant's the

~~A. That's among the prurposes of the Justice Department investigation---to dete--~~

A. Determing whether there was such a campaign is among the ~~a~~ purposes of the Justice Department investigation, which as I've said ~~it~~ has been ongoing for sev~~eral~~ ~~m~~ months.

Smile

I cert. don't know 1st hand. —what I've [illegible] many [illegible]. —affect [illegible]. [illegible]

[illegible] camp. + improper campaign

Lapdogs

A. I certainly don't know firsthand----I only know that I've read.

~~I'm sure that every fuguitive~~ I'm sure that many fugitives would like to affect their fugutive status. But one of the p~~u~~ purposes of the Justice Department investigation, which as I said has been going on for several months, is whethere there was a campaign and if so whether it was improper or illegal.

~~Q Do you mean then that there could could be a "proper" campaign directed towards the Adminisratoin.~~

~~A I suppoise~~

(A)

Q. What does Richard Hardin say he remembers about his conversation with you.

According to my staff, he simply states that he came to let me know that a potential problem - that is Mr. Lee asking Mr. Jordan to meet with someone representing Mr. Visco - ~~to have~~ had not not taken taken place ~~or if~~ because Mr. Lee had realized that this would be inappropriate. Mr. Hardin ~~told my staff it~~ was his feeling and mine that any further discussions on this subject ~~with~~ should take place with the Justice Dept, not at the White House, and that My note was ~~that~~ to make sure that if Mr. Lee called he would be able to get through.

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(E)

Q. Why did your note say "when he calls" rather than "if he calls"?

A. ~~obviously can't be~~ ~~to why I chose a particular word~~ Normally when you write an informal note to make sure a phone call gets returned you don't word it as carefully as if you were writing a legal document.

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UNITED STATES
v.
**BURR.** [FN1]

FN1 For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron **Burr,** see note to Case No. 14,692a.

Circuit Court, D. Virginia.

Sept. 3, 1807.

At law. Trial of Aaron Burr for a misdemeanor, in beginning, setting on foot, and providing the means of, a military expedition against the dominions or territory of the king of Spain.

At the meeting of the court on Wednesday, the 2d of September, 1807, Mr. Hay stated that according to his understanding of the opinion of the court delivered in the trial for treason [Case No. 14,693], the evidence of the transactions on Blennerhassett's Island did not come up to the constitutional crime of levying war; and so it would be improper to press the prosecution against Blennerhassett and Israel Smith. Under these circumstances he should enter a nolle prosequi as to the indictments for treason, and move to commit them, and also Mr. Burr, in order that they should be tried in the place where it should appear that the crime had been committed. He moved that Blennerhassett and Smith might be brought into court; and an order was made accordingly.

Mr. Burr then said that the motions were distinct against the several individuals, and they could not be combined. He insisted on a separate examination as to himself, and required a specification of the time and place when and where the offence was said to have been committed, that he might have an opportunity of meeting the testimony.

A debate of considerable length ensued on this motion.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

1. Where a person, after acquittal on an indictment for treason, is in the custody of the marshal, bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district for trial for treason in the place where the crime was committed.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

2. The laws of the several states cannot be regarded as rules of decision (Judiciary Act, s 34, 1 Stat. 92) in trials for offenses against the United States. Cited in Clark v. Sohier, Case No. 2,835; U. S. v. New Bedford Bridge, Id. 15,867.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

3. The circuit court of the United States, under section 4 of the judiciary act, has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance, without reference to the process given by the state law. Cited in Re Sheazle, Case No. 12,734.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

4. A capias is the proper process to bring an accused in to answer to an indictment for an offense against the laws of the United States.

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CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

5. Where the accused is already in court, an order of the court will supply the place of a capias.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

6. It is sufficient, in an affidavit, for the production of a paper in the possession of the prosecution, to aver that it 'may be material' in the defense.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

7. On a motion to compel the production of a letter written to the president of the United States, and in the hands of the prosecuting attorney, averred to be material to the defense, parts of it cannot be withheld, in the discretion of the prosecuting attorney, on the ground of public interest. The president alone may decide as to the propriety of withholding them, and he cannot delegate his discretion.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

8. On the trial of an indictment for a misdemeanor, in beginning or setting on foot a military expedition against a nation at peace with the United States, containing no allusion to a conspiracy, the declarations of third persons, not forming a part of the transaction, and not made in the presence of the accused, are not admissible in evidence.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

9. In such case the acts of accomplices, except so far as they prove the character or object of the expedition in question, are not admissible in evidence.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

10. The acts of the accused in a different district, which constitute, in themselves, substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

11. Any legal testimony which shows the expedition in question to be military, or to have been designed against the dominions of the nation, as charged, is admissible.

***187** MARSHALL, Chief Justice.

MARSHALL, Chief Justice, finally remarked that as Col. Burr was now in custody of the marshal, and bound to answer an indictment for a misdemeanor,

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the court had no authority to send him to another district.

Mr. Hay said that all three were in the same situation, and the same difficulty applied to all. He regretted that the difficulty had not been adverted to at an earlier period, which would have saved much trouble; that he did not wish to disturb the opinion of the court, but would proceed with the trial of Col. Burr for a misdemeanor. He requested the clerk to read the indictment in the usual way, that they might proceed without issuing process to take the accused into custody, as he was in court.

The clerk was about to proceed, when Mr. Burr interrupted him, and said that he ought not to be arraigned, but to be permitted to plead by attorney. He said he was in court, not on that indictment, but because he had not moved to be discharged since his acquittal on the first indictment for treason. In this case he wished certain land-marks to be set up, in order to direct in future cases.

A protracted debate ensued, occupying the remainder of the day, in which Mr. Botts made a very long speech, and several of the counsel, on both sides, made shorter ones; all about the question whether a capias or a summons was the proper process to bring Col. Burr before the court, he being all the time in court, and participating in the debate.

[FN2]MARSHALL, Chief Justice, said, that if ***188** a capias should be determined to be the proper process, he should consider the situation of the party, and direct that he should not be discharged till the cause was finally decided. If a capias should be considered not to be the proper process, a venire facias must be awarded. There was another consideration: If a venire facias issued, it would involve the right to a continuance of the cause till another term. He would consider that with the principal question.

FN2 From 2 Robertson's Report of the Trial of Aaron Burr, 481.

THE COURT.

THE COURT took time to consider; and adjourned till to-morrow.

Thursday, September 3, 1807.

MARSHALL, Chief Justice.

The question now before the court is whether bail be demandable from a person actually in custody, against whom an indictment for a misdemeanor has been found by a grand jury. As conducting directly to a decision of this point, the question has been discussel whether a summons or a capias would be the proper process to bring the accused in to answer the indictment, if, in point of fact, he were not before the court. It seems to be the established practice of Virginia in such cases to issue a summons in the first instance; and if by any act of congress the laws of the several states be adopted as the rules by which the courts of the United States are to be governed in criminal prosecutions, the question is at an end; for I should admit the settled practice of the state courts as the sound construction of the state law under which that practice has prevailed. The 34th section of the judicial act, it is contended, has made this adoption. The words of that section are 'that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.'

It might certainly be well doubted whether this section (if it should be construed to extend to all the proceedings in a case where a reference can be made to the state laws for a rule of decision at the trial) can comprehend a case where, at the trial in chief, no such reference can be made. Now in criminal cases the laws of the United States constitute the sole rule of decision; and no man can be condemned or prosecuted in the federal courts on a state law. The laws of the several states therefore cannot be regarded as rules of decision in trials for offences against the United States. It would seem to me too that the technical term, 'trials at common law,' used in the section, is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty. The provision of this section would seem to be inapplicable to original process, for another reason. The case is otherwise provided for by an act of congress. The 14th section of the judicial act

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empowers the courts of the United States 'to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' This section seems to me to give this court power to devise the process for bringing any person before it who has committed an offence of which it has cognisance, and not to refer it to the state law for that process. The limitation on this power is, that the process shall be agreeable to the principles and usages of law. By which I understand those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.

Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. Thus in civil actions, where the body may be taken in execution to satisfy the judgment, bail may be demanded. If the right of the plaintiff be supported by very strong probability, as in debt upon a specialty, bail is demandable without the intervention of a judge. If there be no such clear evidence of the debt, bail is often required upon the affidavit of the party. Now, reasoning by analogy from civil suits to criminal prosecutions, it would seem not unreasonable, where there is such evidence as an indictment found by a grand jury, to use such process as will hold the person of the accused within the power of the court, or furnish security that the person will be brought forward to satisfy the judgment of the court. Yet the course of the common law appears originally to have been otherwise. It appears from Hawkins that the practice of the English courts was is issue a venire facias in the first instance, on an indictment for a misdemeanor. This practice however is stated by Blackstone to have been changed. He says (volume 4, p. 319), 'And so in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of capias immediately, in order to bring in the defendant.'

It is then the English construction of the common law, that although in the inferior courts the venire facias might be the usual course, and although it had prevailed, yet that a judge of the king's bench might issue a capias in the first instance. This subject has always appeared to me to be in a great measure governed by the 33d section of the judicial act. That section provides, that for any crime or offence against the United States, the offender may, agreeably to the usual mode of process against offenders in that ***189** state where he is found, be arrested and imprisoned or bailed as the case may be. This act contemplates an arrest, not a summons; and this arrest is to be, not solely for offences for which the state laws authorize an arrest, but 'for any crime or offence against the United States.' I do not understand the reference to the state law respecting the mode of process as overruling the preceding general words, and limiting the power of arrest to cases in which according to the state laws a person might be arrested, but simply as prescribing the mode to be pursued. Wherever, by the laws of the United States, an offender is to be arrested, the process of arrest employed in the state shall be pursued; but an arrest is positively enjoined for any offence against the United States. This construction is confirmed by the succeeding words: the offender shall be imprisoned or bailed as the case may be. There exists no power to direct the offender, or to bind him without bail, to appear before the court; which would certainly have been allowed had the act contemplated a proceeding in such a case which should leave the person at large without security. But he is absolutely to be imprisoned or bailed as the case may be.

In a subsequent part of the same section it is enacted 'that upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death.' There is no provision for leaving the person at large without bail; and I have over construed this section to impose it as a duty on the magistrate who proceeds against any offender against the United States to commit or bail him. I perceive in the law no other course to be pursued. This section, it is true, does not respect the process upon an indictment. But the law would be inconsistent with itself if it required a magistrate to arrest for any offence against the United States, if it commanded him on every arrest to commit or to bail, and yet refused a capias and permitted the same offender to go at large, as soon as an indictment was found against him. This section therefore appears to me to be entitled to great influence in determining the court on the mode of exercising the power given by the 14th section in relation to process. On the impeachment which has been mentioned, this point

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was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him. The only difficulty I ever felt on this question was produced by the former decision of Judge Iredell. If the state practice on this subject had been adopted I should have held myself bound by that adoption. But I do not consider the state practice as adopted. Mundell's Case [Case No. 15,834] was a civil suit; and the decision was that the state rule respecting bail in civil actions must prevail. Sinclair's Case [unreported] was indeed a case similar to this; and in Sinclair's Case a venire facias was issued. But I am informed by the clerk that this was his act, at the instance of the attorney, not the act of the court. The point was not brought before the court.

In U. S. v. Callender [Case No. 14,709] a capias, or what is the same thing, a bench warrant was issued. This was the act of the court; but, not having been an act on argument, or with a view of the whole law of the case and of former decisions, I should not have considered it as overruling those decisions if such existed. But there has been no decision expressly adopting the state practice; and the decision in Callender's Case [supra] appears to me to be correct. I think the capias the more proper process. It is conformable to the practice of England at the time of our Revolution, and is, I think, in conformity with the spirit of the 33d section of the judicial act. I shall therefore adopt it. To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of the court very properly supplies the place of a capias. The only difference between proceeding by capias and by order, which I can perceive, would be produced by making the writ returnable to the next term. [FN3]

FN3 From 2 Robertson's Report of the Trial of Aaron Burr, 481.

Mr. Hay then said he would proceed to the trial of the indictment for a misdemeanor.

Mr. Burr then referred to the letter which had been demanded of the president, which had often been promised but not yet produced. He wished to know whether that letter was in court.

Mr. Hay said he did not know whether the original letter was among his papers or not. He had searched for it, but had not been able to find it. He had a copy, which was ready to be produced.

Mr. Burr said the president had promised that the letter should be produced, and it was strange that it was not here. He was not disposed to admit a copy.

After some further remarks by counsel, the CHIEF JUSTICE said, unless the loss of the original be proved, a copy cannot be admitted.

Mr. Burr then called the attention of the court to the subject of bail, (made necessary by the decision that a capias was the proper process to bring him before the court.)

After some discussion, the CHIEF JUSTICE fixed the amount of the bail at five thousand dollars.

The counsel for the prosecution here took the alarm, that taking bail might entangle the motion intended subsequently to be made to commit for treason in another state. A debate on this subject of considerable length ensued, in the course of which the CHIEF JUSTICE remarked that those who prosecuted had the choice of making the motion to commit for a greater crime by discontinuing the prosecution for a misdemeanor, or of persevering in the latter.

At the close of this discussion, resulting in ***190** nothing, Mr. Burr observed that he had discovered that a letter written by General Wilkinson on the 12th of November, 1806, to the president of the United States, was material to his defence.

Mr. Hay said he had that letter, and would produce it. But there were some matters in the letters of General Wilkinson which ought not to be made public. It would be extremely improper to submit the whole of his letters to public inspection. He was willing to put them in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause.

The counsel for Colonel Burr were not satisfied with this proposal. They demanded the whole letters.

Mr. Hay said he was willing that Mr. Botts, Mr. Wickham, and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosures; and if there should

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was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him. The only difficulty I ever felt on this question was produced by the former decision of Judge Iredell. If the state practice on this subject had been adopted I should have held myself bound by that adoption. But I do not consider the state practice as adopted. Mundell's Case [Case No. 15,834] was a civil suit; and the decision was that the state rule respecting bail in civil actions must prevail. Sinclair's Case [unreported] was indeed a case similar to this; and in Sinclair's Case a venire facias was issued. But I am informed by the clerk that this was his act, at the instance of the attorney, not the act of the court. The point was not brought before the court.

In U. S. v. Callender [Case No. 14,709] a capias, or what is the same thing, a bench warrant was issued. This was the act of the court; but, not having been an act on argument, or with a view of the whole law of the case and of former decisions, I should not have considered it as overruling those decisions if such existed. But there has been no decision expressly adopting the state practice; and the decision in Callender's Case [supra] appears to me to be correct. I think the capias the more proper process. It is conformable to the practice of England at the time of our Revolution, and is, I think, in conformity with the spirit of the 33d section of the judicial act. I shall therefore adopt it. To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of the court very properly supplies the place of a capias. The only difference between proceeding by capias and by order, which I can perceive, would be produced by making the writ returnable to the next term. [FN3]

FN3 From 2 Robertson's Report of the Trial of Aaron Burr, 481.

Mr. Hay then said he would proceed to the trial of the indictment for a misdemeanor.

Mr. Burr then referred to the letter which had been demanded of the president, which had often been promised but not yet produced. He wished to know whether that letter was in court.

Mr. Hay said he did not know whether the original letter was among his papers or not. He had searched for it, but had not been able to find it. He had a copy, which was ready to be produced.

Mr. Burr said the president had promised that the letter should be produced, and it was strange that it was not here. He was not disposed to admit a copy.

After some further remarks by counsel, the CHIEF JUSTICE said, unless the loss of the original be proved, a copy cannot be admitted.

Mr. Burr then called the attention of the court to the subject of bail, (made necessary by the decision that a capias was the proper process to bring him before the court.)

After some discussion, the CHIEF JUSTICE fixed the amount of the bail at five thousand dollars.

The counsel for the prosecution here took the alarm, that taking bail might entangle the motion intended subsequently to be made to commit for treason in another state. A debate on this subject of considerable length ensued, in the course of which the CHIEF JUSTICE remarked that those who prosecuted had the choice of making the motion to commit for a greater crime by discontinuing the prosecution for a misdemeanor, or of persevering in the latter.

At the close of this discussion, resulting in ***190** nothing, Mr. Burr observed that he had discovered that a letter written by General Wilkinson on the 12th of November, 1806, to the president of the United States, was material to his defence.

Mr. Hay said he had that letter, and would produce it. But there were some matters in the letters of General Wilkinson which ought not to be made public. It would be extremely improper to submit the whole of his letters to public inspection. He was willing to put them in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause.

The counsel for Colonel Burr were not satisfied with this proposal. They demanded the whole letters.

Mr. Hay said he was willing that Mr. Botts, Mr. Wickham, and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosures; and if there should

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be any difference of opinion as to what were confidential passages, the court should decide.

Mr. Martin objected to this as a secret tribunal. The counsel had a right to hear the letters publicly, without their consent.

Mr. Burr's counsel united in refusing to inspect anything that was not also submitted to the inspection of their client.

The CHIEF JUSTICE saw no real difficulty in the case. If there were any parts of the letters confidential, then a public examination would be very wrong; otherwise they ought to be read.

Mr. Hay said the president wrote to him when he understood the process had been awarded, that he had reserved to himself the province of deciding what parts of the letters ought to be published and what parts required to be kept secret; that they wished everything to be as public as possible except those parts which were really confidential. The discussion continued till the court adjourned.

Friday, September 4, 1807.

Colonel Burr renewed his application for the production of the two letters from General Wilkinson to the president of the United States, for one of which a subpoena duces tecum had been awarded. He said that the president was in contempt, and he had a right to demand process of contempt against him; but as it would be unpleasant to resort to such process, and it would produce delay, he hoped the letters would be produced. It might, perhaps, suffice to produce a copy, if duly authenticated, of that of October 21st, which was said to be lost or mislaid. As to the letter of the 12th of November, he had reason to believe that the whole letter had been shown to others to injure him, and as the whole letter had been used against him, the whole ought to be produced.

Mr. Hay said he did not know what was meant by the expression of such a belief or suspicion.

Mr. Burr said he would be more explicit; and asked whether this letter had not been used against him before the grand jury.

Mr. Hay said he could not be certain whether it was produced before the grand jury or not. He was not as well acquainted with what passed before the grand jury as some other gentlemen were.

A long and excited debate ensued, in which Mr. Burr's counsel insisted on the production of the whole letter, and Mr. Hay insisted on withholding certain passages. He said there were two passages in the letter which he could not submit to public inspection; and he did not know that they could be extorted from him under any circumstances. Finally, the counsel of Colonel Burr applied for a subpoena duces tecum to Mr. Hay, which was awarded. To this Mr. Hay made a return, tendering a copy of the letter of 12th November, 1806, 'excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined; the parts excepted being communicated to the president, and he having devolved on me the exercise of that discretion which constitutionally belongs to himself. The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection. I further certify, in order to show more clearly the irrelevancy of the parts excepted to any defence which can be set up in the present case, that these parts contain a communication of the opinion of the writer concerning certain persons, about which opinion, or the fact of his having communicated it, the writer, if a witness before the court, could not legally, as I conceive, be interrogated; and about which no evidence could legally be received from other persons.'

The CHIEF JUSTICE asked if there were any objections to this return.

Mr. Burr said he could not be satisfied with a copy of part of the letter.

Mr. Botts said it would be a matter of the deepest regret if an attachment should go against Mr. Hay, and nothing would give him greater pain than to be under the necessity of making such a motion. To avoid this, there was another alternative, but which was, also, extremely disagreeable, as it would produce delay, viz: To move that the cause should be continued until the letter should be produced. He made that motion, and supported it by a speech of considerable length.

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Other counsel followed, in a protracted debate on the motion. When the discussion ended the CHIEF JUSTICE delivered the following opinion:

MARSHALL, Chief Justice. [FN4]It is not without regret that I find myself constrained to deliver an opinion on the present application. To overrule the motion may, at least, have the appearance of imposing a hardship ***191** on the prinsoner, and to grant it may occasion delay in a case which all must desire to terminate. It is with regret that I decide a question under such circumstances, because it is probable that those parts of the letter which are withheld, are of much less importance than gentlemen suppose; and that the effect of their production would be to dissipate suspicions which are now entertained, and to show that the subject of the controversy is by no means proportioned to the zeal with which it has been maintained. Upon an affidavit made by the accused, a subpoena duces tecum has been awarded to the president of the United States, requiring the production of this letter. In consequence of this process the letter was transmitted to the attorney for the United States, accompanied with a communication from the president, authorizing the attorney to exercise his discretion in the case. In the exercise of this discretion, he has selected certain parts of the letter which he has determined to withhold, because he believes them to be confidential, and therefore such as ought not to be exhibited in public. If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In this respect the courts of law are invested with the power of a court of chancery, and if the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him.

FN4 From 2 Robertson's Report of the Trial of Aaron Burr, 533.

Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? If the opposite party be required to produce his books on a particular subject, it is not necessary that the entries on those books should be stated in order to entitle the applicant to his motion. He cannot be expected to make such a statement. It has always been deemed sufficient to describe the paper required, to express its general purport, and to state its materiality to the case in some degree, even when its contents are known. When a paper is in possession of one party, it is completely in his power, and is required by the other, very strong reasons must be given to justify its being withheld, if it have any relation to the case. Before a court would make a decisive order in such a case it certainly ought to receive reasonable satisfaction of the probable materiality of the evidence asked for and refused, and of its relation to the pending controversy; but the information to be required must depend on the nature of the case.

Criminal cases, it is true, are not provided for; but courts will always apply the rules of evidence to criminal prosecutions so as to treat the defence with as much liberality and tenderness as the case will admit. The prosecutor is the representative of the government, and the government acts as a party through the agency of the attorney, who directs and manages the prosecution on behalf of government. If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper which might be required for the defence. If the executive possess a paper which is really believed by the accused to be material to his defence, ought it to be withheld? The question will recur, is it really material to his defence? The only evidence that can be received on this point is from the party himself, and he has made his affidavit to its materiality. But that is said to be insufficient; and why? Because the averment is, that the letter 'may be material' in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor. But there were two indictments: the one for treason and the other for a misdemeanor, and the allegation of materiality made in the affidavit may, it is said, refer to either indictment. But the prosecution for treason is terminated, and was terminated before the affidavit was made. Consequently it can relate only to the indictment for a misdemeanor. It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the

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letter itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence?

Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge. 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. I cannot, however, on this point, go the whole length for which counsel have contended. 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 do not think precisely with the gentlemen on either side. I can readily conceive that the president might receive a letter which it would be improper to exhibit ***192** 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. I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.

Yet it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. 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. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered.

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. But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown. In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the court. They must therefore be approved by himself, and not be the mere suggestions of another for him. It does not even appear to the court that the president does object to the production of any part of this letter. The objection, and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. He submits it to the discretion of the attorney. Of course, it is to be understood that he has no objections to the production of the whole, if the attorney has not. Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used. The declarations therefore made upon that subject can have no weight. Neither can any

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argument on its materiality or immateriality drawn from the supposed contents of the parts in question. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject. I believe, myself, that a great deal of the suspicion which has been excited will be diminished by the exhibition of this paper. [FN5]

FN5 From 2 Robertson's Report of the Trial of Aaron Burr, 533.

Mr. Hay said he would consult Gen. Wilkinson, and if he consented, he would produce the letter under the restrictions suggested by the court--preferring that to a continuance of the cause.

On Saturday, the 5th of September, Mr. Hay stated to the court that he would immediately send an express to Monticello (where the president then was) for instructions in relation to producing the letter, and that he would probably get a return by Tuesday evening.

On Wednesday, the 9th of September, a ***193** jury was empanneled and sworn, just one week having been consumed in the preliminary proceedings hereinbefore briefly noticed.

On the same day, Mr. Hay presented a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public.

The clerk read the indictment, consisting of seven counts, all charging the defendant in slightly variant forms, with beginning, setting on foot, or providing the means of a military expedition against the dominions or territory of the king of Spain.

In all the counts the offence was charged to have been committed at Blennerhassett's Island, in the county of Wood, and district of Virginia.

The trial then proceeded, and in the course of it the counsel for the prosecution offered in evidence declarations of Blennerhassett tending to implicate Colonel Burr, and endeavored to support it by alleging: 1st, a conspiracy between these two and others; and that the declarations of one conspirator were evidence against the others; or, 2d, that they were accomplices. They also offered in evidence acts of the nature laid in the indictment, committed by the defendant in Ohio and Kentucky, all of which was objected to.

The argument on the admissibility of the testimony lasted several days, at the close of which

[FN6]MARSHALL, Chief Justice, delivered the following opinion:

FN6 From 3 Carpenter's Report of Burr's Trial, 93.

The present motion is particularly directed against the admission of the testimony of Neale, who is offered for the purpose of proving certain conversations between himself and Herman Blannerhasset. It is objected that the declarations of Herman Blannerhasset are at this time inadmissible on this indictment. The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might

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be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important. This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question.

The first exception is, that in cases of conspiracy, the acts, and it is said by some, the declarations of all the conspirators, may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy, and this case it is alleged, comes within the exception. With regard to this exception, a distinction is taken in the books between the admissibility and operation of testimony, which is clear in point of law, but not at all times easy to practice in fact. It is, that although this testimony be admitted, it is not to operate against the accused, unless brought home to him by testimony drawn from his own declarations or his own conduct. But the question to be considered is, does the exception comprehend this case? Is this a case of conspiracy according to the well-established law meaning of the term? Cases of conspiracy may be of two descriptions. 1st. Where the conspiracy is the crime, in which case the crime is complete although the act should never be performed, and in such cases if several be indicted, and all except one be acquitted, that one cannot, say the books, be convicted, because he cannot conspire alone. 2d. Where the crime consists in the intention, and is proved by a conspiracy, so that the conviction of the accused may take place upon evidence, that he has conspired to do an act which manifests the wicked intention. In both these cases an act is not essential to the completion of the crime, and a conspiracy is charged in the indictment as the ground of accusation. If the conspiracy be the sole charge, as it may be, the question to be decided, is, not whether the accused has committed any particular fact, but whether he has conspired to commit it. Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design; the degree of guilt, however, of the particular conspirator upon trial, must still depend on his own particular conduct.

In the case at bar, the crime consists not in intention but in acts. The act of congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however, extensive, if it do not amount to a beginning or setting on foot a military expedition. The indictment contains no allusion to a conspiracy, and of consequence the issue to be tried by the jury is not whether the conspiracy has taken place, but whether the particular facts charged in the indictment have been committed. I do not mean to admit, that by any course which might ***194** have been given to the prosecution, that could have been converted into a case of conspiracy; but most assuredly if it was intended to prove a conspiracy, and to let in that kind of testimony which is admissible only in such a case, the indictment ought to have charged it. I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment. The researches of the counsel for the prosecution have not been more successful. But they suppose this case, though not within the letter, to come clearly within the reasoning of those cases where this testimony has been allowed. It has been said, that wherever the crime may be committed by a single individual, although in point of fact more than one should be concerned in it, as in all cases of felony, the prosecution must be conducted in the usual mode, and the declarations of third persons cannot be introduced at a trial; but whenever the crime requires more than one person, where from its nature it cannot be committed by a single individual, although it shall consist, not in conspiracy, but in open deed, yet it is in the nature of a conspiracy, and evidence of the declarations and acts of third persons connected with the accused may be received whether the indictment covers such testimony or not. I must confess that I do not feel the force of this distinction. I cannot conceive why, when numbers do in truth conspire to commit an act, as murder or robbery, the rule should be, that the declaration of one of them is no evidence against another, and yet, if the act should require more than one for its commission, that the declarations of one person engaged in the plot would immediately become evidence against another. I cannot perceive the reason of this distinction; but, admitting its solidity, I know not on what ground to dispense

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with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third persons made in the absence of the accused, because he is connected with those persons; if in consequence of this connection the ordinary rules of evidence are to be prostrated, it would seem to me that the indictment ought to give some notice of this connection. When the terms used in the indictment necessarily imply a combination, it will be admitted that a combination is charged and may be proved. And where A., B., and C. are indicted for murdering D., yet in such a case the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others. If then this indictment should even imply that the fact charged was committed by more than one person, I cannot conceive that the declarations of a particeps criminis would become admissible on the trial of a person not present when they were made, unless those declarations form a part of the very transaction charged in the indictment.

If in all this I should be mistaken, yet it remains to be proved that the offence charged may not be committed by a single individual. This may, in some measure depend on the exposition of the terms of the act; and it is to be observed that this exposition must be fixed. It cannot vary with the varying aspect of the prosecution at its different stages. If, as has been said, a military expedition is begun or set on foot when a single soldier is enlisted for the purpose, then unless it be begun as well by the soldier who enlists, as by the officer who enlists him, a military expedition may be begun by a single individual. So if those who engage in the enterprize follow their leader from their confidence in him, without any knowledge of the real object, there is no conspiracy, and the criminal act is the act of an individual. So, too, if the means are any means, the crime may unquestionably be committed by any individual. Should the term be even so construed as to imply that all the means must be provided before the offence can be committed, still all the means may, in many cases, be provided by a single individual. The rule then laid down by the counsel for the prosecution, if correct in itself, would not comprehend this case.

Secondly, there are also cases in the books where acts are in their nature joint, and where the law attaches the guilt to all concerned in their commission, so that the act of one is in truth the act of others, where the conduct of one person in the commission of the fact constitutes the crime of another person; but this is distinct from conspiracy. If many persons combine to commit a murder, and all assist in it, and are actually or constructively present, the act of one is the act of all, and is sufficient for the conviction of all. So in acts of levying war, as in the Cases of Damane and Purchase, the acts of the mob were the acts of all in the mob whose conduct showed a concurrence in those acts, and in the general design, which the mob were carrying into execution. But these decisions turn on a distinct principle from conspiracy. The crime is a joint crime, and all those who are present aiding in the commission of it participate in each other's actions, and in the guilt attached to those actions. The conduct of each contributes to shew the nature of this joint crime; and declarations made during the transaction are explanatory of that transaction; but I cannot conceive that in either case declarations unconnected with the transaction would have been evidence against any other than the person who made them, or persons in whose presence they were made. If, for example, one of several men who had united in committing ***195** a murder should have said, that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. So if Damane had previously declared that he had entered into a confederacy for the purpose of pulling down all meeting houses, I cannot believe that this testimony would have been admissible against a person having no knowledge of the declaration and giving no assent to it. In felony the guilt of the principal attaches to the accessory, and therefore the guilt of the principal is proved on the trial of the accessory. In treason, all are principals, and the guilt of him who has actually committed the treason does, in England, attach to him who has advised, aided or assisted that treason. Consequently the conduct of the person who has perpetrated the fact must be examined on the trial of him who has advised or procured it. But in misdemeanors by statute, where the commission of a particular fact constitutes the only crime punished by the law, I believe there is no case where the declaration of a particeps criminis can affect any but himself.

Thirdly. The admission of the declarations of Mr.

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Blannerhasset may be insisted upon under the idea he was the agent of Col. B. How far the acts of one man may affect another criminally, is a subject for distinct consideration, but I believe there is no case where the words of an agent can be evidence against his principal on a criminal prosecution. Could such testimony be admissible, the agency must be first clearly established, not by the words of the agent, but by the acts of the principal, and the word must be within the power previously shown to have been given.

The opinions of the circuit court of New York in trials of Smith and Ogden have been frequently mentioned. [Case No. 16,342.] Although I have not the honor to know the judge who gave those decisions, I consider them as the determination of a court of the United States, and I shall not be lightly induced to disregard them, or unnecessarily to treat them with disrespect. I do not, however, in the opinions of Judge Talmadge, perceive any expression indicating that the declarations of third persons could be received as testimony against any individual who was prosecuted under this act. If he has given that opinion, it has certainly escaped my notice, and has not been suggested to me by counsel. He unquestionably says in page 113 of the trial 'that the reference which was made to the doctrine of conspiracy did not apply in that case.' The reference alluded to was the observation of Mr. Emmet, who had said 'that, if the object was to charge Col. Smith with the acts of Capt. Lewis, they ought to have laid the indictment for a conspiracy.' The opinion of the judge that the doctrine of conspiracy had no application to the case, appears to me to be perfectly correct.

I feel, therefore, no difficulty in deciding, that the testimony of Mr. Neale, unless he can go further than merely stating the declarations made to him by Blannerhasset, is at present inadmissible. But the argument has taken a much wider range. The points made, comprehend the exclusion of their testimony suggested by the attorney for the United States, and the opinion of the court upon the operation of testimony. As these subjects are entirely distinct, and as the object of the motion is the exclusion of testimony supposed to be illegal, I shall confine my observations to that part of the argument which respects the admissibility of evidence of the description of that proposed by the attorney for the United States. The indictment charges the accused in separate counts with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against a nation at peace with the United States. Any legal testimony which applies to any one of these counts is relevant. That which applies to none of them must be irrelevant. The expedition, the character and object of that expedition, that the defendant began it, that he set it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment, and consequently these charges may be all supported by any legal testimony. But that a military expedition was begun and set on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alleged against the defendant, and testimony to that effect is therefore not relevant. All testimony which serves to show the expedition to have been military in its character, as, for instance, testimony respecting their arms and provisions, no matter by whom purchased, their conduct, no matter by whom directed, or who was present, all legal testimony which serves to show the object of the expedition, as would be either actually marching against Mexico, any public declarations made among themselves stating Mexico as their object, any manifesto to this effect, any agreement entered into by them for such an expedition, these or similar acts would be received to show the object of the expedition.

In trials of Smith and Ogden they were received. Whether the particular acts of the accused on which his guilt or innocence depends, must precede this species of testimony or may be preceded by it, is a question which merely respects the order of evidence. There can be no doubt but that at some stage of the prosecution, either before or after the particular part performed by the accused has been shown, the character and object of the expedition may be shown, and that by any legal testimony calculated to develope that character and object. Whether this testimony is admissible before the proof which particularly applies to the part performed by the accused, or ought to be introduced by first proving that ***196** part, is a question which is not made in this case, and which was not made in the case of Smith and Ogden. In that case it was certainly entirely unimportant, and it is probably not less so in this. It has been also contended that the acts no more than the declarations of third persons can be given in evidence on this indictment. It has

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been already said that those acts of equipment which go to show the character of the expedition may be given in evidence. If, for example, Blannerhasset, Tyler, Smith, or any other persons, provided arms, ammunition or provisions which were applied to the armament, this would be evidence, because it would show the character of the expedition. This was done in the case of Smith and Ogden, without enquiring who provided the arms, for they belonged to the expedition. Captain Lewis, for instance, purchased several military equipments. It was not deemed necessary to show that Smith was connected with Lewis, for these purchases were made for the expedition, and Smith was not charged with providing them. He was charged with providing other means; and the means provided by Lewis served to show the character of the expedition. But although the acts of all persons providing means applied to the expedition may be given in evidence upon the same principle that the state of the expedition may be shown, it does not follow that other acts of third persons may be given in evidence. It has also been contended that no transactions out of the district are testimony. This position is correct to a considerable extent, but not to the extent in which it is laid down. A declaration of Mr. Burr, for example, made in Kentucky or elsewhere, that he did not set on foot a military expedition on Blannerhasset's Island to be carried on against the dominions of the king of Spain while the United States were at peace with that power, would I think be evidence. So would the actual marching of the troops proved to be raised by him against the province of Mexico. Testimony which goes directly to prove the indictment may, I think, be drawn from any place. But I do not understand this to be the point really in contest. I understand the counsel of the United States to insist that providing means in Kentucky, that enlisting men in Kentucky, that joining the expedition in Kentucky, may be given in evidence to show that the accused did begin and set on foot the expedition in Blannerhasset's Island, or did provide the means at that place as charged in the indictment. This I understand to be the great question which divides the prosecution and defence.

It is I believe a general rule in criminal prosecutions that a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed. If gentlemen think me wrong in this, I will certainly hear them upon the point, but I believe the position to be correct. Now providing the means for a military expedition in Kentucky to be carried on against the dominions of a prince with whom the United States are at peace, is certainly in itself a distinct offence, upon which an indictment may be as well supported as it can be for providing means for the same or a similar expedition in Virginia. According to the rule laid down then, this testimony cannot be received unless it goes to prove directly the charges contained in the indictment. But how can it go directly to prove those charges? Does it follow that the man who has provided the means in Kentucky has also provided the means in Virginia? Certainly it does not follow; and consequently the acts alleged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprize, and gentlemen argue as if they thought this sufficient for their purpose. I shall be excused if I employ a few moments in stating my reasons for thinking it not sufficient. I have already said, and surely no man will deny, that two distinct persons may at different places furnish different means for the same enterprize. It will, I presume, not be contended that one of them may be indicted for the means provided by the other. So, too, if the same man shall provide means for the enterprize at different places, as in Virginia and Kentucky. I do not imagine that an indictment for providing arms in Virginia could be supported by proving that he provided ammunition in Kentucky. They are distinct offences, for either of which he may be punished, and the commission of one may render more probable, but does not prove, the commission of the other. How do gentlemen mean to make this testimony more relevant? It is by making the acts of Blannerhasset, Tyler and Smith, the acts of Burr, by insisting that their acts show an unlawful expedition to have been begun by him in Virginia, or that the means for that expedition were provided by him in Virginia. This being accomplished, his acts in Kentucky may be adduced to corroborate or confirm the testimony which discloses his conduct in Virginia. As preliminary then to this testimony, such proof of the specific charges contained in the indictment must be given, as may be left to the consideration of the jury. This proof relates to place as well as to fact. 'Of whatsoever nature an offence indicted may be,' says Hawkins (2 Hawk. P. C. c. 25, § 35), 'whether local or transitory, as seditious words or battery, &c., it seems to be agreed that if,

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upon not guilty pleaded, it shall appear that it was committed in a country different from that in which the indictment was found, the defendant shall be acquitted.' This rule is the stronger in the United States, where it is affirmed by the constitution itself, and where the jurisdiction of the court is limited to offences within the district. Its obligation therefore is complete. If there be any direct testimony that an expedition was begun, or set on foot, or that the ***197** means were provided or prepared in Virginia, that testimony has not yet been heard, so far as I recollect. If there be such testimony it must also be shown that the expedition was begun, or that the means were prepared by the accused. No single act of his in Virginia has been offered in evidence. He made a contract in the state of Ohio for boats and provisions, which may have been intended as a part of the expedition, but no contract appears to have been made in Virginia, nor were the boats constructed or provisions procured in Virginia. How then is it to appear that he begun or set on foot a military expedition in Virginia, or that he provided or prepared the means for such an expedition? It is said, that if he gave orders from Kentucky or elsewhere, and in consequence of those orders the means were provided in Virginia, the accused is within the letter of the act, as well as its spirit, and has himself provided the means in Virginia. If these orders were in proof, the court as well as the counsel would be enabled to view the subject with more accuracy, and to treat it with more precision. Since those orders are not adduced, nor accurately stated, and the question has been argued without them, the court must decline giving any opinion, or consider the orders as offered, and say what orders would be admissible and what inadmissible. The latter course may save the bar the trouble of another argument. To whom are orders supposed to have been given, and who are supposed to have executed them? They must have been given to accomplices or to those who had no share in the expedition.

The accomplices, under the direction of Col. Burr, have provided the means. Can their liability to the penalties of the law be doubted? I presume not. If persons engaged in the expedition have provided the means for carrying it on, it will, I presume, be admitted that they are within the letter and the spirit of the act. Each man has himself provided and prepared those particular means which he has furnished. If Col. Burr, as was the case with Col. Smith, has supplied money for the expedition, then money may be charged as the means provided by him; but, if that money was advanced to an accomplice, its investment in means for the expedition is the act of the accomplice, for which, being a free agent, he is himself responsible. The accomplice has committed the very act which the law punishes. Has the accused, by suggesting or procuring that act, also committed it? I will not say how far the rule, that penal laws must be construed strictly, may be carried without incurring the censure of disregarding the sense of the legislature. It may, however, be safely affirmed that the offence must come clearly within the description of the law according to the common understanding of the terms employed, or it is not punishable under the law. Now, to do an act, or to advise or procure an act, or to be connected or leagued with one who does that act, are not the same in either law, language, or in common parlance; and, if they are not the same, a penalty affixed to the one is not necessarily affixed to the other. The penalty affixed to the act of providing the means for a military expedition is not affixed to the act of advising or procuring those means to be provided, or of being associated with the man who has provided them. The distinction made by the law between these persons is well settled, and has been too frequently urged to require further explanation. The one is a principal, the other an accessory. In all misdemeanors punishable only by a statute which describes as the sole offender the person who commits the prohibited act, the one is within and the other not within the statute. In passing the act under consideration, congress obviously contemplated this distinction. I presume that in a prosecution under the 3d section, for fitting out a privateer, it would not be alleged that a person who was concerned with the man who actually fitted out the privateer, but who performed no act himself, could be convicted on an indictment, not for being concerned in fitting out the privateer, but for actually fitting her out. These are stated in that section as separate offences. This distinction taken in the law is well understood, and cannot be considered as overlooked by those who frame penal acts. They cannot be considered as intending to describe one offender when they describe another, and, if experience suggests defects in the Penal Code, the legislature exclusively judges how far those defects are to be remedied. While expounding the terms of the act, it may not be improper to notice an argument advanced by the attorney for the

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United States which was stopped by my observing that he had not correctly understood the opinion delivered in the case of treason. He understood that opinion as approving the doctrine laid down by Keeling and Hale, that an accessory before the fact might plead, in bar of an indictment as accessory, that he had been acquitted as principal, whence it was inferred that, on an indictment for doing an act, evidence of advising or producing that act might be received. I was certainly very far from approving this doctrine. On the contrary, I declared it to contradict every idea I had ever formed on the subject. But, if it were correct, I endeavored to show that it could not affect that case. My disapprobation of the doctrine induced me to look further into it, and my persuasion that it is not law is confirmed. 2 Hale, P. C. p. 292, says: 'If A. and B. be indicted of the murder of C., upon their evidence it appears that A. committed the fact and B. was not present but was accessory before the fact by commanding it, B. shall be discharged.' In 2 Hawk. P. C. c. 85, § 11, Hawkins discusses the subject, shows in a note the contradiction in those authorities which maintain the doctrine, cites the opposing authorities, and obviously approves the opinion which is here given. It is apparent, then, that the law never considers the ***198** commission and the procurement of an act, even where both are criminal, as the same act.

I cannot, therefore, consider means provided by those who are his accomplices in the expedition, as means provided by Col. Burr. If the means were provided by order of the accused, by persons not accomplices and not guilty under the act, the law may be otherwise. I shall not exclude such testimony. There is, however, some doubt whether the place of trial should be where the orders were given, or where they were executed. At common law, if an act was procured or advised at one place, and executed at another, it was doubted whether the procurer could be tried at either place, because the offence was not complete at either. This difficulty was removed by a statute made in the reign of Edward VI. If there be testimony showing, by orders from the accused, means were provided in Virginia by a person not an accomplice, it may be received, and the question respecting the scene of trial put in way for a final decision. The question whether all the means must be provided before the offence described in the statute has been committed, relates to the effect rather than to the exclusion of the testimony. I shall certainly not reject any evidence which shows that any means were provided by the accused in the place charged in the indictment. Upon the subject of beginning and setting on foot a military expedition or enterprize, it would be unnecessary at this time to say anything, were it not on the account of the question respecting the introduction of testimony of the district. What is an expedition? What is an enterprize? An expedition, if we consult Johnson, is 'a march or voyage with martial intentions.' In this sense, it does not mean the body which marches, but the march itself. The term is, however, sometimes employed to designate the armament itself, as well as the movement of that armament. An enterprize is 'an undertaking of hazard, an arduous attempt.' The proper meaning of this word also describes the general undertaking, and not the armament with which that undertaking is to be accomplished.

The first count in the indictment charges that Burr began the expedition in 'Blannerhassett's Island; the second and third, that he set on foot the enterprize on Blannerhassett's Island. If the term expedition is to be taken in its common and direct sense,--that is, to mean a march or voyage with martial intentions,--it began where that march or voyage begun; and it must have been begun by the accused to bring him within the act. If the term be taken in its figurative sense to designate the armament instead of the movement of the armament, then I cannot readily conceive an act which begins an expedition, unless the same act may also be said to provide the means of an expedition. The formation of the plan in the mind is not the commencement of the expedition, within the act. Our laws punish no mental crimes not brought into open deed. The disclosure of that plan does not begin it. If it did, the first disclosure would be the beginning. I find a difficulty in conceiving any act which amounts to providing the means for an expedition. However, if there can be such an act, and it has been committed in Virginia, it may certainly be given in evidence. The same observations apply to setting on foot an enterprize. These remarks are made to show what it will be necessary to prove in order to let in corroborative proof.

It is then the opinion of the court, that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case.

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That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received. Gentlemen well know how to apply these principles. Should any difficulty occur in applying them, the particular case will be brought before the court and decided.

After the opinion was delivered, Mr. Hay requested a copy of it, and made some observations as to its effect upon the future progress of the trial. He considered that the man who had the supreme command and direction of this military enterprize (which they could prove it to be) did provide the means and set it on foot. This was a question he thought proper for the consideration of the jury, and this idea would be strengthened by evidence which could be produced, if permitted.

Mr. Wirt. The fact is, that Mr. Belknap can prove (as well as others) that he sent orders and did other acts showing that he was at the head and command of the whole.

The CHIEF JUSTICE. But suppose the connection was proved (which I have no doubt could be), and suppose the enterprize originated with Col. Burr (which is very probably the case), others might have provided the means, from what could be made to appear. He is not indicted for being connected with the enterprize, but for providing certain specific means. If the party under Tyler is to be considered as of a military nature, and that an expedition began at Beaver, or where not, if the movement is to be considered as an enlistment of men, then, wherever the first movement was made, there the expedition began. I do not think that his taking the command at Cumberland can be considered as a count in the indictment; it might go to render it more probable (if ***199** there was any doubt as to the transaction) that what was done was under his control; but the act itself must be proved on Blannerhasset's Island; and there the intention with which that act was done would come in by proving that he took the command afterwards. But how can he be charged with beginning there, if it should appear that he began in Pennsylvania? The question of 'beginning' I do not mean to take from the jury; of the place of beginning and of the acts themselves, they must decide. An abstract, independent question will arise, however, which is, whether the witnesses proved the indictment or not? Now I do not think that they did prove the indictment. What might be done is a future question.

Mr. Wirt. Am I to understand, sir, that the acts of accomplices, out of the district, tending to prove the acts laid in the indictment, may be given in evidence?

The CHIEF JUSTICE. Any act which shows the character of the transaction itself, in my opinion, may be given.

Mr. Wickham. I understand the opinion of the court to be that we cannot be liable for the acts of others, though done within the district; no auxiliary acts can be given against us, and they are not entitled to go out of the district to show acts done elsewhere, against us?

Mr. M'Rae. If we shall offer evidence that will be proper to submit to a jury, to prove where he did commence this enterprize, at any period whatever, it is not necessary that we should show that he remained on Blannerhasset's Island all the time. But seeing the enterprize was actually commenced, we shall be able to satisfy a jury that, when Burr was on the island, he did there actually project it, and did agree with Blannerhasset as to its progress, which was afterwards carried on, we ought certainly then to be at liberty to go out of the district to show that he was the principal person concerned in it. I do not suppose it necessary for us to show that all the means were provided by him.

The CHIEF JUSTICE. There is no doubt which I had at the commencement of this case (which I do not now suggest to make a question of) it relates to the indictment, and consequently to a particular part of the evidence, particularly to the words of the statute 'beginning and setting on foot an expedition.' I do doubt whether it is not necessary to show in the indictment how the expedition was begun. I do not know that it is necessary to set forth the principal means in the indictment. It is in itself, an extremely vague term, but if it is a

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necessary one, surely the particular manner of beginning must be showed. I think, however, it ought to be laid in the indictment, and if so, that is a strong reason why it ought to be shown by evidence.

The counsel on both sides were ordered to be furnished with copies of the opinion, and the court adjourned to Tuesday, ten o'clock.

Tuesday, September 15.

Mr. Hay said, that the counsel for the prosecution had agreed to go on as well as they could, for that they had drawn such a construction from the opinion as to excite them to suppose that they had sufficient evidence yet remaining to produce a conviction of the person accused, without interfering with the opinion of the court. He was stating some of the points laid down by the court, as far as we were able to hear him (which was extremely difficult), when Mr. Botts interfered to explain what were the limits set by the court, upon which he dwelt at some length, and repeated most of the arguments before used, as to the absence of Mr. Burr, and the evidence offered respecting conversations held between him and others. Indeed, he took a brief review of the whole opinion, and concluded, upon the whole, that the absence of Mr. Burr rendered all evidence which it appeared could be produced irrelevant; none had been offered, and he defied the prosecution to offer a particle,--for, from the whole review of the opinion, it was not within the compass of the heart of man to produce a conviction.

Mr. Martin offered a few observations favorable to the production of any evidence which the prosecution could produce: if they exceeded the bounds which the court had justly prescribed, it would then be due time to make objections, on which the court would determine.

Much desultory conversation ensued, when Richard Neale was again called, and asked whether he was on the island on the night of Blannerhasset's departure. 'A. I was not. I left the country in October, and know nothing of it.'

James McDowell was then called and sworn.

Mr. Burr stated that this witness was introduced for the purpose of proving an interview between him and the accused at the mouth of Cumberland river, where the accused stated to him the object of the expedition. The witness commenced his evidence by saying that he should begin up at Wheeling and proceed downwards to Cumberland where he first saw Col. Burr, when Col. Burr interrupted him by observing that he understood that this was offered as corroborative or auxiliary testimony, but auxiliary to what? They ought first to demonstrate acts done at the island, before they attempt to prove what was done, or (what is worse) said, out of the district.

Mr. Wirt went into a review of the opinion to support the propriety of offering this species of evidence, and contended that, before they could come to the substantive charge, they ought to be permitted to show the parts so nearly attached as this was. On this ground was General Eaton's testimony admitted, because it bore direct on the charge laid in the indictment, and equally intimate ***200** were the acts at Cumberland. Under the act of congress, the charge is, providing means, &c. Now, was not the assumption of the command of those engaged in this expedition a material article in the means provided or providing? Here was the right to command acknowledged. It is not our meaning to say that there he began the expedition; he provided most of his means elsewhere, but there he met with his men, and there he headed them (he referred to Vaughan's case.) The mouth of Cumberland transaction was one link in the great chain; it commenced perhaps with what occurred between him and General Eaton, and proceeded by degrees till men, arms, &c., were procured, but the superintendence of Burr was discoverable everywhere; he projected and hastened on the scheme, as will appear. The transactions at Cumberland cannot be abstracted more than others of equal importance. Such corroborative testimony as that now offered, he contended, was even let in in capital cases, and could not be excluded without manifest injustice to the prosecution, because of its very intimate connection with the whole. There was a wide difference between a mere connection, and a man having the sovereign command of a criminal transaction (as was now attempted to be proved). The beginning was with General Eaton,--the consummation was to be somewhere else. It would be proved that Burr not only began, but brought the thing about so far as it went; he was the life and prime mover of the whole. Mr. Wirt went into some reasoning and elucidation of the propriety of this evidence; though it was no positive proof of his guilt under the indictment, yet he insisted it was

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strong circumstantial evidence that these means were his means, and that the evidence was within the meaning of the court, as far as he understood the opinion.

Mr. Botts expressed his extreme surprise at the light in which the gentlemen had represented the opinion of the court: he made some strong strictures on Mr. Wirt's representations of it, and admired the judge's patience to sit there and hear it. He then quoted some parts of the opinion, and made some strong eulogistic remarks upon it, after which he compared it with the point in dispute; as to Burr's presence, &c. (which has so often been the topic). It was stated to be one continued act. Be it so; let it be supposed to be an act of unanimity and continuity, and how would it then stand? A distinct offence was charged to have been committed by Col. Burr on the island, but, instead of its being done by him, on the island, it appeared to have been done by others, and evidence of words used elsewhere were brought as corroborative, to prove what was done where he was not! By what kind of ingenuity could anything done in Cumberland be transported to Blannerhasset's Island, when the act, though laid there, was already disproved.

MARSHALL, Chief Justice. I certainly should not have sat so patiently to hear the elaborate arguments which were offered, if I had not had a hope that the opinion which was afterwards delivered would have settled the point; an opinion which I thought was given so clear as to render it unnecessary to give another opinion upon the same point. It appears to me now that it would be unnecessary were it not for the vaguity of the law, and different understandings of gentlemen as to the terms 'beginning and setting on foot' an expedition. They vary in opinions amazingly on those terms. Now, what is 'beginning'? There must be some definite meaning affixed to the word, or I do not know how a court is to act upon the law. It means something, or else it is too vague for a court to punish those who have committed the act, or are the subjects of prosecution. As I before stated, an 'expedition' must mean one of two things; it must indicate the march of a military force or army from one place to another, or it must be considered as a military armament substantively. Now, its natural and direct meaning must be the movement of a military armament, and not the armament itself. Now, when this movement takes place the expedition is said to begin; the march is said to have commenced. But the word also means an armament that moves, rather than the movement of that armament. However, I did not undertake to decide this question of the meaning, because I wished not to fix a positive meaning to terms when they relate to a law that may possibly undergo a revision, particularly when I had no precedent nor assistance in it. But if it be the movement of an armament itself, when that armament existed as such, then as I said before I could not distinguish between providing the means of that armament and the beginning of it. I cannot conceive what it is, nor can I conceive any fact that will amount to a 'beginning' this armament, unless it is in the provision of the means, or of some means. Furnishing money or enlisting men may be considered as providing means. This, then, must be beginning the expedition. It must either mean this, or it must mean the march. If it means the march, then the expedition was brought down by Mr. Tyler from Beaver, where they first assembled, and afterwards rested at Blannerhasset's Island, whence they proceeded lower down. If it be expedition, and the meaning of the word is the march of the armament, then the proof is positive that it did not begin at Blannerhasset's Island. If the meaning is the provision of the armament, then the beginning of the expedition is the place where the first means were provided. Taking then, the word in one or the other meaning, it certainly appears to me that the testimony produced by the attorney of the United States disproves his own charge, for that it was not begun on Blannerhasset's Island, where the charge is ***201** laid in the indictment. The beginning, then, is out of the question.

The question then is whether the means were provided or not on Blannerhasset's Island. If there be any testimony that goes to prove this, I certainly am not at liberty to refuse it. But gentlemen will consider whether they are not wasting the time and money of the United States, and of all those persons who are forced to attend here, whilst they are producing such a mass of testimony which does not bear upon the cause. Any arguments on the principle which was stated, that the testimony respecting means provided elsewhere, supporting this charge, I am willing to hear. If the opinion of the court before given can be proved to be erroneous, I shall be very happy to hear it pointed out, because I wish to be as correct as possible; but,

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if these principles are not erroneous, why do gentlemen bring witnesses forward in direct opposition to them? I can ascribe no other reason to it, than because the law does not give definite ideas on the subject of its own provisions. The truth is, the words of the law must be taken to retrospect to the origination of the plan. For instance, General Eaton states that in Washington the accused laid before him a certain plan, when he said that he had sufficient means, &c. Now, if those means could be discovered, it certainly shows that the beginning of this expedition was in Washington, but the indictment states it to be on Blannerhasset's Island. Now, unless the fact itself shall be proved, how can there be evidence given of motives, yet undiscovered? [FN7]

FN7 From 3 Carpenter's Report of Burr's Trial, 93.

It is, then, the opinion of the court that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case. That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received.

THE COURT.

The attorney of the district finding in the progress of the cause that this decision excluded almost the whole of his testimony, on the 15th of September moved the court to discharge the jury. This was objected to by the defendant, who insisted upon a verdict. THE COURT being of opinion that the jury could not, in this stage of the case, be discharged without mutual consent, and that they must give a verdict, they accordingly retired, and not long after returned with a verdict of 'Not guilty.'

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BODY:

President Carter is expected to submit videotape testimony rather than appear in person before a federal grand jury investigating alleged White House influence-buying involving fugitive financier Robert L. Vesco.

Sources familiar with the investigation said Wednesday that no date has been set for Carter's testimony and some details remain to be worked out.

The sources, who asked not to be identified, said some members of the grand jury wanted to be able to submit follow-up questions to Carter personally, but were outvoted by other grand jury members who agreed to the videotape arrangement.

The sources said the minority grand jurors contended the president could be afforded special security precautions if he agreed to be questioned in person, and that the special videotape treatment was uncalled for.

Under the arrangement, Carter will be interviewed by government lawyers outside the presence of the grand jury.

The grand jury is investigating charges that shortly after Carter took office in January 1977, attempts were made on Vesco's behalf to quash extradition proceedings against the financier. Vesco fled the country while under indictment for stock fraud and is believed to be living in the Bahamas.

The Carter administration has denied taking part in any effort to quash extradition.

But a White House aide, Richard M. Harden, was approached in February 1977 by W. Spencer Lee IV, a Georgia lawyer allegedly acting in Vesco's behalf.

Both Lee and Harden have said Harden talked the lawyer out of pursuing the matter.

But Harden said he went to Carter after meeting with Lee, and that the

president sent a note to then-Attorney General Griffin B. Bell which said "please see Spencer Lee from Albany (Ga.) when he requests an appointment."

Justice Department officials said the memo was placed in a file folder for potential job-seekers, and Lee never appeared for an appointment.

R.L. Herring, an Albany, Ga., businessman who was convicted last year on unrelated federal fraud and racketeering charges, has said he hired Lee for $10,000 to plead Vesco's case with the Carter administration.

The Justice Department refused all comment Wednesday on the proposed arrangement for taking Carter's testimony.

If Carter videotapes answers for the grand jury, the department believes it would be the first time a president has answered grand jury questions in this manner.

Carter was interviewed for four hours on Sept. 5 by Paul J. Curran, the special counsel who investigated the Carter family's peanut business in Georgia. Curran concluded there was no evidence of any criminal wrongdoing in that case.

Also, in April 1978, the president provided 51 minutes of videotape testimony in a federal court in Macon, Ga., at the trial of Georgia state Sen. Culver Kidd, who was acquitted of gambling and conspiracy charges.

LANGUAGE: ENGLISH

4TH STORY of Level 1 printed in FULL format.

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January 1, 1989, Sunday, Final Edition

SECTION: FIRST SECTION; PAGE A7

LENGTH: 893 words

# HEADLINE: Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, but the Issue Has Never Been Clearly Decided

BYLINE: Ruth Marcus, Washington Post Staff Writer

BODY:

When Aaron Burr stood trial for treason in 1807, he employed an unprecedented tactic: subpoenaing the president of the United States, Thomas Jefferson, under whom Burr had served four years as vice president.

Burr sought to have Jefferson appear in court and testify about a letter written to the president by one of Burr's alleged coconspirators. Chief Justice John Marshall, presiding over the trial, declared that the president, unlike a king, was subject to the law. Eventually, Jefferson finessed the matter. He refused to appear but provided a certified copy of the letter, with sensitive parts deleted, and insisted he was doing so voluntarily.

Now, lawyers for former White House aide Oliver L. North are employing a similar tactic. On Friday, they served on the Justice Department subpoenas seeking the testimony of President Reagan and President-elect George Bush at North's trial, scheduled to start Jan. 31.

The administration is expected to contest the subpoenas. Administration lawyers -- citing the Jefferson example -- have argued that no sitting president has ever testified in court in a criminal trial. "Jefferson made it very clear that he thought it was improper to bring presidents into a trial proceeding, and that precedent has been followed in every other case that I know of," said one Justice Department official.

Between 1807 and now, however, the issue has never been squarely decided.

In 1974, the Supreme Court, in the Watergate tapes case, ruled 8 to 0 that President Richard M. Nixon had to comply with the special prosecutor's subpoena to turn over the White House tapes.

In an opinion by then-Chief Justice Warren E. Burger, the court rejected Nixon's claim that the doctrine of separation of powers and the need for confidential government communications gave him absolute privilege to refuse to release the tapes. The court ruled that the need for the evidence in the Watergate case outweighed the "presumptive privilege" protecting disclosure of presidential communications.

"The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the court said.

The tapes case, however, did not involve a subpoena seeking the president's appearance in court.

In 1975, President Gerald R. Ford gave a videotaped deposition as a defense witness -- later played in court -- in the trial of Lynette (Squeaky) Fromme, who was convicted of attempting to assassinate Ford. Administration lawyers lost a bid to have the court accept a written statement by the president.

Likewise, President Jimmy Carter, while in office, twice gave videotaped testimony, once as a government witness in the perjury and gambling trial of a Georgia state senator, and a second time before a federal grand jury investigating allegations that fugitive financier Robert Vesco sought to bribe members of the Carter administration.

Nixon, after leaving office, was scheduled to testify at the 1974 Watergate cover-up trial of his former aides, but was suffering from phlebitis and the trial proceeded without him. Six years later, Nixon voluntarily complied with a subpoena to testify at the conspiracy trial of two former FBI agents.

In the current case, legal experts said there will be a heavy burden on North's lawyers to show why they need the testimony.

In the Watergate tapes case, said R. Stan Mortenson, one of Nixon's lawyers, "what the court clearly said was, if the president has relevant evidence, then the criminal justice system and the need for evidence in criminal cases will overcome any privilege . . . but that it's not something to be lightly undertaken . . . . "

Justice Department officials have argued that Bush, who will have been sworn in as president by the time the North trial begins, cannot be hauled into court, away from his presidential duties. They said that Reagan, although he will be out of office by then, will still have knowledge of sensitive national security information and the right to assert executive privilege.

The Watergate tapes case, in which the court emphasized that it was not dealing with a claim of privilege based on national security grounds, offers "a fairly strong precedent" for fighting the subpoenas, one department official said.

As to Reagan, the official said, "I think the claim for this former president in light of the timing [so close to his departure from office] is still very powerful and so the distinction between a President Bush and former president Reagan is not going to be, in my judgment, constitutionally significant," the official said.

But other legal experts said that, particularly with regard to Reagan, if North can show a need to question the former president -- who has already answered written questions submitted by independent counsel Lawrence E. Walsh -- the subpoena could be upheld.

The president, "like any other witness, can refuse to divulge national security information unless ordered by the court," said Alan B. Morrison of

Public Citizen Litigation Group.

But Morrison said, "My tentative view is that [claim of privilege] would be overruled. Looking at U.S. v. Nixon [the tapes case] and the 6th Amendment right to call witnesses in your behalf, assuming that conversations were material to the defense, I think it would be very hard to keep that out."

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LANGUAGE: ENGLISH

63RD STORY of Focus printed in FULL format.

The Associated Press

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August 17, 1979, Friday, BC cycle

SECTION: Domestic News

LENGTH: 221 words

DATELINE: ATLANTA

BODY:

A federal investigation into the operation of President Carter's peanut warehouse in Plains, Ga., is close to completion, according to the probe's special counsel.

"We've completed a good part of it and we hope to finish soon," Special Counsel Paul Curran said Thursday.

He indicated that the bulk of the data for the investigation has been gathered, but he added: "We've got a lot of analyzing and a lot of reviewing to do and some decisions to make."

Curran said he has set no deadline for completion of the work.

Curran was appointed last March by then-Attorney General Griffin Bell to investigate allegations concerning the warehouse, including one that loans to the business may have been diverted to Carter's 1976 presidential campaign.

Curran would not say whether he plans to seek indictments in the case. He has the option of seeking indictments and prosecuting them himself or turning any indictments in the case over to the Justice Department for prosecution.

Whether or not there are indictments, Curran said he expects to make public a report of his findings.

A special grand jury has heard testimony from several witnesses in the case, including Billy Carter, the president's brother, who managed the warehouse until 1977.

The warehouse is owned by the president, his brother and their mother.

LANGUAGE: ENGLISH

57TH STORY of Focus printed in FULL format.

The Associated Press

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October 15, 1979, Monday, PM cycle

SECTION: Domestic News

LENGTH: 241 words

BYLINE: By CHARLES CAMPBELL, Associated Press Writer

DATELINE: ATLANTA

BODY:
Paul J. Curran, the special counsel appointed in March to investigate loans to President Carter's peanut warehouse, said today he would hold a news conference Tuesday in Washington.

Curran refused to specify the purpose of the news conference. He said several weeks ago, however, that he expected to wind up his investigation in October.

There was no immediate White House comment on Curran's announcement.

The federal grand jury that convened in Atlanta under Curran's direction has taken testimony from a number of witnesses, including President Carter's brother Billy Carter, part owner of the warehouse.

While there has been some published speculation about Curran seeking testimony from the president, it was not known whether Curran attempted to talk directly to President Carter or whether the grand jurors heard testimony from the president.

Curran has steadfastly said he would not comment on the probe until it was complete. He has not called a news conference since he selected his staff, shortly after his appointment by then-Attorney General Griffin Bell.

The grand jury has not filed presentments or issued any indictments during the eight-month probe, which grew out of the investigation into the banking practices of former federal budget director Bert Lance.

Curran's probe has centered on loans to the warehouse from the National Bank of Georgia during the time that Lance was president of that Atlanta bank.

LANGUAGE: ENGLISH

56TH STORY of Focus printed in FULL format.

Copyright 1979 Newsweek
Newsweek

October 29, 1979, UNITED STATES EDITION

SECTION: NATIONAL AFFAIRS; Pg. 35

LENGTH: 445 words

HEADLINE: THE PEANUT PROBE: CASE CLOSED

BYLINE: ALLAN J. MAYER with ELAINE SHANNON in Washington

BODY:

Did Jimmy Carter's peanut business in Plains, Ga., illegally funnel millions of dollars into his 1976 Presidential campaign? Last week, Justice Department special counsel Paul Curran delivered what should be the final answer: no. After an intensive six-month investigation -- including four hours of testimony from the President himself -- Curran issued a 239-page report that exonerates the Carter family. "No evidence whatsoever was discovered that any moneys were diverted from the warehouse into the campaign," Curran said. "Based on all the evidence and the applicable law, no indictment can or should be brought against anyone."

The investigation grew out of a Federal probe last year of the National Bank of Georgia, which once was headed by Carter's friend and former budget chief Bert Lance. Last March, after an FBI report questioned NBG's dealings with the Carter business, the then Attorney General Griffin Bell appointed Curran to investigate how the Carter warehouse handled nearly $9.9 million in loans from NBG between 1975 and 1977. Curran, a Republican lawyer and former Federal prosecutor, reported that he had traced "every nickel and every peanut into and out of the warehouse" and found that "no funds were unlawfully diverted."

OVERDUE: Curran said that an NBG loan to Carter media adviser Jerry Rafshoon had not been illegally used to float the campaign through a spring 1975 cash crisis. When Federal matching funds were briefly shut off, Rafshoon's ad agency let nearly $700,000 in overdue campaign bills pile up. NEWSWEEK has learned that a separate Justice inquiry -- to determine whether this practice violated the ban on corporate loans -- has been closed with no charges recommended.

But though the family business was cleared of any criminal wrongdoing, Curran criticized it for sloppy business practices during the time it was run by the President's brother, Billy. According to Curran, the Carter warehouse was continually strapped for cash -- and NBG repeatedly allowed Billy to repay the bank loans with checks drawn on insufficient funds. Instead of depositing the rubber checks, the bank held them until the Carter account was large enough to cover the amount due. The bank also permitted the warehouse to release the peanuts that had been pledged as collateral for one of the loans -- a direct violation of the loan agreement.

Finally, Curran's accountants concluded that the peanut business understated its net income in 1977 and overstated it in 1975 and 1976. The net result, he

said, is that the business may owe more Federal income taxes. Apart from that, the case now appears to be closed.

GRAPHIC: Picture 1, Billy and Jimmy in 1976, Ron Sherman -- Nancy Palmer; Picture 2, prober Curran: Tracing every nickel and peanut, AP

LANGUAGE: ENGLISH

53RD STORY of Focus printed in FULL format.

The Associated Press

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December 7, 1979, Friday, AM cycle

SECTION: Washington Dateline

LENGTH: 683 words

BYLINE: By JAMES H. RUBIN, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Attorney General Benjamin R. Civiletti disclosed Friday he has removed himself from any role in the government's investigation into allegations of White House influence-buying on behalf of fugitive financier Robert L. Vesco.

At the same time, Civiletti told an impromptu news conference he believes it is proper that President Carter be allowed to give videotaped testimony to a grand jury. Carter plans to give the testimony to a federal grand jury that has been investigating the Vesco case for more than a year.

Civiletti said he is taking no part in the investigation because of his role in the Carter administration's decision in 1977 to abandon efforts to extradite Vesco in favor of using diplomatic channels to have him deported.

There has been no evidence the decision was made to benefit Vesco, who is believed to be living in the Bahamas.

Civiletti said, nonetheless, it would be "inappropriate for me" to take part in the investigation "since I was involved in contemporaneous actions" relating to extradition proceedings against Vesco.

Civiletti said he was not consulted about the plans disclosed this week for Carter to testify by videotape rather in person before the grand jury.

The attorney general said he learned of the plans unofficially. "I may have heard about it second or third hand," he said.

According to sources close to the investigation, some grand jurors complained that the videotaping procedure would prevent them from asking follow-up questions.

Asked if a president should be given special treatment when called to testify, Civiletti said, "Certainly. Only in the most compelling circumstances should a president have to provide information directly to a court or investigation."

He said that if high public officials were forced to appear in court every time someone subpoenaed them, in civil as well as criminal cases, "you'd have nothing but (the officials) sitting around courtrooms all day."

Civiletti said he regards the videotaping procedure as direct testimony. He said he had not considered what conditions would ever require a president to appear in person before a grand jury.

A District of Columbia grand jury is investigating allegations that shortly after Carter took office in January 1977, an attempt was made to pay off high administration officials to quash extradition proceedings against Vesco, who fled the country nearly 10 years ago after his indictment on stock fraud charges.

R.L. Herring, a Georgia businessman who has been convicted on unrelated federal fraud and racketeering charges, has said he paid $10,000 to a Georgia attorney, W. Spencer Lee IV, to act in Vesco's behalf.

Lee has said he met with a White House aide, Richard M. Harden, in February 1977, and was persuaded by Harden not to pursue the matter further.

Harden subsequently met with Carter, who sent a note to then-Attorney General Griffin B. Bell which said, "Please see Spencer Lee from Albany (Ga.) when he requests an appointment."

The Justice Department said the memo was placed in a file folder for potential job-seekers, adding that Lee never appeared for an appointment.

It is believed that Carter's videotaped answers for the grand jury in the Vesco case would mark the first time a president has answered grand jury questions in this manner. Carter has provided testimony in different forms at least twice before criminal investigations since he became president.

On another subject, Civiletti said he wasn't aware of any tension between himself and the White House that has developed from his decision to recommend a special prosecutor investigate allegations that White House Chief of Staff Hamilton Jordan used cocaine.

On Civiletti's recommendation, a special three-judge federal appeals court appointed a New York lawyer, Arthur Christy, to investigate the case.

Asked if his decision had caused strained relations with the White House, Civiletti said, "Not to my knowledge."

Civiletti said he met this week with Christy for about 15 or 20 minutes to offer Justice Department office space and staff for the investigation.

LANGUAGE: ENGLISH

52ND STORY of Focus printed in FULL format.

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Facts on File World News Digest

December 14, 1979

SECTION: U.S. AFFAIRS; Vesco Case

PAGE: Pg. 943 C2

LENGTH: 494 words

HEADLINE: Carter to Tape Testimony

BODY:
President Carter was to videotape testimony for a federal grand jury investigating an alleged plan to fix legal problems of fugitive financier Robert Vesco, government sources told the Associated Press Dec. 5. [See p. 725F2-E3]

Several members of the grand jury reportedly objected to the proposed arrangement for questioning Carter on the ground that they would be unable to submit follow-up questions to the President.

The grand jury was investigating allegations that in 1977 there was an attempt to quash extradition proceedings against Vesco, who fled the country after being indicted on stock fraud charges, through White House influence-buying.

The questions for Carter were likely to center on a Feb. 15, 1977 meeting Carter had with a White House aide, Richard M. Harden.

A Georgia lawyer, W. Spencer Lee 4th, who allegedly acted as an intermediary in Vesco's behalf, had contacted Harden with a bribe offer. [See p. 725A3]

Harden and Lee had both said Harden talked the lawyer out of pursuing the Vesco matter.

The New York Times reported Dec. 4 that after President Carter met with Harden, he sent a note to then Attorney General Griffin B. Bell urging him to see Lee. Justice Department officials had said that Bell never received the note and never met with Lee.

Bell Testifies -- Former Attorney General Griffin B. Bell Dec. 4 testified for some 90 minutes before a Washington, D.C. federal grand jury investigating possible White House influence-buying attempts by fugitive financier Robert L. Vesco. [See above]

Based on the questions he encountered, Bell told the New York Times Dec 5, he felt the government lawyers and members of the grand jury appeared to be "wrapping up loose ends" in their probe.

Bell said of Vesco and his intermediary, convicted businessman R. L. Herring: "This was just a group of con artists working each other. That goes on every

day. But the question is, did they ever get to the government? The answer to that is emphatically no."

Bell said he did not know what had happened to a note sent to him by President Carter in 1977 urging him to see W. Spencer Lee 4th, a Georgia lawyer representing Vesco. Bell said he never received the note and did not meet with Lee.

Civiletti Withdraws from Probe -- Attorney General Benjamin R. Civiletti Dec. 7 said he had removed himself from any role in the government investigation of Vesco.

Civiletti cited as a reason his role in the Carter Administration's 1977 decision to end efforts to extradite Vesco to the U.S. in favor of using diplomatic channels to have him deported from countries in which he sought refuge.

Civiletti said that while there had been no evidence that the decision was made to benefit Vesco, he believed it would be "inappropriate" for him to take part in the probe. Civiletti also said he was "involved in contemperaneous actions" relating to extradition proceedings against Vesco.

LANGUAGE: ENGLISH

22ND STORY of Focus printed in FULL format.

The Associated Press

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March 26, 1989, Sunday, AM cycle

SECTION: Washington Dateline

LENGTH: 900 words

HEADLINE: Last President Subpoenaed Less Than 15 Years Ago

BYLINE: By HARRY F. ROSENTHAL, Associated Press Writer

DATELINE: WASHINGTON

BODY:
History is repeating itself rather quickly in the demand by Oliver North that former President Reagan come from his home in California to testify for North at his criminal trial.

There was a gap of 167 years between the time Thomas Jefferson was subpoenaed and the 1974 summons to Richard Nixon, by then an ex-president. Less than 15 years passed before the subpoena for Reagan.

During the 1974 Watergate cover-up trial, former aide John D. Ehrlichman almost succeeded in his request for Nixon's appearance. It would have happened, too, had the former president not fallen critically ill following surgery.

"I would have loved to have Nixon in court, I had a few questions I wanted to ask him myself," U.S. District Judge John J. Sirica wrote in his memoirs.

But at the time, a team of court-appointed doctors determined that Nixon would be in no condition to travel for some time, which would have delayed the trial. "I ruled reluctantly," Sirica remembered of his decision that the former president would not have to appear. "I did feel that no matter how anxious many of us were to see Nixon face the lawyers and testify under oath, having him in court was not really critical to Ehrlichman's defense."

Had he gone on the witness stand, Nixon would have been the first ex-president to do so under subpoena. That dubious distinction will fall to Reagan if U.S. District Judge Gerhard Gesell accedes to North's request.

The debate whether a president must obey subpoenas and other court orders dates to the beginning of the republic, and it is just as volatile today as it was then.

President Thomas Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr,

Jefferson's first vice president.

Burr wanted Jefferson to appear in court and testify about the letter written to the president by one of Burr's alleged co-conspirators. Chief Justice John Marshall, presiding over the trial, declared that the president unlike a king was subject to law.

Jefferson cited the independence of the executive branch of government from the judicial branch and refused, at first, to release the letter. Eventually, he turned it over but made clear that his decision was voluntary and not in response to the subpoena.

From then until Watergate, the concept of executive privilege was never tested. No sitting president ever has testified in court in a criminal trial, although several have provided testimony or what might be considered an equivalent.

It is not difficult to see why North's lawyers want Reagan to testify. Defense attorney Brendan Sullivan has attempted to show, in his cross examination of prosecution witnesses, that Reagan was much more involved in the secret aid to the Contra rebels than was known publicly before.

The jury heard that Reagan personally approved an NSC-recommended deal in 1985 to give Honduras $$110 million in covert economic and military aid as an inducement to support the Contras.

The jury also heard that Reagan apparently approved a plan from North and others in the government to airdrop intelligence data and recoilless rifles to the Contras for the purpose of destroying ships carrying arms to the Nicaraguan government.

Those actions all were at a time when Congress had banned U.S. military aid to the Contras.

The closest the Supreme Court has come to ruling on so-called executive privilege was in the Watergate tapes case of 1974. The special prosecutor had subpoenaed the White House for tapes of 64 conversation and Nixon didn't want to give them up.

In the case called Nixon v. U.S. the court ruled unanimously that Nixon had to comply with the subpoena. The specific need for evidence in a criminal case, the court said, outweighed the president's rights in the matter.

In 1975, President Gerald Ford gave a videotaped deposition as a defense witness in the trial of Lynette (Squeaky) Fromme who was convicted of attempting to assassinate Ford. Lawyers for the administration tried unsuccessfully to have the court accept a written statement by the president. The videotape was played in court.

Jimmy Carter, too, as president, gave videotaped testimony - twice. Once was as a government witness in the perjury and gambling trial of a Georgia state senator. The second time he taped testimony for a federal grand jury that was investigating allegations that fugitive financier Robert Vesco sought to bribe members of the Carter administration.

Reagan was served with the subpoena while he was still president, along with then-Vice President Bush. Both men sought to quash the subpoenas.

Attorney General Dick Thornburgh argued in a Jan. 13 court filing that the summonses "raise profound constitutional concerns ... regarding the authority of the courts to compel appearances by a former or sitting president."

He added that "The spectacle of a former or sitting president being subjected to peremptory judicial process may chill foreign governments in the way they deal with the president now and in the future."

On the day before the North trial started, Gesell ruled the defendant had not shown that Bush had "relevant and material" testimony to give and squashed the subpoena against the new president.

But Gesell left the decision on Reagan open. He'll probably make it this week when the defense starts presentation of its case.

LANGUAGE: ENGLISH

19TH STORY of Focus printed in FULL format.

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The Washington Times

February 6, 1990, Tuesday, Final Edition

SECTION: Part F; COMMENTARY; Pg. F1

LENGTH: 1037 words

HEADLINE: Skewed to the plebian

BYLINE: Bruce Fein

BODY:

Last Tuesday, U.S. District Judge Harold H. Greene commanded former President Reagan to deliver more than a score of personal diary entries made during his presidency to the indicted former National Security Adviser John M. Poindexter. Judge Greene found that Mr. Reagan's entries "contain information of significance" to Adm. Poindexter's defense to five charges of misleading Congress and obstructing its probe of the Iran-Contra affair.

The defense seems to rest on these strained linkages:

* That Reagan knew of and authorized Adm. Poindexter's activities on behalf of the Nicaraguan resistance, the Contras.

* That such knowledge and authorization is shown by Mr. Reagan's abbreviated and elliptical diary references to a Poindexter trip to Central America in 1985 on behalf of the Contras,

* A discussion of Iranian arms sales.

* Mr. Reagan's intervention with Honduras to obtain release of a shipment of arms to the Contras that was seized by the Honduran military.

* U.S. military assistance to a Central American nation arguably to assist the military arm of the Contras or to oppose the Sandinistas.

* That Mr. Reagan's knowledge and authorization of these pro-Contra activities led Adm. Poindexter to believe all of his actions to bolster the Contras militarily were legal; that Adm. Poindexter thus lacked any self-interested motive to deceive Congress in its Iran-Contra investigation; and, that any actions or communications by Adm. Poindexter that misled Congress thus were committed without criminal intent.

Judge Greene's order will probably be opposed by Mr. Reagan on the grounds of executive privilege. But even if that opposition prevails, Judge Greene's embroilment of a former president in litigation on behalf of Adm. Poindexter's contrived and attenuated theory of defense is dismaying. The judicial order culminates the rapid emergence of the plebeian presidency and the stunning fall of the imperial presidency that began with the 1974 Supreme Court decision in United States vs. Nixon, ordering disclosure of presidential tapes to assist

prosecution of the Watergate cover-up defendants.

Until the Nixon case, an unbroken political custom of almost two centuries ordinarily shielded presidents from the coercion of either Congress or the judiciary. In 1796, President George Washington refused a House request for correspondence related to the controversial Jay Treaty with Great Britain. In 1843, President John Tyler withheld from Congress portions of reports regarding alleged Indian frauds that would have interfered with executive-branch discretion, disclosed confidential sources or exposed officials to malicious publicity. In 1948, President Harry Truman refused a congressional demand for the loyalty file of the director of the Bureau of Standards. President Dwight Eisenhower, in 1954, forbade testimony during the Army-McCarthy hearings regarding a meeting between Attorney General Herbert Brownwell and Army counsel John Adams.

Judges treated presidential claims of privilege with exceptional deference until the onset of the plebeian presidency. President Thomas Jefferson was subpoenaed to provide documents to aid the defense in the treason trial of Aaron Burr. But Jefferson's delivery of material to the trial court was expressly voluntary, and he redacted portions of a letter that he believed should be kept secret. Moreover, Burr then dropped his demand for the materials. President James Monroe volunteered to answer interrogatories for use in a court-martial. Until the Nixon tapes case, no other presidents had been entangled by the courts in criminal prosecutions or private civil litigation.

After that landmark ruling, former President Nixon was required to appear and be deposed in several civil cases and was subpoenaed to testify in the Watergate criminal trial (but was excused because of ill health). President Ford testified by videotape in the Squeaky Fromm criminal trial. President Carter provided videotaped testimony as a prosecution witness in a federal trial and a videotaped deposition to a grand jury investigating alleged White House efforts to quash extradition proceedings against an international fugitive.

Prior to the Poindexter case, former National Security Council aide Oliver North had abortively sought the testimony of President Reagan to develop a defense. Panama's former strongman, Gen. Manuel Antonio Noreiga, predictably will seek President Bush's testimony or records in his impending criminal trial.

The torrent of judicial orders directed to the plebeian presidency is improvident. If the incumbent or a former president legitimately invokes executive privileges, an appearance of a cover-up is generated and unjustified cynicism of the office is promoted. If a privilege claim is denied, instant appeals endlessly delay already lead-footed justice.

To defend executive privilege, former presidents must incur hefty legal fees; and, if the defense is overruled, the appearance of a president or presidential papers at trial creates a circus atmosphere fostered by the media that disturbs the sobriety indispensable to legal fairness.

In addition, the perception abroad of hemorraging presidential confidentiality will confound full and forthright presidential communications with foreign leaders pivotal to charting enlightened United States policies. And presidents will resist personal diaries - a treasure trove for students of politics and political practitioners - because of a pervasive fear that

premature and embarrassing disclosures may be demanded by court order.

A president uniquely makes momentous and knotty decisions affecting countless people and frequently arousing strong antagonisms. Lawsuits generated because of the ripple effects of presidential action are legion. If a president must expect routine entanglement with such litigation, irresolution, timidity and flaccidity will become permanent fixtures of the Oval Office.

The nation needs a presidency that sits midway between the plebeian and the imperial. At present, it is skewed toward the plebeian.

Bruce Fein is a lawyer and free-lance writer specializing in legal issues.

LANGUAGE: ENGLISH

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Los Angeles Times

February 17, 1990, Saturday, Home Edition

SECTION: Part A; Page 1; Column 2; National Desk

LENGTH: 1346 words

HEADLINE: REAGAN TAPES TESTIMONY FOR POINDEXTER CASE

BYLINE: By NORMAN KEMPSTER, TIMES STAFF WRITER

BODY:

Former President Ronald Reagan testified behind closed doors for about six hours here Friday, facing some of the most detailed questions he has ever had to answer about his role in the Iran-Contra affair that rocked the closing years of his second term.

Called as a defense witness by former White House National Security Adviser John M. Poindexter, Reagan's appearance was videotaped so his testimony can be scrubbed clean of any diplomatic and military secrets that may have been mentioned. The tape will then be made public, perhaps as early as next week.

U.S. District Judge Harold H. Greene, scheduled to preside over Poindexter's trial in Washington, starting March 5, brought his court -- lawyers, clerks and others -- to Los Angeles to make it as convenient as possible for Reagan to appear. Poindexter's lawyers plan to play the videotape for the jury once the prosecution completes its case, making Reagan the star witness for the defense of his former aide.

Reagan spent six hours and 40 minutes in Courtroom 8 on the second floor of the Federal C Courthouse in the Civic Center, answering the initial batch of the 154 specific questions that Greene earlier authorized Poindexter's lawyers to ask. The 79-year-old former President is scheduled to return this morning for more questioning.

Reporters were kept more than 100 yards from the courtroom, which was guarded by a contingent of U.S. marshals, when Reagan, accompanied by lawyers and Secret Service bodyguards, walked across the hall from a stairwell to the court in the morning and back in the afternoon. He gave a somewhat tentative wave each time but said nothing.

There were no such restrictions when Greene, Poindexter, lawyers and other participants departed for the day. But they provided little information about the extraordinary session.

Greene said the hearing would resume at 9:45 a.m. today. When asked how many of the 154 questions were asked Friday, the judge would say only that the taping will conclude today, apparently indicating that much of the ground had been covered.

Poindexter's only comment as he left the courtroom was: "You'll have to ask someone else."

Facing five felony counts of obstruction of Congress, making false statements and conspiracy, Poindexter sought Reagan's testimony to bolster his contention that his activities were authorized by the former President. Greene ruled that the retired rear admiral could not get a fair trial unless he was allowed to call Reagan as a witness.

Richard W. Beckler, Poindexter's lawyer, originally submitted a list of 183 questions that he hoped to ask. Greene threw out 29 of them because he said they had no relevancy to the case or touched too closely on military or diplomatic secrets. However, he said that Beckler could ask the others, following up if necessary but introducing no new subjects.

Dan K. Webb, the chief prosecutor for Iran-Contra independent counsel Lawrence E. Walsh, cross-examined Reagan.

The hearing posed something of a tactical dilemma for Webb. In the context of the Poindexter case, his chief objective is to discredit the suggestion that Reagan authorized the activities of his national security adviser. But from a larger standpoint, the hearing provides the independent counsel's office with the best chance it may ever get to assess Reagan's role in the affair, which involved the sale of arms to Iran and the diversion of profits to the Contras in Nicaragua.

Although the judge did not make public the precise questions, he said they fell into several broad categories, such as the extent of Reagan's knowledge of the shipment of missiles to Iran and the former President's understanding of legislation which for a time barred U.S. assistance to the Contras.

Reagan originally asked to be excused from testifying on the grounds that a subpoenaed court appearance would diminish the dignity of the office of the presidency. But Greene ruled earlier this month that Reagan would have to testify unless he invoked the doctrine of executive privilege, something the former President declined to do.

"Although (Poindexter) might not have a valid defense based directly on the claim that his illegal activities, if any, were known to the President, the fact of the President's knowledge of, and apparent acquiescence in, such activities -- if that is what occurred -- would be material evidence, for it would bear on (Poindexter's) specific intent to commit various offenses," Greene said in ordering Reagan to provide the taped testimony.

Reagan and some other participants had lunch brought to the courtroom that is usually presided over by Manuel L. Real, chief judge of the Central District of California. However, Poindexter and a few others left the courtroom for lunch, delaying the taping by about an hour.

With no matters of substance leaking out of the courtroom, a swarm of reporters interviewed whomever they could. When Steve Preoteasa, a Romanian immigrant who runs the International Deli in the Los Angeles Mall across the street from the courthouse, arrived with a tray of turkey, ham, roast beef and chicken salad sandwiches, he briefly became the center of attention.

Preoteasa, an outspoken anti-Communist, said he wanted to tell Reagan that he was a longtime admirer. But the marshals would not let him into the courtroom, choosing instead to carry in the sandwiches and an order of Chinese food that arrived shortly after.

The Reagan drama was played out in one of several large courtrooms on the second floor of the 17-story 1930s-era building. It is frequently referred to as "the ceremonial courtroom" because many of the court's most formal functions take place there.

The walls are decorated with 14 large oil paintings of the men who have been the chief judge of the central district.

Three cameras were used to tape the hearing, one trained on Reagan, one on the judge and one on the lawyer asking the questions.

Security in the courthouse is usually very heavy with metal detectors regularly used to screen all visitors. Samuel Cicchino, chief deputy U.S. marshal, said his agents sealed off Courtroom 8, permitting entry only to authorized people. He said everyone who goes into the courtroom is photographed.

"Everything is going rather smoothly," he told reporters a few hours after the hearing began.

Staff writer Henry Weinstein contributed to this story.

PRESIDENTIAL COURT TESTIMONY

Former President Ronald Reagan waived his right of executive privilege to give videotaped evidence Friday that will be used in the defense of former National Security Adviser John M. Poindexter. Poindexter faces criminal charges arising from the Iran-Contra scandal. Reagan is not the first to provide court testimony:

1807: President Thomas Jefferson provided a sworn statement for the treason trial of Aaron Burr, who was accused of trying to foment a rebellion in part of the newly acquired Louisiana Purchase. Supreme Court Chief Justice John Marshall originally ruled that Jefferson could be compelled to appear in court but agreed on the precedent-setting compromise allowing the statement alone.

1870s: President Ulysses S. Grant gave a deposition in the criminal trial of his confidential secretary.

1975: President Gerald R. Ford presented testimony on videotape at the trial of his would-be assassin Lynette (Squeaky) Fromme.

1978: President Jimmy Carter provided on videotape testimony at a criminal trial in Georgia in which two state officials were charged with conspiracy to protect gambling interests. Carter had been Georgia's governor.

1980: President Jimmy Carter also presented videotape testimony for a grand jury investigating Robert Vesco, the fugitive financier.

1980: Former President Richard M. Nixon, after leaving office, appeared voluntarily as a witness at the trial of two ex-FBI agents, who were found guilty of authorizing illegal break-ins in search of fugitive members of the radical Weather Underground. Nixon also provided depositions in some Watergate-related trials.

Compiled by Times Researcher Aleta Embrey

GRAPHIC: Photo, COLOR, Former President Ronald Reagan leaves Los Angeles federal courthouse after first day of testimony. KEN LUBAS / Los Angeles Times

LANGUAGE: ENGLISH

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Chicago Tribune

February 23, 1990, Friday, NORTH SPORTS FINAL EDITION

SECTION: NEWS; Pg. 1; ZONE: C

LENGTH: 1407 words

HEADLINE: Reagan hazy on Iran-contra
Knowledge of diversion is denied

BYLINE: By Janet Cawley and Linda P. Campbell, Chicago Tribune

DATELINE: WASHINGTON

BODY:

Former President Ronald Reagan, in testimony made public Thursday, said he had no recollection of ever being told that profits from Iran weapons sales were diverted to the Nicaraguan contras, and that he "never had any inkling" White House aide Oliver North was secretly helping the guerrillas.

Reagan, who was subpoenaed by the defense in the upcoming trial of his onetime national security adviser, John Poindexter, neither clearly exonerated Poindexter nor critically undermined his defense. Nor did his videotaped testimony do much to answer questions about who authorized the diversion at a time when such aid to the contras was illegal.

But his deposition did reveal startling gaps in the memory of the 79-year-old former president. In all, Reagan said "I don't recall" or "I can't remember" 88 times in the eight hours of testimony taken Feb. 16-17 in Los Angeles.

At one point, Reagan said he could not identify Gen. John Vessey, who served for more than three years as his chairman of the Joint Chiefs of Staff. At other times, he said he could not identify a picture of contra leader Adolfo Calero, could not recall a shipment of Hawk missiles to Iran in November 1985, had no memory of signing one presidential finding relating to the shipment of weapons to Iran and had only the slightest recollection of signing a second such finding.

He also appeared hazy on the identity of Eugene Hasenfus, an American whose shooting down over Nicaragua helped precipitate the unraveling of the then-secret Iran-contra operation. And Reagan seemed totally unable to recall what the Tower Commission - a panel he appointed in December 1986 to investigate the affair - said in its report three months later.

Despite concerns that some material would have to be withheld from the public because of national security considerations, the judge released the entire transcript of the deposition once the Bush administration said it saw no need for deletions.

In defense of his sporadic recollections, Reagan said that he had been told

by statisticians that he met on the average with about 80 people a day for eight years and that 50 million pieces of paper accumulated during his presidency.

Reagan was clear and emphatic, however, on his dedication to the anti-communist contras, explaining his belief that the Soviet Union planned to "take Eastern Europe . . . organize the hordes of Asia and . . . move on to Latin America. And once having taken that . . . the United States would fall into their outstretched hand like overripe fruit."

The deposition was the former president's first testimony under oath about his knowledge of the Iran-contra affair.

The testimony also represents the first time a U.S. president has testified about his own conduct in office in connection with a criminal trial. President Gerald Ford provided videotaped testimony in the trial of Lynette "Squeaky" Fromme, who tried to assassinate him, and President Jimmy Carter gave videotaped depositions in two criminal trials and a grand jury investigation.

Wearing a dark suit with white shirt and dark tie, Reagan looked much like his presidential days, his hair grown back from minor brain surgery last year but showing a gray patch near the right temple.

Reagan was sworn in and, like any other witness, spelled his last name for the court reporter. He looked mildly nervous when U.S. District Judge Harold Greene thanked him for appearing despite the inconvenience, but seemed to relax when he recounted his background as a former president, California governor and actor.

"Prior to working in the movie business, I was a sports announcer in radio," he said.

Despite the objections of all parties in the case, Greene ordered the release of a 293-page transcript of the deposition and allowed reporters and members of the public to view a videoptape of it before the trial. But the judge said news organizations could not have copies of the videotapes until after they were played at the trial, because premature widespread showing could jeopardize Poindexter's right to a fair and impartial jury.

Poindexter, who testified during the 1987 Iran-contra congressional hearings that he never told Reagan about the diversion scheme to allow the president "plausible deniability," sat in the courtroom during Reagan's deposition.

Poindexter, who is charged with lying to Congress, obstruction of Congress and conspiracy, is scheduled to go on trial March 5. His defense appears to rest on the theory that Reagan either approved of or knew about his aides' secret activities on the contras' behalf.

Reagan denied any knowledge of the diversion. But he also emphasized that he repeatedly told his staff he wanted to help the contras in any way possible as long as no one broke the law.

There was a certain deference throughout the deposition proceedings, with Greene and the lawyers addressing Reagan as "Mr. President." Richard Beckler, Poindexter's lead attorney, who can be combative in court, was generally low-key

in his questioning.

But Dan Webb, the former U.S. attorney in Chicago who is prosecuting the case for the independent counsel's office, sparred with Reagan several times over whether he knew about or approved the diversion of funds to the contras or the destruction of government records about the scheme.

At one point, a clearly agitated Reagan said, "for heaven's sake, no!" when Webb asked if he had approved or authorized a diversion of funds in violation of a law banning any such aid. But, he added, "no one has proven to me that there was a diversion."

He also said Poindexter should have told him about any diversion "if he knew about it . . . unless maybe he thought he was protecting me from something."

Reagan said he did not recall the Tower Commission's reporting that North and the National Security Council were providing military aid to the contras, who were waging war against Nicaragua's Sandinista government. When asked whether the panel ever explained how the U.S. received more than $12.2 million it was owed for a shipment of TOW anti-tank missiles to Iran, and how excess profits might have been diverted, he said he didn't think it was explained.

When Webb said the answer was "completely unresponsive," Reagan shot back, "I don't think it is unresponsive to state what I appointed the commission to do and what I tried to get from them, and they could not supply that information until this day."

Reagan said prosecutors for the first time were bringing to his attention the Tower Commission's reference to a diversion.

"This is the first time I have ever seen that," Reagan said.

President Bush's national security adviser, Brent Scowcroft, who also was a member of the Tower Commission, said Thursday that Reagan had been briefed on the report at the time. White House reporters recalled that when the report was released in February 1987, Reagan held a copy aloft and said he planned to take it to Camp David to study.

As for North's participating in the illegal scheme to aid the contras, Reagan said, "I never had any inkling" such a thing was going on.

He also said he and North "did not meet frequently or anything of that kind, nor do I remember ever having a single meeting with him, as has been hinted at times by others."

In trying to explain his faulty memory, Reagan said at one point that his administration was concerned with more than "this Iranian issue."

"That was just one of many things that were going on," he said. "The government was involved in things of great import, not only having to do with domestic problems, but with the Cold War and things of that kind, and trying to arrive at treaties with regard to nuclear weapons and so forth."

Perhaps the most startling lapse in Reagan's memory involved Vessey, who was

chairman of the Joint Chiefs of Staff from 1982 to 1985.

His name arose when Beckler referred to a Central American trip made by Vessey and then asked Reagan to explain who Vessey was.

"Oh, dear," the former president said. "I could ask for help here. The name I know is very familiar . . ."

At Vessey's retirement in 1985, Reagan said to the army general, "A career like yours, combining as it does heroism, patriotism, competence, wisdom and kindness, doesn't need elaboration from commanders in chief or presidents. It speaks enough all by itself, and today I'll let history be your valedictorian, not me."

LANGUAGE: ENGLISH

IC investigation of Carter peanut business – transcripts given to GJ



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THE ARIZONA REPUBLIC

June 14, 1994 Tuesday, Final Chaser

SECTION: FRONT; Pg. A6

LENGTH: 577 words

HEADLINE: CLINTON WHITEWATER TESTIMONY IS MORE GRIST FOR SCHOLARS TO MILL

BYLINE: By Ann McFeatters, Scripps Howard

DATELINE: WASHINGTON

BODY:

President Clinton's testimony under oath before the Whitewater prosecutor Sunday was not unprecedented, but it is one more issue added to a legal pad full of presidential legal problems that have stirred debate among constitutional scholars.

For a presidency that is only 18 months old, the list of constitutional issues is surprisingly long.

No specifics were released Monday of what Clinton provided independent counsel Robert Fiske about Whitewater, the suicide of White House legal aide Vincent Foster, or a possible White House cover-up of Whitewater.

The session in the White House residence lasted 90 minutes, and a stenographer took notes.

Hillary Clinton had a separate hourlong interview.

The very act of their testifying has raised questions.

Can a president perjure himself if he lies under oath administered by a court reporter? The answer is decisively yes, constitutional lawyers say.

Less certain is whether a president can be indicted for something he says under oath or fails to say.

Some legal scholars say he can, but others say that is what the impeachment process is all about. The uproar over President Gerald Ford's pardon of his predecessor, Richard Nixon, was all about allowing the former president to escape a possible indictment.

Special White House counsel Lloyd Cutler issued a statement Monday saying that the Clintons voluntarily decided to give their testimony under oath to Fiske because they want to cooperate fully.

It would have been a messy predicament for everyone if the Clintons had refused. They have steadfastly said they would not invoke executive privilege,

as Nixon did during Watergate.

Jimmy Carter was the first sitting president to provide sworn testimony in a criminal investigation. He testified under oath for four hours at the White House to independent counsel Paul Curran, who was investigating the handling of loans to Carter's family peanut business. Curran handed the testimony over to a federal grand jury in Atlanta, and his final report found unequivocally no illegality.

Ronald Reagan testified to the Tower Commission about the Iran-contra scandal, and so did his vice president, George Bush. There were strong hints by Iran-contra independent counsel Lawrence Walsh in his final report that he believed that both Reagan and Bush had lied about the extent of their knowledge about the sale of arms to Iran and the diversion of funds to the Nicaraguan contras and the subsequent cover-up.

No personal legal action was ever brought against either man. Bush also testified under oath as president, denying a plot for an "October surprise" to free 52 Americans held hostage in Iran as an election-year benefit for Reagan.

Another unresolved question is whether the Clintons will pay the entire legal bill they will owe when the Whitewater issue is finally resolved. Just the appearance of their Whitewater lawyer, David Kendall, at the White House residence Sunday will result in a bill of about $1,000, let alone his preparation time. Also present Sunday was Cutler, who is temporarily serving as White House lawyer without pay.

Eventually, according to Mrs. Clinton, the Clintons could owe hundreds of thousands of dollars in legal fees.

The White House has floated a trial balloon of setting up a legal-defense fund to raise money through private channels. That has made many people uneasy because of the potential for conflicts of interest.

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The New York Times

April 1, 1989, Saturday, Late City Final Edition

SECTION: Section 1; Page 1, Column 1; National Desk

LENGTH: 1023 words

HEADLINE: JUDGE WON'T ORDER REAGAN TESTIMONY ✓

BYLINE: By DAVID JOHNSTON, Special to the New York Times

DATELINE: WASHINGTON, March 31

BODY:

The judge in the trial of Oliver L. North today emphatically rejected an attempt to force Ronald Reagan to appear as a witness, declaring that no written evidence had yet been found to suggest that Mr. Reagan authorized the illegal acts Mr. North is accused of committing.

The ruling by Federal District Judge Gerhard A. Gesell dealt a blow to Mr. North, whose attorneys wanted the former President summoned as their first witness when the defense began its case Monday.

''There has been no showing that President Reagan's appearance is necessary to assure Lieutenant Colonel North a fair trial,'' the order read. ''Accordingly, the subpoena is quashed.''

Mr. Reagan, in response to the judge's order, told a California television station that he would have resisted efforts to force his appearance.

''I made up my mind I wasn't going,'' the former President told KESQ-TV, an ABC affiliate in Palm Springs. ''I think it would have set a precedent that the next President doesn't have a right to impose on other Presidents. No President has ever been subpoenaed.'' While no President has been ordered to testify about decisions he made in office, subpoenas have been issued in criminal cases to chief executives.

Judge Gesell also turned down a defense motion to dismiss all 12 criminal charges against the former aide to the National Security Council. The charges include making false statements to Congress and obstructing an Attorney General's investigation into the Iran-contra affair.

In announcing his decision, the judge said sufficient evidence had been produced by the prosecution to warrant submitting all the charges to the jury. He said his determination was based on his belief that there was sufficient evidence for a jury to decide whether ''the defendant is guilty on all of the counts.'' The jury was not in the courtroom at the time.

No 'Generalized Inquiry'

As the judge uttered the word ''guilty,'' Mr. North's resolutely impassive countenance seemed to crack. He looked up, his face creased as if in pain, and slowly shook his head. After a few seconds, he assumed the same grave demeanor

he has displayed throughout the trial, staring toward a far wall and slowly tapping a felt tip pen on a pad.

Without Mr. Reagan, it is not clear whom Mr. North's lawyers will present in his defense. The chief defense lawyer, Brendan V. Sullivan Jr., has said he would ask the judge to show the jury a four-hour videotape of John M. Poindexter's testimony before the Iran-contra Congressional committees. Mr. Poindexter, the former national security adviser, testified that he had approved some of Mr. North's activities.

The order waiving Mr. Reagan's appearance appeared to foreclose the possibility that he would soon be asked under oath to clarify his role in the Iran-contra affair, the central unanswered question.

The judge acknowledged a widespread desire to know more about Mr. Reagan's actions, but he rejected public interest as a reason to compel Mr. Reagan's appearance. ''While there is understandable public interest in what a President may have known or may have done, the focus of North's trial does not involve any necessity for such a generalized inquiry,'' the judge said.

The former President has emerged in the trial as the central offstage character in the drama. Defense lawyers have said repeatedly that he was the ultimate inspiration and authority for Mr. North's actions.

But the judge concluded that there was no written evidence to suggest that Mr. Reagan authorized any of the activities that are the subject of the charges against Mr. North.

''The written record has been exhausted in this regard,'' the judge said, in material presented so far in the trial, in the secret documents furnished to the court in any public records, in an extensive written statement given by Mr. Reagan in late 1987 in response to questions from Government prosecutors or in portions of Mr. Reagan's personal diary obtained by prosecutors.

The judge said, however, that Mr. Reagan's approval of the broad policies under which Mr. North operated was clear from the former President's public statements, previous investigations and the trial record.

Mr. Reagan encouraged his subordinates to support the Nicaraguan rebels in spite of a Congressional ban on Government assistance from 1984 to 1986 and in Janurary 1986 authorized covert arms sales to Iran, the proceeds of which were diverted to aid the rebels.

The specific charges against Mr. North stem in large part from his efforts to conceal his activities in the arms sales and in behalf of the contras.

Judge Gesell said his decision was rooted squarely in the failure of the defense to show that Mr. Reagan's testimony was needed, rather than on legal theories that contend former Presidents are immune from appearing at criminal trials.

Jefferson Subpoenaed

No sitting President has ever testified in court in a criminal trial, although a few Presidents and former Presidents have provided testimony or its

equivalent in criminal trials and grand jury proceedings.

Thomas Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Mr. Jefferson's first Vice President.

Chief Justice John Marshall, who presided over the trial, declared that the President was subject to law. After first resisting, Mr. Jefferson submitted the letter, making clear that his decision was voluntary.

During the 1974 trial in the cover-up of the Watergate affair, John D. Ehrlichman, a domestic policy adviser at the Nixon White House, sought Mr. Nixon's appearance. But the President was too ill to appear.

In 1975, Gerald R. Ford consented to a videotaped interview for use in the trial of Lynette Fromme, who was convicted of attempting to assassinate him. In 1980, Jimmy Carter answered questions on a videotape in a grand jury investigation of Robert L. Vesco, the fugitive financier.

In 1980, Mr. Nixon appeared as a witness in the trial of two former officials of the Federal Bureau of Investigation who had been accused of conducting illegal break-ins.

LANGUAGE: ENGLISH

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March 31, 1989, Friday, AM cycle

LENGTH: 473 words

HEADLINE: ALLOWING PRESIDENT'S TESTIMONY WOULD BREAK U.S. PRECEDENT

BYLINE: By Deborah Zabarenko

DATELINE: WASHINGTON, March 31

BODY:
Friday's ruling by a judge against forcing Ronald Reagan to testify in Oliver North's defense is in line with two centuries of U.S. history.

No president or former president has ever been compelled to testify in open court, according to the Justice Department.

The issue of executive privilege -- the privilege of chief executives to refuse to testify -- was first raised by Thomas Jefferson, who received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Jefferson's first vice president.

Jefferson cited the independence of the executive branch from the judicial branch and refused, at first, to release the letter. Eventually, he turned it over, but made it clear his decision was voluntary and not in response to the subpoena.

President James Monroe was served with a subpoena to testify at a criminal trial, but based on his attorney general's advice, he declined, saying his presidential duties were paramount.

He said he would submit to a deposition -- in which attorneys would interview him outside court -- but the court instead submitted written questions to him, called interrogatories, which he answered.

Reagan has already answered interrogatories submitted to the grand jury that ultimately returned the indictment against fired White House aide North. Judge Gerhard Gesell ruled Friday that Reagan need not testify to guarantee North a fair trial.

Abraham Lincoln voluntarily appeared before a congressional committee.

Ulysses S. Grant at first volunteered to testify at a criminal trial, but after consulting with his staff chose to give a deposition instead.

Richard Nixon, the only president to resign, was ordered to produce the Watergate tapes in response to a subpoena after the tapes were shown to be necessary to the fair administration of justice.

Gerald Ford gave a deposition for the trial of Lynette "Squeaky" Fromme, who attempted to assassinate him, but his statement concerned only his eyewitness account of the attempt on his life, not the way he carried out his presidential duties.

Reuters, March 31, 1989

Former presidents John Tyler and John Quincy Adams appeared before congressional committees in response to subpoenas in the investigation of whether their Secretary of State Daniel Webster improperly disbursed funds from a confidential fund.

And Nixon gave several depositions after he resigned.

The Justice Department claims that in the case of presidents and former presidents, a "high threshhold of relevance" is required to compel testimony. That is, litigants must make absolutely clear that the president's testimony or deposition is essential to assure a fair trial.

When Nixon claimed executive privilege, the court denied it only because of "the demonstrated, specific need for evidence in a pending criminal trial."

LANGUAGE: ENGLISH

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Los Angeles Times

March 25, 1989, Saturday, Home Edition

SECTION: Part 1; Page 14; Column 1; National Desk

LENGTH: 976 words

# HEADLINE: NORTH LAWYERS RENEW BID FOR REAGAN TO TESTIFY; JUDGE DECLINES TO RULE BUT LEGAL SOURCES SAY EX-PRESIDENT MAY HAVE TO APPEAR

BYLINE: By ROBERT L. JACKSON, Times Staff Writer

DATELINE: WASHINGTON

BODY:

Attorneys for Oliver L. North renewed their request Friday to compel former President Ronald Reagan to testify at the fired White House aide's trial, amid growing indications that the former President eventually will have to take the witness stand in the Iran-Contra case.

U.S. District Judge Gerhard A. Gesell declined to make an immediate ruling on the brief motion by North's defense but legal sources close to both sides of the case said that they expect Reagan will be required to appear at some point.

The six weeks of testimony in the trial have provided more substantial grounds for questioning the former President about his instructions to subordinates on aid for the Nicaragua's Contra rebels at a time when it was banned by Congress, the sources said.

## Defense Given Latitude

During the trial, Gesell has shown his willingness to give North's lawyers broad latitude in questioning witnesses.

Brendan V. Sullivan Jr., North's principal attorney, said in his motion that "the importance of Mr. Reagan's testimony to the defense of this case is clear."

A spokesman for independent counsel Lawrence E. Walsh's office, which is prosecuting the case, said that prosecutors probably will remain neutral on the issue, but a Justice Department spokesman said that the agency "will pursue" its pending court motion to block an earlier defense subpoena for Reagan.

Theodore B. Olson, a Washington attorney who is representing Reagan, declined immediate comment.

In January, Gesell quashed North's subpoena for the testimony of President Bush but refused to quash a similar subpoena for Reagan. The judge hinted that he might order Reagan's appearance later if testimony at the trial showed it to be necessary.

## May Call Hearing

One lawyer in the case, who asked to remain anonymous, predicted that Gesell would call a hearing next week before reaching a decision. The lawyer said he doubts, in any event, that Reagan will have to appear as early as March 31 as requested in Sullivan's latest motion.

In presenting the government's case, prosecutor John W. Keker has elicited extensive testimony that the retired Marine officer and former National Security Council aide made false statements to Congress and obstructed congressional inquiries into his secret efforts to support the Contras. Those are the principal allegations among 12 felony counts on which North is being tried.

But in cross-examination of key prosecution witnesses, Sullivan has attempted to show that North had top-level authorization for his efforts to aid the rebels and that Reagan had a greater role than previously known.

Trial testimony has shown that the former President, for example, passed instructions to his subordinates that they should, in the words of former National Security Adviser Robert C. McFarlane, "keep the Freedom Fighters (Contras) together, body and soul," after Congress cut off military aid in 1984.

Not to Share Information

McFarlane, who testified for five days, also said that Reagan approved soliciting funds from U.S. allies to make up for the lost funding and warned that the existence of this effort was "not to be shared" with Congress.

Reagan underscored this admonition by telling his top aides that "we'll all be hanging by our thumbs in front of the White House" if Congress found out that his Administration was seeking Contra funds from other nations, according to McFarlane and official minutes of a June 25, 1984, meeting.

Witnesses have suggested that Reagan thought Congress would refuse ever to resume aid if it learned of this unofficial substitute assistance.

No testimony or evidence introduced to date has countered the allegation that North deliberately misled Congress. But Sullivan hopes to convince the jury that the retired Marine lieutenant colonel, following the directions of his commander-in-chief, had "no criminal intent" in his actions and that this should be considered a key mitigating factor, legal sources said. To that end, they said, direct testimony from Reagan seems highly relevant.

Deference to Presidents

Legal precedent protects a sitting President from being compelled to testify at a trial in all but the most extreme circumstances, attorneys say. But such deference may no longer shield him after he leaves office, they said.

During the Watergate scandal, U.S. District Judge John J. Sirica agreed with a request of former White House aide John D. Ehrlichman that former President Richard M. Nixon should be called to testify as a defense witness.

Nixon, suffering from phlebitis at his home in San Clemente, objected that he was too ill to travel to Washington. Sirica, however, was so insistent that he sent a panel of court-appointed doctors to examine the former President and only relented after the doctors reported that Nixon was seriously ill.

If Reagan is compelled to testify in the trial's remaining two months, the former President likely would be pressed about his instructions to his staff and the extent of his knowledge of their activities.

Statements by Reagan

In his statements on the Iran-Contra scandal, Reagan has said that he did not know North was directly advising and assisting the Contras and that he did not approve or direct any illegal actions.

Asked by Keker if Reagan ever recommended lying to Congress, McFarlane simply answered in the negative. He did not say that Reagan counseled against lying, however, and other prosecution witnesses suggested that North is not the kind of person who would understand the subtle difference between lying and not sharing information.

North has been portrayed by these witnesses, called by the prosecution, as a deeply religious, dedicated, high-energy military officer with a "can do" attitude toward any order given him by a superior officer, especially his commander-in-chief.

LANGUAGE: ENGLISH

4TH STORY of Level 1 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

January 4, 1989, Wednesday, PM cycle

SECTION: Washington Dateline

LENGTH: 577 words

HEADLINE: North Tactic Revives Old Debate: Can A President Be Forced To Testify?

DATELINE: WASHINGTON

BODY:

The effort by Oliver North to compel President Reagan and President-elect Bush to testify at his Iran-Contra trial has renewed a debate, almost as old as the Union, over "executive privilege."

Can a president, or a former one, be forced to testify in a legal case? Courts have provided little guidance, but constitutional experts said Tuesday that North's legal tactic may succeed.

No sitting president ever has testified in court in a criminal trial, but several have provided testimony or what might be considered the equivalent.

The personal stakes are high for North. The former White House aide is charged with theft, conspiracy to defraud the government and several other felonies in the case involving the support of Nicaraguan rebels with money from the sale of U.S. weapons to Iran.

His trial is scheduled to begin Jan. 31 - just 11 days after Bush is to succeed Reagan. Besides Reagan and Bush, subpoenas also have been issued for other key figures in the Reagan administration, including Secretary of State George P. Shultz and four other State Department officials.

The man who first tried to force a president to testify was Aaron Burr, a former vice president who stood trial in 1807 on charges of treason.

Burr sought to force Thomas Jefferson, the president under whom he had served, to testify at the trial.

Jefferson resisted. But Chief Justice John Marshall, presiding over the trial, ruled against Jefferson. The president eventually avoided having to appear by releasing some information Burr had sought.

The closest the Supreme Court has come to ruling on the issue presented by North's subpoena came in the Watergate tapes decision of 1974, in a case called Nixon vs. U.S.

The court then ruled, 8-0, that President Richard M. Nixon had to comply with a special prosecutor's subpoena seeking the surrender of White House tape recordings.

"The general assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the high court ruled 15 years ago.

Jerome Barron, a law professor at George Washington University here, said Tuesday the 1974 decision is a strong precedent for North.

"Whether Mr. Reagan or Mr. Bush can be subpoenaed was resolved in Nixon vs. U.S., and the answer is yes," Barron said.

"If the evidence (sought by North) is material, I think Reagan and Bush can be required to appear," Barron said.

On the other hand, unnamed Justice Department sources were quoted by The Washington Post as saying that Nixon vs. U.S. offers support for fighting subpoenas of Reagan and Bush. They said the Supreme Court emphasized that its Watergate-tapes decision did not deal with a claim of privilege based on national security grounds.

Justice Department and White House officials have said they will try to have the subpoenas thrown out.

Stanley Brand, a Washington lawyer who once served as general counsel to the House of Representatives, said North may succeed.

"My sense is North has a good claim. The president was involved in the process, and one of North's defenses is that he was serving the president by following orders," Brand said.

In 1975, then-President Gerald R. Ford gave a videotaped deposition in the trial of Lynette "Squeaky" Fromme, who was convicted of trying to assassinate Ford. The videotape was played for jurors at Fromme's trial.

While in office, President Jimmy Carter provided videotaped testimony in two criminal prosecutions.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

August 25, 1982, Wednesday, AM cycle

SECTION: Domestic News

LENGTH: 366 words

HEADLINE: Lawyer Says Can't Get Past Door to Serve Nixon With Subpoena

BYLINE: By BOB SPRINGER, Associated Press Writer

DATELINE: SPRINGFIELD, Ill.

BODY:

Process servers have been unable to get past U.S. Secret Service agents to serve former President Richard M. Nixon with a subpoena seeking written testimony, the lawyer for an Illinois couple suing Ford Motor Co. said Wednesday.

Nixon's written deposition is sought along with ones from Henry Ford II and Chrysler Corp. Chairman Lee Iacocca in a $4.5 million damage suit brought by Donald and Peggy Sweet of rural Mechanicsburg.

The couple contends the three men met in the White House in 1971 and discussed relaxation of federal regulations on fuel tank safety. Ford was chairman of the No. 2 U.S. automaker, and Iacocca was president of Ford at the time.

Mrs. Sweet suffered third-degree burns over most of her body, and the couple's child also was injured, when the gas tank of their 1969 Ford station wagon exploded after the vehicle was hit in the rear by a truck near Litchfield, Ill., about 35 miles south of Springfield.

Thomas Tobin of Chicago, attorney for Ford Motor Co., has called the depositions a "fishing expedition." He said last week that the Sweets don't know if the alleged conversation between the former president and the two auto company officials took place or, if it did, the date and time of such a meeting.

Thomas Londrigan, the Sweets' attorney, said in an interview Wednesday that private process servers have been blocked so far from delivering the subpoena on Nixon. He said the former president either has been away from his New Jersey home or New York City office, or Secret Service agents have blocked the servers' path to his door.

Londrigan said he may ask a federal judge in New York to use U.S. marshals to deliver the subpoena if the private servers' efforts continue to be unsuccessful.

Londrigan spoke after a hearing in which U.S. District Judge Harold Baker denied a request by lawyers for Henry Ford that the deposition not be required

of him.

Baker upheld last Friday's denial by a U.S. magistrate of an identical request to quash the subpoena for Ford, and set Sept. 7 for taking written testimony from him.

A federal judge in Detroit has not ruled on a request by Iacocca's lawyers that the subpoeana for his deposition be quashed.

LANGUAGE: ENGLISH

2ND STORY of Level 1 printed in FULL format.

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Los Angeles Times

January 30, 1989, Monday, Late Final Edition

SECTION: Part 1; Page 1; Column 6; Late Final Desk

LENGTH: 502 words

HEADLINE: BUSH EXCUSED FROM NORTH TRIAL; REAGAN PUT ON CALL; PRESIDENT'S SUBPOENA QUASHED

BYLINE: From Times Wire Services

DATELINE: WASHINGTON

BODY:
The federal judge in the Iran-Contra case threw out Oliver L. North's subpoena of President Bush but ruled today that former President Ronald Reagan can be compelled to testify in the case against his former aide.

U.S. District Judge Gerhard A. Gesell, clearing one of the last obstacles to the scheduled start of North's trial Tuesday, ruled that the former White House aide had made no showing that Bush "has any specific information relevant and material" to the charges against North.

Gesell said Reagan "shall remain subject to call" to testify in the case but said in his three-page order that there would be further proceedings if it is found necessary to summon the former President as a witness.

Gesell also quashed, with "one narrow exception," North's subpoena for Reagan's personal diary.

The judge said portions of the diary might become part of the trial "if at some point" North's defense team "supports a claim that President Reagan ordered, directed, requested or, with advance knowledge, condoned any of North's" alleged criminal activities in the diversion of Iranian arm-sales profits to the Contra rebels in Nicaragua.

'Production Procedure'

In that event, Gesell said, "an appropriate production procedure" must be developed for reviewing the former President's diary and determining whether any of the entries support North's assertions.

North contended in testimony at the congressional Iran-Contra hearings in 1987 that all of his activities were authorized by superiors in the Reagan Administration and that he reported to former national security advisers Robert C. McFarlane and John M. Poindexter.

Government lawyers had challenged the subpoena for testimony by Reagan and Bush as unprecedented.

They argued on constitutional grounds that Reagan and Bush enjoyed executive privilege and could not be forced to testify on sensitive national security

issues.

Gesell's order implemented a tactic he had indicated at a hearing Friday that he would use with regard to Reagan's testimony. Gesell said then that circumstances may change as evidence is introduced at the trial and that testimony of certain individuals may become relevant.

The 12 counts against North include obstruction of Congress, destruction of documents and acceptance of illegal gifts.

2 Counts Thrown Out

The two key counts returned against North March 16 -- conspiracy to defraud the government and theft of government property -- were thrown out earlier this month. An interagency committee of intelligence experts feared that trial on those two charges could expose so much classified information that the national security would be jeopardized.

If convicted on all counts, North faces a maximum 60 years in prison and $3 million in fines.

Independent prosecutor Lawrence E. Walsh has turned over trial duties to his chief deputy, John Keker.

Jury selection is expected to take about two weeks, and lawyers for both sides have predicted that the trial will take about five months.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

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The Reuter Library Report

June 16, 1989, Friday, AM cycle

LENGTH: 496 words

HEADLINE: BUSH, REAGAN TO BE SUBPOENAED AT POINDEXTER IRAN-CONTRA TRIAL

BYLINE: By James Vicini

DATELINE: WASHINGTON, June 16

BODY:
Attorneys for former White House aide John Poindexter said on Friday they plan to subpoena President George Bush and former President Ronald Reagan at his Iran-Contra trial.

But prosecutors announced that they would move to drop the must serious charges against Poindexter, just as they had been forced to do in the case against his onetime White House aide, Oliver North. They said they were concerned that national security secrets might be revealed.

If the charges are dropped, it may not be necessary to subpoena Bush and Reagan, the prosecutors said.

The charges go to the heart of the Iran-Contra scandal, alleging wrongdoing in the secret scheme to sell weapons to Iran and divert millions of dollars in profits to the Nicaraguan Contra rebels in 1985-86, when Congress had banned military aid to them.

The disclosure of the subpoenas at a pre-trial hearing raised the prospect of new problems for Bush and Reagan, both of whom have been trying to put the Iran-Contra scandal behind them.

"My client had substantial contact with both individuals during the events outlined in the indictment," defence attorney Richard Beckler said.

Poindexter, the White House national security adviser under Reagan, has taken responsibility for authorising the covert activities conducted during the Iran-Contra affair. Bush was vice president at the time.

Both Reagan and Bush received defence subpoenas at North's Iran-Contra trial, but the judge in that case ruled that their testimony was not necessary or relevant.

During the North trial, there was damaging evidence and testimony showing that Bush and Reagan had been actively involved in the efforts to support the Nicaraguan Contra rebels.

Independent special prosecutor Lawrence Walsh said he plans to seek next week the dismissal of the two most serious charges involving theft of government property and fraud and the narrowing of the conspiracy charge against Poindexter.

He said the defence was seeking documents of the "utmost sensitivity."

The same conspiracy and theft charges had to be dropped against North after the Bush administration in January refused to make publicly available at the trial classified documents demanded by the defence.

The prosecutors previously had hoped to salvage the three charges against Poindexter, arguing that the North trial showed that the case could go forward without jeopardising national security.

The four other charges against Poindexter allege obstruction of Congress and making false statements about the scandal. No trial date has been set.

North, who was an aide to Poindexter, is scheduled to be sentenced on June 23 after being found guilty of helping to obstruct Congress in its efforts to learn about the scandal in 1986, shredding secret documents and accepting an illegal gratuity in the form of a 14,000-dollar home security fence.

North, who was acquitted on nine other counts, faces up to 10 years in prison and 750,000 dollars in fines.

LANGUAGE: ENGLISH

LOAD-DATE: 061689

1ST STORY of Level 1 printed in FULL format.

The Associated Press

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February 6, 1990, Tuesday, AM cycle

SECTION: Washington Dateline

LENGTH: 627 words

HEADLINE: Appeals Judge Questions Why Reagan Didn't Testify for North

BYLINE: By PETE YOST, Associated Press Writer

DATELINE: WASHINGTON

BODY:
A federal appeals judge hearing Oliver North's Iran-Contra case Tuesday questioned why North wasn't allowed to call former President Reagan as a defense witness at his trial.

During nearly 2 hours of arguments, U.S. Court of Appeals Judge Laurence Silberman noted that Reagan's written answers to questions in the Iran-Contra affair were submitted to a grand jury, but were never provided to North's lawyers.

Silberman, one of three judges who will rule on North's appeal of his conviction on three felony counts, asked why, "as a matter of basic fairness" Reagan's written answers weren't turned over to the defendant.

Government attorney Gerard Lynch said the judgment was made that Reagan's written answers would not have been "helpful" to North and so weren't turned over.

"But our system ... is based on" giving someone accused of a crime wide latitude in obtaining information for his defense, responded Silberman.

The appeals court panel consists of Silberman and David Sentelle, both Reagan administration appointees, and Carter administration appointee Patricia Wald, chief judge of the appeals court.

Indicating that Reagan's written answers in the Iran-Contra inquiry may have been more general than specific, Silberman said that "what troubles me is we don't have a very good idea" of what Reagan might have said as a defense witness for North.

If North had worked in the State Department and Reagan had been secretary of state, there would have been no question that he would have been called to testify, said Silberman.

North, who was convicted of aiding and abetting an obstruction of Congress, altering and destroying National Security Council documents and accepting an illegal gratuity, argued that all his activities were approved by his

superiors, national security adviser John Poindexter and Reagan.

Silberman also questioned whether Poindexter's videotaped testimony on Capitol Hill should have been admitted as evidence at the North trial.

"Only two people were north of North ... the president and Admiral Poindexter," said Silberman.

Lynch emphasized that "North's own testimony" was that he never met alone with Reagan, and that North "never said the president told him to do anything."

Silberman said that even if Reagan didn't specifically authorize the actions for which North was convicted of crimes, the ex-president's testimony might have been helpful to North.

"Suppose the ex-president says that 'I never gave specific authorization' (but) 'I did indicate that I didn't wish this information to be revealed," said Silberman.

Defense attorney Barry Simon said Reagan should have been called to confirm that he authorized keeping secret from Congress the U.S. connection to a November 1985 shipment of Hawk missiles from Israel to Iran.

Lynch conceded that North may have gotten the "impression" from Poindexter that the U.S. role was to be kept secret. But Lynch argued that North knew he was committing a wrongful act when he obstructed Congress from learning of the issue.

"We're not talking about keeping secrets from enemies of the United States" or "even the public," said Lynch.

At North's trial, U.S. District Court Judge Gerhard Gesell quashed a subpoena for Reagan's appearance. The judge ruled there was no evidence in the record to suggest that the former president authorized any illegal activities by North.

Gesell also rejected a request to admit as evidence portions of Poindexter's congressional testimony on videotaped segments which were prepared by North's trial team.

Gesell on July 5 placed North on probation for two years, fined him $$150,000 and sentenced him to 1,200 hours of community service. North is performing the community service while appealing the convictions and fine.

LANGUAGE: ENGLISH

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58 U.S.L.W. 1126

February 20, 1990

LENGTH: 360 words

SECTION: SUMMARY AND ANALYSIS.

TITLE: Former President Reagan Must Give Taped Testimony In Iran-Contra Trial.

TEXT:

The great majority of some 183 questions Iran-Contra defendant John Poindexter proposes to ask former President Reagan are material to his defense, the U.S. District Court for the District of Columbia held Feb. 5 as it ordered Reagan to give testimony via videotaped deposition for use at the defendant's trial. Historical practice and precedent from the Watergate era led the court to reject the argument that a president can never be compelled to testify in a criminal proceeding; however, concerns about national security and trial administration supported the videotape procedure, the court said. (U.S. v. Poindexter, DC DC, No. 88-0080-01 (HHG), 2/5/90)

As of this decision, the former president had not yet asserted executive privilege in opposition to the defendant's subpoena. Nevertheless, the court said, Reagan's testimony should be required only if it meets a "meticulous standard" of materiality and is "necessary" in the sense of being a more logical and persuasive source of evidence than available alternatives.

Most of the questions proposed by the defendant--dealing with private conversations between Reagan and the defendant, Reagan's understanding of the "Boland Amendment," which barred intelligence agencies from providing support to the Contras, and courses of action discussed in the event Congress restricted military aid to the Contras--satisfy this heightened standard, the court said, since they go to the heart of the defendant's contention that he lacked the specific intent to engage in criminal conduct.

There is no precedent for compelled in-court testimony by a former president, the court noted; on the other hand, written answers to interrogatories cannot fulfill the essence of the defendant's Sixth Amendment right. However, taking Reagan's testimony by videotape has the virtue of permitting him to fully exercise his right to claim executive privilege, if he so chooses, while at the same time eliminating the inevitable disruptions repeated claims of privilege would cause at trial. Moreover, the court said, national security concerns argue in favor of taking Reagan's testimony in a private setting.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

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The National Law Journal

February 26, 1990

SECTION: THE POINDEXTER TRIAL; Pg. 1

LENGTH: 1673 words

HEADLINE: Reagan Testimony Takes Center Stage

BYLINE: BY FRED STRASSER, National Law Journal Staff Reporter; An *NLJ* News Analysis

DATELINE: WASHINGTON

BODY:

It began as a clash among the branches of government over control of foreign policy. And five years after the events that bloomed into the Iran-Contra affair occurred, the tumultuous constitutional battle continues as former national security adviser John M. Poindexter prepares to go on trial next month.

Legally, the case is a knot of fascinating issues, but the questions of fact are fairly unexciting. Attorney General Dick Thornburgh saw to that last year when he pressured prosecutors not to use classified information needed to support the central conspiracy charges of the original indictment.

So what's left is largely the same question jurors faced with Mr. Poindexter's far more subordinate, Oliver L. North. Did Mr. Poindexter, the president's right-hand man, intentionally lie to Congress about arms sales to Iran and deceive Capitol Hill about the administration's militant support of Nicaraguan Contras at a time Congress had banned military aid? And did he conspire with others to carry out the deception and destroy documents to derail efforts to uncover it?

The answers will include some replay of Mr. North's case. What has breathed new energy into this fading political scandal, however, is defense witness Ronald Reagan, who, for the first time in the Iran-Contra affair, is being forced to testify under oath and whose personal diaries -- if surrendered -- could become important evidence for the defense.

There is every indication from the defense attorneys' moves that Mr. Poindexter, who good-soldiered for his boss during immunized testimony before Congress in 1987, is now ready to point upward to the last rung in the Iran-Contra affair and argue that Mr. Reagan had the final responsibility for Mr. Poindexter's acts.

The Role Mr. Reagan will play in the case, however, remains in doubt. Indeed, his failure to play a significant one could lead to dismissal of the charges altogether, observers say.

Softened Stance

In the ongoing battle of the branches, Mr. Reagan dropped his relatively weak claim of executive privilege with respect to any appearance as a witness and

agreed to give a videotaped deposition. But he has offered no assurances about what he will say in response to the 154 questions approved by U.S. District Judge Harold H. Greene, or whether he will assert the executive privilege claim of presidential privacy on key questions. It would then be up to the judge to rule on each item as to whether Mr. Reagan's interest in the privilege outweighed Mr. Poindexter's need for the information to obtain a fair trial.

In addition, the Bush administration has not taken a final position on Mr. Reagan's executive privilege claims yet -- a decision that could be critical. As Judge Greene has made clear, the sitting president represents the institution of the presidency and presumably knows better than the former president what impact a breach of customary confidentiality would have. President Bush, therefore, is entitled to assert executive privilege over Mr. Reagan's testimony or diaries on the grounds of protecting state secrets or serving foreign policy goals.

With the ghost of Richard Nixon and Watergate hanging over even the term "executive privilege," Mr. Reagan's lawyers demurred on its use until Judge Greene demanded it. The administration presumably is no more inclined toward pursuing the claim and could simply argue the information Mr. Poindexter wants from the former president is classified and cannot be used -- a decision the attorney general has the power to make.

Then, if Judge Greene decides Mr. Poindexter cannot get a fair trial without it, the charges would be dismissed, as happened in federal court in Alexandria, Va., last November with the indictment of Joseph Fernandez, the former CIA station chief in Costa Rica who assisted Mr. North's resupply operation.

With respect to the 33 diary entries that Judge Greene ordered turned over to the defense and for which Mr. Reagan asserted executive privilege, the judge seems to be less intent on demanding compliance now that Mr. Reagan has agreed to testify. At a hearing Feb. 13, the judge pressed the defense attorneys, led by Richard W. Beckler of the Washington office of Houston's Fulbright & Jaworski, on why the diaries were necessary when Mr. Reagan himself would testify. Mr. Beckler responded that they were important to help prepare for Mr. Reagan's interrogation.

And problems with classified information are not confined to the evidence Mr. Poindexter is seeking from the former president. Although the trial had been scheduled for Feb. 20, Judge Greene changed the date to March 5 after it was disclosed publicly for the first time during the same hearing that prosecutors and defense lawyers are locked in dispute over the handling of more than 150 classified documents proposed for use as evidence. Again, if Judge Greene finds they are necessary to Mr. Poindexter's defense and the attorney general refuses to make them available -- or summaries or redacted versions are not sufficient -- some or all of the charges could be dismissed.

If the prosecution clears the remaining hurdles, it appears likely Mr. Poindexter will build his defense by showing Mr. Reagan was active and involved in setting and executing policy rather than being the aloof, distant figure he described during immunized testimony before the congressional Iran-Contra Investigating committee in July 1987.

In that testimony, Mr. Poindexter portrayed his commander in chief as someone who was not "a man for great detail." As a result, Mr. Reagan knew nothing

whatsoever about the diversion of proceeds from the Iranian arms sales and understood only in the most general terms the Contra support efforts of his National Security Council aides, Mr. Poindexter said.

But now, Mr. Poindexter has changed his tune. Instead, court papers show, , he will argue he routinely received private direction from the president on both the arms sales and the secret Contra support operation.

In changing the tune, however, Mr. Poindexter must stick at least to the theme. While he received immunity for his congressional testimony, he is not immune to perjury charges if he contradicts it too sharply. But most observers think the military bureaucrat covered himself adequately by speaking in generalities.

'Spirit and Letter'

As Mr. Beckler struggled to make clear at pretrial hearings, the ex-admiral does not claim that President Reagan authorized him to break the law. Rather, they argue, Mr. Reagan authorized certain actions -- and as a result, Mr. Poindexter assumed they were not a legal problem.

For example, it appears Mr. Poindexter will argue that he did not intend to lie on Congress when he assured three congressional committees during July 1986 that the administration was in compliance with the "spirit and letter" of the Boland Amendment banning military aid to the Contras. He may well contend that his sincere belief -- and thus lack of criminal intent -- was based on the president's assurance that the restrictions did not apply to the NSC staff.

Mr. Reagan's testimony could help because the then-president publicly stated he shared that belief.

Whatever Mr. Reagan says -- or doesn't say -- is likely to be the political, legal and historic highlight of the case.

"This will be the first time a president has been compelled to appear in a court proceeding for adversarial questioning on his own conduct in office," notes Prof. Paul. F. Rothstein of the Georgetown University Law Center, a criminal law expert who was closely followed the Iran-Contra proceedings. "It is really quite an event."

And in terms of the type of conduct and the claim of executive privilege, experts say it is hard to picture a tougher case.

In U.S. v. Nixon, the U.S. Supreme Court held that a president may use his office as a shield against subpoena for documents or testimony but the claim is limited and can be overcome. There, the stakes were the truth of the Watergate scandal and a bid to make the president a prosecution witness. In the case of Mr. Poindexter "the interest of the defense is arguably of greater weight," observed Prof. Peter M. Shane of the University of Iowa College of Law, an authority on separation of powers. "Mr. Poindexter has a due process right at work to demonstrate a lack of criminal culpability."

But limitations on the claim depends on circumstances. The privilege is virtually absolute when a sitting president can legitimately claim privilege with respect to foreign affairs or military matters, said Professor Shane. It

is perhaps weakest when, as in Mr. Reagan's case, a former president asserts "presidential privacy," a claim based on the rationale that if presidents are discouraged from keeping accurate, personal memorandums it will impede effective decision-making.

But if the current administration joins Mr. Reagan's claim, the balance would shift again, said Prof. Peter L. Strauss, Columbia University School of Law, another separation-of-power authority. "Here, you are talking about the national security adviser discussing military and foreign affairs with the president," he said.

So while the importance of the Iran-Contra affair's political dimension has abated, the waves of constitutional contention have not. First it was the extent to which Congress can use appropriations to limit presidential action in foreign affairs. Later, the extent to which congressional overseers were entitled to pry into White House communications. Later still, the constitutionality of independent counsel was challenged; and then the struggle moved to a battle between the independent counsel and the attorney general over use of classified information.

Now the trial of the former rear admiral has stripped the Iran-Contra affair down to its long-avoided essence, the role President Ronald Reagan played in the actions of his subordinates -- passive observed or active instigator?

GRAPHIC: Photo, BETTER DAYS: President Reagan confers with Chief of Staff Donald Regan and security adviser John M. Poindexter in Reykjavik, Iceland, during talks with Soviet leader Mikhail Gorbachev. AP/Wide World Photos

LANGUAGE: ENGLISH

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The Washington Times

January 24, 1990, Wednesday, Final Edition

SECTION: Part A; NATION; Pg. A4

LENGTH: 432 words

HEADLINE: Poindexter lawyers must put questions to Reagan in writing

BYLINE: Jay Mallin; THE WASHINGTON TIMES

BODY:

A federal judge ordered attorneys yesterday to write out the questions they would ask former President Reagan should he be required to testify at retired Rear Adm. John Poindexter's trial.

U.S. District Judge Harold H. Greene issued his ruling after a hearing in which Adm. Poindexter's attorneys asked the judge to allow them to subpoena Mr. Reagan for the trial, set to begin Feb. 20. Attorneys for Mr. Reagan and the Justice Department opposed the request.

"The only thing Mr. Reagan is concerned about is not having to take the stand himself and tell what he knows" about the Iran-contra affair, charged Frederick Robinson, one of Adm. Poindexter's attorneys.

Adm. Poindexter, a former national security adviser, faces trial on five felony counts: one count of conspiracy to obstruct Congress, two counts of actual obstruction of Congress and two counts of lying to Congress. The charges stem from statements he made to Congress during its investigation of the Iran-contra affair, a scheme to sell arms to Iran and divert the proceeds to assist the Nicaraguan resistance when Congress had banned such assistance.

Adm. Poindexter's attorneys have sought testimony and documents from Mr. Reagan in order to bolster their defense that Adm. Poindexter acted at least partly under direction of the president.

Courts going back to the early 1800s have ruled that presidents may be forced to testify in a criminal case. However, no president or former president actually has been forced to testify under subpoena.

"Everybody says it [can be done] but nobody has done it," remarked Judge Greene during yesterday's hearing.

"That just means that your honor gets the first opportunity," replied Mr. Robinson.

Theodore B. Olson, a former assistant attorney general who is representing Mr. Reagan, agreed yesterday that a former president theoretically could be forced to testify. But he argued that Mr. Reagan can be subpoenaed only if Adm. Poindexter's attorneys prove the testimony would be central to their defense and that there is no other way to present the information.

The Washington Times, January 24, 1990

The defense attorneys had already listed for Judge Greene 67 categories of information they may need Mr. Reagan's testimony on. Judge Greene called the list "far too opaque," and ordered the lawyers to submit specific questions.

The judge said copies of those questions would be given to Mr. Reagan's attorney and the Justice Department, but not to the special prosecutors handling the case in order to avoid tipping them off to Adm. Poindexter's defense strategy.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

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The Washington Times

January 24, 1990, Wednesday, Final Edition

SECTION: Part A; NATION; Pg. A4

LENGTH: 432 words

HEADLINE: Poindexter lawyers must put questions to Reagan in writing

BYLINE: Jay Mallin; THE WASHINGTON TIMES

BODY:

A federal judge ordered attorneys yesterday to write out the questions they would ask former President Reagan should he be required to testify at retired Rear Adm. John Poindexter's trial.

U.S. District Judge Harold H. Greene issued his ruling after a hearing in which Adm. Poindexter's attorneys asked the judge to allow them to subpoena Mr. Reagan for the trial, set to begin Feb. 20. Attorneys for Mr. Reagan and the Justice Department opposed the request.

"The only thing Mr. Reagan is concerned about is not having to take the stand himself and tell what he knows" about the Iran-contra affair, charged Frederick Robinson, one of Adm. Poindexter's attorneys.

Adm. Poindexter, a former national security adviser, faces trial on five felony counts: one count of conspiracy to obstruct Congress, two counts of actual obstruction of Congress and two counts of lying to Congress. The charges stem from statements he made to Congress during its investigation of the Iran-contra affair, a scheme to sell arms to Iran and divert the proceeds to assist the Nicaraguan resistance when Congress had banned such assistance.

Adm. Poindexter's attorneys have sought testimony and documents from Mr. Reagan in order to bolster their defense that Adm. Poindexter acted at least partly under direction of the president.

Courts going back to the early 1800s have ruled that presidents may be forced to testify in a criminal case. However, no president or former president actually has been forced to testify under subpoena.

"Everybody says it [can be done] but nobody has done it," remarked Judge Greene during yesterday's hearing.

"That just means that your honor gets the first opportunity," replied Mr. Robinson.

Theodore B. Olson, a former assistant attorney general who is representing Mr. Reagan, agreed yesterday that a former president theoretically could be forced to testify. But he argued that Mr. Reagan can be subpoenaed only if Adm. Poindexter's attorneys prove the testimony would be central to their defense and that there is no other way to present the information.

The Washington Times, January 24, 1990

The defense attorneys had already listed for Judge Greene 67 categories of information they may need Mr. Reagan's testimony on. Judge Greene called the list "far too opaque," and ordered the lawyers to submit specific questions.

The judge said copies of those questions would be given to Mr. Reagan's attorney and the Justice Department, but not to the special prosecutors handling the case in order to avoid tipping them off to Adm. Poindexter's defense strategy.

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Commentaries

# *701 EXECUTIVE PRIVILEGES AND IMMUNITIES: THE NIXON AND CLINTON CASES

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In 1978, Ernest Fitzgerald sued Richard Nixon, and in 1994, Paula Jones sued Bill Clinton. In a landmark but closely divided 1982 opinion, Nixon v. Fitzgerald, the Supreme Court sided with Nixon and against Fitzgerald. [FN1] What does this mean for Jones and Clinton today? [FN2] Ed Meese speaks for many when he insists that Nixon protects Presidents only for presidential conduct and that extending immunity to Clinton's pre-presidential conduct would be a huge and unprincipled stretch that would place Bill Clinton above the law. [FN3] Other commentators aren't so sure that Nixon itself was rightly decided but are sure that Clinton's claim is much weaker. Terry Eastland has argued ***702** that, if you reject Nixon's immunity claim, you presumably must reject Clinton's a fortiori. [FN4]

We will show that all of this is dead wrong. Bill Clinton's claim for immunity is actually much stronger than Richard Nixon's -- supported by crisper arguments from constitutional text and structure, by more historical evidence from the Founding and early Republic, and by better modern-day policy arguments. Nixon sought absolute and permanent immunity from a civil damage action after he left office; Clinton seeks only temporary immunity from litigating a civil damage suit while he serves as President. We will show that the Arrest Clause of Article I, Section 6 and the democratic structural principles underlying this Clause cast light on Article II, and provide a sturdy constitutional basis for temporary presidential immunity. In the process of elaborating the best argument for Clinton, we will also show how all nine Justices in Nixon missed the point and in particular misread a key quote from the great Justice Joseph Story. We will outline a new theory of limited executive immunity that protects a sitting President and (most importantly) the American people he serves, yet does not put the President above the law, as Nixon did, despite the Court's protestations to the contrary.

## I. UNTANGLING IMMUNITY

The Constitution nowhere explicitly describes what litigation immunity, if any, the President merits by dint of his unique constitutional role. The document does, however, explicitly describe certain governmental immunities. Article I, Section 6 provides that:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. [FN5]

### A. Expressio Unius?

At first glance, this Clause seems to be powerful ammunition for the presidential immunity skeptics. After all, no such explicit provision exists for the President. Didn't our Founders clearly mean to say, by expressio unius, [FN6] that the President is not entitled to immunity?

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*703 But this expressio unius argument is far weaker than it looks. In light of the explicit reference to "Speech or Debate" in Article I, let's look at the Constitution's other free speech clause: "Congress shall make no law . . . abridging the freedom of speech." [FN7] By similar expressio unius logic, shall we say that the First Amendment limits only Congress--that the President may propound censorship edicts and the federal courts may issue gag rules without regard to First Amendment principles? Or shall we say under expressio unius that, in the absence of the First Amendment, only Senators and Representatives, but not ordinary citizens, would enjoy constitutional freedom of speech or debate?

Surely not. Even if the First Amendment did not exist, the Constitution's overall structure and its commitment to democratic self-government would require a broad freedom of speech and debate for citizens on issues of public concern. [FN8] Article I, Section 6 had its roots in England, where Parliament was sovereign, and, as a self-governing body, needed wide freedom to debate public issues. [FN9] (The very word Parliament -- from the French parler, to speak -- emphasizes the central role of speech and debate.) But in America, "We the People" are sovereign and must enjoy an analogous (though not necessarily identical) freedom of speech and debate on public, political issues. [FN10] So, if the First Amendment had never been adopted, we clearly would not read Article I, Section 6, by expressio unius, to say that Senators and Representatives enjoy freedom of speech, but citizens do not. Even if the scope of freedom were only analogous and not identical, [FN11] it would be odd to say that Section 6 meant that no other immunities for speech existed; that such immunities were unconstitutional or extra-constitutional; or that to recognize such immunities in the teeth of the words inside Section 6 and the silence outside it would be to "make things up."

So too with the words of the First Amendment explicitly prohibiting only congressional censorship. The general theory of popular sovereignty frowns on all suppressions of citizens' free speech, whether by *704 congressional law, presidential edict, or judicial decree. [FN12] If the President and federal courts cannot censor citizens with a congressional law, it would be odd to think they can do so without such a law. As with Section 6, the First Amendment is best read not to bar, by expressio unius, citizen freedoms against courts and executives, but rather to invite, by analogy, these unenumerated freedoms implicit in constitutional structure.

It might be argued that the structural reasoning outlined thus far should go no further. Ordinary citizens, the people, may well enjoy unenumerated rights, especially if collective self-government is at stake -- this principle is the heart of the Ninth Amendment's affirmation of the people's unenumerated rights. [FN13] But, it might be said, unenumerated rights and immunities for governmental officials qua officials are a very different kettle of fish.

Are they really? Always? Consider a federal judge who, in the course of her published judicial opinion, criticizes some person who then brings a libel suit. Our judge is not a Senator or Representative; nor is she speaking "in either House." Must we read Section 6 by expressio unius to imply that our judge enjoys no analogous immunity in performing her public function and doing the people's business? Must we reject even a "constitutional common law" immunity that might be modifiable at the margins by statute? [FN14] Surely expressio unius does not require this rigidity; and we should note that, since our nation's Founding, courtroom litigants have enjoyed absolute common law immunity from libel -- an immunity arguably constitutionalized in the First Amendment Petition Clause. [FN15] Should a judge have less freedom of speech than a litigant? [FN16] In a working democracy under law, judges -- like Senators, Representatives, and ordinary citizens § *705 must have a wide zone of freedom to speak and print. Though the idea is not textually specified in Article I, Section 6, or in Article III, federal judges need absolute or near absolute freedom "of Speech [and] Debate." The very notion of jurisdiction is the power to speak the law, [FN17] the power, in John Marshall's immortal phrase, "to say what the law is." [FN18] To do their job, and to serve the people, judges must be free to enter declaratory judgments of law and fact, judgments that may criticize and anger powerful people. Libel suits against judges interfere with these judicial functions and thus offend our basic constitutional structure. [FN19] Regardless of the specific words of Section 6, its deep structural logic applies to judges as well as legislators.

Now consider a presidential speech (say, on health care legislation pending in Congress) criticizing some group

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(say, pharmaceutical companies). Is it sensible to argue that, because of expressio unius, the President has no absolute immunity from libel suits? [FN20] Even if this immunity is merely a matter of constitutional common law, a la Justice Jackson's Youngstown Category Two? [FN21] To perform his role in a constitutional democracy, the President --like Senators, Representatives, judges, and ordinary citizens -- must be free to speak out on issues of public concern. Indeed, the Constitution explicitly invites the President to make State of the Union speeches, to recommend legislation ***706** to Congress, and to give a statement of reasons for any veto he hands down. [FN22] In performing his high constitutional duties of democratic deliberation, the President may need to speak in ways that criticize and anger powerful people. In this situation too, libel suits would offend the basic structure of the Constitution -- for precisely the same reasons as would libel suits against Senators, Representatives, and judges. [FN23] It would be downright silly to argue by expressio unius that the President lacks absolute immunity from libel merely because the clauses governing State of the Union messages, recommendations, and vetoes are less explicit than Article I, Section 6; so too, it would be obtuse to recognize absolute immunity for these and only these three communications (under expressio unius) while muzzling the President the rest of the time under penalty of libel lawsuits.

This examination of the Speech or Debate Clause suggests that it is best read not to bar analogous immunities of coordinate branches but rather, if anything, to invite them. And the same holds true, we shall argue, for its companion, the Article I, Section 6 Arrest Clause. If Representatives and Senators should not be impeded ("arrested") by certain private litigation while performing the people's business (while "at session"), this Arrest Clause immunity should not bar, and if anything might invite, analogous immunities for members of coordinate branches while performing the people's business. [FN24]

***707** Nor does any of this analysis violate the language or history of Section 6 or even the formal rule of expressio unius, properly understood. Section 6 nowhere explicitly rejects coordinate immunities -- statutory, common law, or constitutional. The Framers simply provided more details about the legislature in their prolix Article I than about coordinate branches; so more must be left to sensible structural inference when dealing with the sparser Articles II and III. Textual specification of legislative immunities might have been especially important to some Framers because the practical protection of these immunities would be committed to the other two branches in enforcing and adjudicating concrete cases. Whatever implicit immunities were appropriate for those other branches, it might have been thought, were effectively self-executing -- effected by the President's refusal to enforce certain processes against himself, and judges' refusal to entertain certain suits against judges -- and so perhaps needed less textual emphasis. [FN25] And even under a stringent expressio unius theory, Section 6 could be read merely to set out those governmental immunities that Congress cannot in any way qualify by statute.

Supreme Court case law also emphatically rejects the notion that Section 6 precludes implied immunities for coordinate branches. The Court, for example, has held judges and prosecutors immune for their official duties. [FN26] These immunities, it can be argued, do not violate the central tenet of Marbury v. Madison, and of Anglo-American law more generally, that "every right . . . must have a remedy." [FN27] Rather, the notion of judicial and prosecutorial immunity may be that one's ***708** remedy for intra-litigation wrongs occurs within the lawsuit itself--by appeal--rather than by a collateral damage action. [FN28]

### B. Separating the Two Tiers of Immunity

In a lengthy and important footnote, the Nixon v. Fitzgerald majority properly rejected a wooden expressio unius reading of Article I, Section 6, arguing that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." [FN29] But the Court's desire to find a quick answer to Nixon's problem blinded it to the architecture of Section 6. To see this, we must carefully pull apart the two types of immunity mentioned in Article I. One type is "Immunity From Arrest": legislators' temporary immunity from litigating even private lawsuits while "at the Session" of Congress as public officers. The other type is "Immunity For Speech or Debate": permanent immunity from liability in lawsuits that arise out of the performance of public duties of democratic deliberation. This latter form is what all nine Justices in Nixon conceptualized as "immunity." [FN30]

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I. Permanent Immunity. -- The Court's application of permanent immunity in Nixon was hard to justify by analogy to the Speech or Debate Clause or by other basic structural principles of constitutional law. Richard Nixon did not speak out against Ernest Fitzgerald in public debate; Nixon fired Fitzgerald from a civil service position. Worse still, Fitzgerald alleged that Nixon fired him because of Fitzgerald's speech activities -- whistleblowing testimony before the Congress. A broad commitment to the constitutional ideals of democratic self-government and citizen speech argued against Nixon's immunity, not for it. According to Fitzgerald's complaint, Richard Nixon violated the Constitution itself (the First Amendment no less), [FN31] and yet the Court shielded Nixon with permanent immunity.

***709** The five-Justice majority in Nixon prominently relied on an important quotation from Justice Joseph Story's classic Commentaries on the Constitution and, less prominently, on the words of Thomas Jefferson and John Adams. [FN32] But as we shall show, all of these sources were badly misread in Nixon. [FN33] The Nixon five also dismissed, too quickly, the concern that permanent immunity for Richard Nixon would leave Ernest Fitzgerald with a constitutional right without an adequate legal remedy. [FN34] The Court pointed to longstanding judicial immunities, [FN35] but as we suggested earlier, these immunities do not necessarily violate Marbury's bedrock teaching that every right must have a remedy. [FN36]

The Nixon five also trotted out various newfangled executive immunities to blunt the message of Marbury. [FN35] But the Framers would have been shocked by the notion that, as a general matter, executive officials could violate the Constitution and yet be held permanently immune. The modern judicial proliferation of various qualified immunities for constitutional torts is a twentieth century betrayal of founding principles. These immunities should be sources of concern -- things to be minimized or, ideally, eliminated -- rather than springboards for further violations of Marbury. The Nixon five's complacent apologetics here are embarrassing, at least to those who value the Framers' first principles. [FN38]

The only real argument left in Nixon was the claim that Ernest Fitzgerald had alternative remedies -- remedies against the government itself rather than Nixon personally -- that would fully vindicate his constitutional rights. [FN39] If true, this would indeed satisfy Marbury, for the government may limit a plaintiff's choice of constitutional remedies as long as those remaining suitably vindicate the right at stake. [FN40] Marbury and the rule of law demanded constitutional justice for Fitzgerald [FN41] but not necessarily a pound of flesh from Nixon himself. The ***710** government, after all, could have directly indemnified Nixon for any judgment that he owed to Fitzgerald, and a Fitzgerald suit against the government itself would simply accomplish this result more directly. But the Nixon dissenters denied the adequacy of alternative remedies, [FN42] and the Nixon majority spent little time defending its claim of adequate alternatives.

2. Temporary Immunity. -- The other half of immunity, temporary immunity akin to Article I immunity from arrest, went wholly unnoticed by Nixon's nine Justices. As Article I makes clear, members of Congress are privileged from arrest while Congress is in session. The Framers intended "Arrest" in this Clause to mean civil arrest, not criminal arrest. The Arrest Clause explicitly exempts cases of "Treason, Felony and Breach of the Peace"; and both the clear language of Blackstone's Commentaries and English debates well known to the Framers stressed that this exempting phrase was a term of art encompassing all crimes. [FN43]

***711** The real question is whether civil arrest should be understood strictly and formally, or more functionally. Technical civil arrest -- commencing a lawsuit by seizing the civil defendant's person -- is all but dead today, and so the Arrest Clause, when strictly construed, shrinks to a virtual nullity. But "Arrest" may also be understood more functionally as extending to various civil cases that interfere with -- that arrest -- a person's performance of her duties in public office. [FN44] ***712** This functional immunity avoids undemocratic results: functional civil arrests of members of Congress while it is in session might skew votes in Congress and penalize innocent third parties, namely, the American people. As Joseph Story put the point in his Commentaries, explicitly building on Thomas Jefferson's famous Congressional Manual:

> When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their

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> voice in debate and vote . . . . When a senator is withdrawn by summons, his state loses half its voice in debate and vote . . . . The enormous disparity of the evil admits of no comparison. [FN45]

But Article I prohibits civil arrests only while Congress is in session; it implicitly permits the arrests when Congress is not in session. (And here we see a less wooden and more proper application of the expressio unius maxim.) Arrest Clause immunity is thus temporary immunity -- ***713** stopping the clock on a lawsuit until litigation can occur without disruption of the defendant's public duties. [FN46]

Though a strict expressio unius reading might limit the Arrest Clause to "Senators and Representatives," structural considerations tug the other way. Consider, for example, the Vice President. Surely he is not a "Senator or Representative," strictly speaking, [FN47] and yet under the Constitution, he is empowered to preside over the Senate and cast a tie-breaking vote. [FN48] If he were subject to civil arrest while Congress was in session, he could be wrenched away from these weighty constitutional duties of democratic deliberation by a single private plaintiff, in clear violation of the spirit and logic -- but not the letter -- of the Arrest Clause.

The structural constitutional logic undergirding temporary immunity applies with even greater force to the President. Unlike federal lawmakers and judges, the President is at "Session" twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed. We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America.

What's more, the President is the only person for whom the entire nation -- We the People of the United States -- votes. There are over 500 federal lawmakers -- the House and Senate can function if one member is absent, as the quorum rules of Article I, Section 5 make clear [FN49] -- but there is only one President, in whom all executive power is vested by Article II. [FN50] Thus, the democratic skew that can result if civil suits impede -- arrest --the President is far more dramatic ***714** than for a typical Representative or Senator. To be sure, the Vice President always remains at hand, ready to step in for the President in emergency situations, but the elaborate provisions of the Twenty-Fifth Amendment and past practice indicate that these emergencies should be the exception, not the rule. [FN51] Yet they could well become the rule if a handful of citizens -- acting independently or in concert [FN52] --could functionally arrest the President in his performance of the people's business and trigger his temporary inability "to discharge the Powers and Duties of . . . Office" under Article II and the Twenty-Fifth Amendment.

This approach does not mean that the President is above the law. It simply means that, in cases seeking compensation for past wrongs, a President should be able to request temporary immunity to avoid interference with his duties. [FN53] Whereas Nixon eliminated all remedies against the President, at least for constitutional torts committed qua President, arrest immunity would only "toll" -- stop the clock on -- a lawsuit and would preserve the plaintiff's ultimate remedy and vindicate the ideal of Marbury. [FN54] Because of the Twenty-Second Amendment, ***715** the Constitution itself assures that plaintiffs will not have to wait more than eight years. [FN55]

But eight years is a long time -- much longer than any "Session" of Congress under Article I, Section 6 -- and so perhaps the Section 6 analogy breaks down at precisely that point. On the other hand, eight years is a lot shorter than eternity, which is how long the Nixon Court said Ernest Fitzgerald had to wait. On this point, at least, it may be politically awkward for the Court to distinguish Nixon: aren't Democratic Presidents entitled to the same solicitude as Republican Presidents? (And on the facts of the Jones case, one may well ask if Paula Jones can equitably complain about delay after she waited three years to file her complaint.) [FN56]

If sensible structural inferences lead us to think that a President, under the logic of Article II, merits an

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immunity akin to Section 6 "Arrest" immunity, it becomes important to refine further the functional concept of civil arrest. Our legal order has long distinguished between damage suits for past, discrete wrongs, and injunctive suits to end ongoing harm. In effect, we should distinguish between civil damage arrests and ongoing harm injunctions. In arrest scenarios, plaintiffs may be obliged to wait, but interest payments presumably can make up for lost time. Civil actions arising out of ongoing harms -- continuing possession of a steel mill in Youngstown, [FN57] or a hypothetical divorce or child custody suit involving a sitting President -- are quite different. [FN58] Putting the point more textually, perhaps one could say that an ongoing harm is functionally one kind of "Breach of the Peace" and thus lies outside the proper scope of arrest immunity. [FN59]

C. Nixon Revisited

Not only does temporary immunity from "civil arrest" make good sense from the perspective of constitutional structure and policy, but it also makes the most sense of the historical evidence offered up by the ***716** Nixon majority. The best evidence that the Nixon five had for their position, Justice White's dissent conceded, was from Justice Story. But now that we have tipped our hand and identified two types of immunity, listen to Story's words with fresh ears:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. [FN60]

Let us note carefully Story's moves. First, Story believes that Section 6 does not exclude immunities for coordinate federal branches. In particular there are "incidental" presidential powers, not textually spelled out but "necessarily implied" by the spare words of Article II. Next, Story hints that these immunities should be understood functionally, not formally -- they are deducible from the nature of presidential "functions." Third, Story articulates presidential immunity as an immunity from "arrest" -- obviously conjuring up an analogy to the Arrest Clause of Article I, rather than the Speech or Debate Clause. [FN61] Fourth, this immunity is explicitly temporary, once again in keeping with arrest immunity rather than speech or debate immunity. It is immunity "while he is in the discharge of the duties of his office" -- while he is in "Session," in the analogous language of Section 6. Fifth, it is immunity even for certain lawsuits based on a President's private conduct -- immunity for his "person." Once again, this tracks arrest immunity rather than speech or debate immunity. Finally, Story carefully limits this immunity to "civil cases" -- just as the Arrest Clause (but not the Speech or Debate Clause) is limited to civil cases.

This quote from Story could be challenged, or narrowly construed, were we writing on a clean slate. Perhaps Story is referring only to technical civil arrests, rather than to broader litigation impediments. In any event, Story is not speaking in his judicial capacity, but only as a commentator on the Constitution (though perhaps its most distinguished commentator), and is writing almost fifty years after the document's ratification.

Today, however, we do not write on a clean slate. We write in the wake of Nixon. A very broad reading of Story is inscribed in the United States Reports -- it is the rock on which Nixon is built. If ***717** Story was enough to win for Nixon, why not for Clinton? (Nixon was a Republican, and Clinton is a Democrat, but of course this should make no difference.) [FN62] Indeed, as should be clear by now, a careful reading of Story does not support the result in Nixon, [FN63] contrary to Justice White's glib concession in dissent. [FN64] But a close reading of Story does support Clinton and our Arrest Clause methodology today.

The Nixon majority had a couple of other high cards up its sleeve, a pair of quotations from Thomas Jefferson and John Adams featured in a long and important footnote that addressed the Article I, Section 6 expressio unius argument. Here are Jefferson's words:

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> ***718** But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? [FN65]

And here are the thoughts attributed to Adams and Senator Oliver Ellsworth: "[T]he President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." [FN66]

As with the Story quote, these passages support Clinton far more than Nixon. Jefferson is clearly concerned about litigation that would "withdraw" a President from his current "constitutional duties" -- a concern inapplicable to Nixon in 1982 but very much relevant to Clinton today. As Jefferson put the point three days earlier in words that obviously apply only to sitting Presidents: "To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function." [FN67] Note also how Jefferson's later reference to "imprisonment for disobedience" conjures up arrest, not speech or debate.

As Adams and Ellsworth's last six words suggest, they too are referring to a sitting President, not a former one: only suits against a sitting President would "stop the whole machine of Government." Significantly, Adams and Ellsworth's language goes beyond technical civil arrest and defines temporary immunity functionally to subsume "any process whatever." Their sweeping quote thus encompasses both civil and criminal prosecutions, yet surely they are not claiming, in light of the Article I, Section 3 Impeachment Clause, [FN68] that a former President may not be criminally punished for offenses in office. Indeed, in language that all of the Nixon opinions overlooked, Adams and Ellsworth explicitly concede as much moments later and thus make clear that ***719** they are not talking about suits against ex-Presidents. [FN69] So here too, the Court badly misread the historical evidence. [FN70]

The stunning part of Nixon is not only the majority's hands-off attitude towards an ex-President, but also the fact that none of the nine Justices seemed to understand what Story, Jefferson, and Adams were really saying. [FN71] We can now understand why Eastland and others might question the Court's view that "[t]he best historical evidence clearly supports the Presidential immunity we [the Court] have upheld." [FN72] But the fact that the evidence fails to support Nixon ***720** doesn't mean that the same goes for Clinton. On the contrary, even if Nixon is a twisted stretch of history and text, the historical evidence does provide sturdy support for temporary immunity from arrest. [FN73] ***721** Despite what the pundits are saying, Clinton has a far stronger case than Nixon had.

## II. POSSIBLE PRIVILEGES

The concept of a President's immunity from functional "Arrest" while in "Session" is a modest one -- waivable, temporary, and perhaps subject to congressional modification. Yet from another perspective, arrest immunity is absolute and categorical -- it does not balance or weigh the unique features of a given case. It does not distinguish between a case likely to arrest the President in litigation for two hours, and one likely to arrest him for two months. It does not focus on the equities of a particular plaintiff or her special need for speedy adjudication. It does not reflect the fact that some claims are more difficult than others to revive and to adjudicate after a long delay.

For some, the bright-line quality of arrest immunity -- supported by a textual analogy to the bright-line rule of Article I, Section 6, [FN74] by the categorical language of Story, Jefferson, and Adams, [FN75] and by the prospect that political pressure can be trusted to induce presidential waiver in appropriate cases -- will count as a juridical virtue. For others, the medicine of absolute arrest immunity will taste too strong. For those in this second group -- scholars, lawyers, and judges -- we shall briefly provide a catalogue of weaker prescriptions: presidential privileges attentive to the structural arguments and historical evidence presented above but packaged

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in lower dosages and blended with other general legal principles.

A. Equitable Tolling

In some situations, arrest immunity may work a grave injustice against a worthy and diligent plaintiff. Imagine a pedestrian crushed by a transition team bus (with Clinton at the wheel) one week before the Clinton inauguration. Obviously there is no time to file suit, conduct discovery, litigate the case, and pursue an appeal before Inauguration Day. This plaintiff might have to pay huge out-of-pocket hospital bills and yet, under absolute arrest immunity, may be forced to wait eight years to be made whole.

A more flexible, "equitable" version of presidential immunity would distinguish between cases in which a plaintiff could have brought suit before Inauguration Day and cases in which a plaintiff could not. The structural logic here is the same one that drives arrest immunity: a suit against a sitting President in effect impleads innocent third parties -- the American people --whose democratically chosen leader is obstructed in discharging his unique and awesome constitutional duties. ***722** But the application in this situation is more flexible and equitable. [FN76] Only those cases in which plaintiffs themselves choose to sue while the President is in session are automatically tolled. Other cases (like our hypothetical pedestrian's) could be selectively tolled, depending on factors such as the likely amount of intrusion on a President's time, the practical freezability of a case, and the extent of out-of-pocket losses that call for quick recoupment.

With this rule in place, plaintiffs who have claims against would-be Presidents would have strong incentives to bring suit well before Inauguration Day. [FN77] Pre-inaugural suits are exactly what constitutional structure and history counsel. The constitutional evil to be avoided is distracting --arresting -- litigation while the President is at session. Litigation after --or before -- a President's term is just fine. A bonus of equitable tolling is that pre-presidential litigation may bring information to light for the American people, as well as the courts, before We the People make our momentous choice on Election Day.

Under a regime of equitable tolling, Paula Jones's case looks rather different from our hypothetical pedestrian's. Jones saw the metaphoric Inauguration Bus coming; she was not blindsided. She did not suddenly wake up one day and discover -- mirabile dictu -- that Bill Clinton had become President. Why then, did Jones not bring suit much earlier, when the American people would not have been involuntarily dragged into litigation as de facto third party defendants and when litigation would not have disrupted constitutional government? Unless she can answer this question persuasively, an equitable tolling approach would put her lawsuit on hold. [FN78]

B. Equitable Dismissal

An equally flexible but more emphatic approach would dismiss Jones's suit with prejudice, unless she can persuasively explain why she sat on her claims until after Inauguration. Like tolling, dismissal would of course create strong incentives for future plaintiffs like Jones to bring suit before presidential elections rather than after them. Like tolling, dismissal is more flexible and less categorical than arrest immunity: dismissal would be case-specific, and could, for example, distinguish between Jones's suit and our hypothetical pedestrian's.

The idea here is that litigation delay -- temporary immunity or tolling -- at times hurts defendants and not just plaintiffs. A President's ***723** memory of the facts of any one case will no doubt fade over eight years, while she is preoccupied by many and weighty matters of state, whereas a single-minded plaintiff may be able to rehearse his story over the years. This concern can vividly arise in a case turning on facts more than on law, especially if testimonial credibility is a key issue. By strategically manipulating the timing of a lawsuit -- delaying without good reason until after Inauguration --a plaintiff may place a President who deserves to win the suit in a cruel trilemma: drop vital affairs of state to litigate now and prevail (the "betray the people/waiver" option), or pay off unmeritorious claims (the "nuisance value/extortion floodgates" option), or wait until out of office and defend at a disadvantage (the "can't remember/look like a liar or a dope" option). To discourage precisely this kind of strategic manipulation, Anglo-American law has long recognized the general doctrine of laches. [FN79]

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Laches is a defense that allows a case to be dismissed if the plaintiff cannot explain why he sat on his claims and if his delay substantially prejudices the defendant. [FN80] For example, the Supreme Court held over a century ago that a plaintiff alleging fraud could not needlessly delay a suit until after the alleged defrauder's death and thereby prevail more easily against the alleged defrauder's successors in interest. [FN81] This logic could easily be blended with arguments from constitutional ***724** structure to impose an analogous duty on plaintiffs today to litigate (if possible) before a person's "death" as an ordinary citizen and "birth" as a President.

Historically, as an "equity" doctrine, laches did not apply to cases "at law" governed by explicit statutes of limitation. After the historic merger of law and equity in 1938, however, those old distinctions should matter little here. [FN82] Other formerly "equitable" defenses, such as estoppel and fraud, have long been allowed to defeat actions "at law"; [FN83] and the Federal Circuit, at least, has squarely held en banc that laches may be invoked to prevent strategic manipulation in a "law" case even if an explicit statute of limitation applies and has not run. [FN84] In any event, even if the technical equitable doctrine of laches is unavailable, its underlying logic can apply when understood in light of the dictates of constitutional structure and packaged as a matter of constitutional common law. [FN85]

### C. The Venue Variant

Even if constitutional structure and history are not strong enough to freeze a civil suit against a sitting President, they might be strong enough to influence where and how the suit unfolds. Disruption of the President's duties should be minimized. A good argument can thus be made that, if a sitting President may be sued for damages, suit should ***725** lie only in Washington D.C.: no other court should have personal jurisdiction or venue against an unconsenting [FN86] sitting President.

Several things point this way. First, the language of Article III and of the Judiciary Act of 1789 provided that suits against foreign Ambassadors be tried in the original jurisdiction of the Supreme Court, which would of course sit in the nation's capital. [FN87] The underlying logic here was geographic: ambassadors would operate out of the nation's capital, and suit in that city would minimize disruption of their duties. [FN88] If foreign dignitaries enjoy this litigation privilege, should not the President a fortiori (at least in the absence of an express congressional statute to the contrary)?

Of course, our old friend expressio unius might argue that, if the Framers had meant for the President to enjoy an analogous venue privilege, they would have explicitly so provided in Article III alongside the Ambassador Clause. But perhaps the Framers were simply not thinking about the unusual case of a civil damage action against a sitting President. When they did think about suits against the President, they explicitly provided that impeachment trials would take place in the Senate, again in the nation's capital. The Federalist Papers explicitly emphasized the geographic logic that underlay this choice. [FN89]

Recall also Jefferson's obviously geographic concern that litigation in "the several courts" (note the plural) would "bandy [the President] from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him" from the district and thus from "his constitutional duties." [FN90] Few at the Founding would have thought that any court on the continent could use newfangled longarm statutes to reach out and grab the President of the United States. [FN91] Jefferson summed it up nicely, in words that also sum up nicely much of our overall argument:

> As to our personal attendance in Richmond [at the Burr trial], I am persuaded the Court is sensible, that paramount duties to the nation at large control the obligation of compliance with their summons in this case; as ***726** they would, should we receive a similar one, to attend the trials of Blennerhasset and others, in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place, other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn

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from its station by any co-ordinate authority. [FN92]

## III. CONCLUSION

In the end, we suggest that temporary immunity from arrest is the constitutionally preferable reading of executive immunity in many situations. This immunity, which essentially tolls cases against a sitting President, avoids the twin dangers of making all Americans pay for the President's sins and of putting Presidents above the law. Our "arresting" conclusion is that a proper judicial holding in Clinton's favor could limit rather than extend the mischief of Nixon.

FNa1. Southmayd Professor, Yale Law School.

FNaa1. Student, Yale Law School. At the time this Commentary was written, Mr. Katyal was working in the Office of the Solicitor General, United States Department of Justice. He had no involvement with the brief filed by the Solicitor General in the Paula Corbin Jones litigation.

An earlier version of this Commentary was presented on September 22, 1994 as the Hardy Cross Dillard Lecture at the University of Virginia School of Law; on October 19, 1994 as part of the Scholar-in-Residence Program at Hofstra University School of Law; and on October 26, 1994 as part of the Edward L. Barrett, Jr. Lecture Program at the University of California at Davis School of Law. For helpful comments on earlier drafts, we thank Bruce Ackerman, Vik Amar, Ian Ayres, Jack Balkin, Susan Low Bloch, Steve Calabresi, Betsy Cavendish, Owen Fiss, Joseph Goldstein, Harold Koh, John Langbein, Burke Marshall, Vinita Parkash, Mike Paulsen, Jeff Rosen, Jed Rubenfeld, Peter Swire, Laurence tribe, and Eugene Volokh.

FN1. 457 U.S. 731 (1982). The suit alleged that Nixon had unlawfully fired Fitzgerald in retaliation for his testimony before Congress about military aircraft cost overruns.

FN2. Jones's suit raises four claims. She asserts violations of 42 U.S.C. §§ 1983 and 1985 that stem from Clinton's alleged conduct while Governor of Arkansas, a state law intentional infliction of emotional distress claim that arises from the same alleged action, and a state law claim alleging that Clinton and his aides defamed her while he was President. See Jones v. Clinton, Complaint, Civ. No. LR-C-94-290 (E.D. Ark. May 6, 1994).

Editors' Note: As this Commentary went to press, the U.S. District Court for the Eastern District of Arkansas ruled that no trial should occur until after the end of President Clinton's tenure, but that pretrial discovery could proceed now. This ruling may be appealed. See Jones v. Clinton, 1994 WL 721905 at *7-*8 (E.D. Ark. Dec. 28, 1994).

FN3. Nightline: Presidential Immunity (ABC television broadcast, June 13, 1994) (transcript on file with the Harvard Law School Library); Crossfire: Justice Delayed for the President? (CNN television broadcast, May 25, 1994) (transcript on file with the Harvard Law School Library); Morning Edition: Sexual Harassment Suit Questions Presidential Immunity (National Public Radio broadcast, June 15, 1994) (transcript on file with the Harvard Law School Library).

FN4. See Terry Eastland, No Immunity for Clinton from Paula Jones's Charges, WALL ST. J., June 8, 1994, at A17.

FN5. U.S. CONST. art. I, § 6.

FN6. The legal maxim expressio unius est exclusio alterius means that the expression of one thing (here, congressional arrest and speech or debate immunities) by implication excludes other things (here, presidential or judicial immunities, or other congressional immunities). The maxim is in many contexts sound, but as we shall show, must not be applied clumsily or mechanically.

FN7. U.S. CONST. amend. I. On the connection between these two clauses, see Akhil Reed Amar, The Bill of Rights

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as a Constitution, 100 YALE L.J. 1131, 1151 (1991) [hereinafter Bill of Rights]; Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 141 (1992); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255-56.

FN8. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 35-50 (1969); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 101-24 (1960).

FN9. See Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1267 (1992) [hereinafter Fourteenth Amendment].

FN10. See id. The citizen's freedom of speech might be only analogous rather than identical in that it might be, say, less absolute than the legislator's freedom.

FN11. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 269-80 (1964) (recognizing broad, though not absolute, freedom of speech for citizens on issues of public concern).

FN12. See Fourteenth Amendment, supra note 9, at 1273-74.

FN13. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For discussion of the connection between this amendment and collective self-government, see Bill of Rights, cited above in note 7, at 1200.

FN14. "Constitutional common law" here refers to judicially recognized principles that are deducible from the Constitution and designed to implement the Constitution's structure and fill in its gaps but that may nevertheless be subject to statutory modification. We are indebted here to Professor Henry Monaghan. See Henry P. Monaghan, The Supreme Court, 1974 Term -- Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 10-17 (1975).

FN15. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. For an excellent analysis of the protection the Clause was designed to afford litigants, see Eric Schnapper, "Libelous" Petitions for Redress of Grievances -- Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303, 343-47 (1989).

FN16. See Spalding v. Vilas, 161 U.S. 483, 497 (1896) ("The authorities . . . are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.") (quoting Dawkins v. Lord Rokeby, 8 Q.B. 255, 263 (1873)) (internal quotation marks omitted).

FN17. See THE FEDERALIST No. 81, at 489 n.* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

FN18. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803) (emphasis added).

FN19. Our reasoning on this point tracks the Court's:

> [A] series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice . . . . "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. . . ."
>
> Spalding, 161 U.S. at 495 (quoting Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868)).

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FN20. Consider the following Supreme Court passage:

> The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session. This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher, 13 Wall. 335, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v. Goff, 12 F.2d 396, aff'd per curiam, 275 U.S. 503, involving a Special Assistant to the Attorney General. Nor has the privilege been confined to officers of the legislative and judicial branches of the Government and executive officers of the kind involved in Yaselli.
>
> Barr v. Matteo, 360 U.S. 564, 569-70 (1959) (footnotes omitted).

FN21. In his famous Youngstown concurrence, Justice Jackson outlined three categories of presidential power under the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Category Two is the functional equivalent of constitutional common law --powers enjoyed by the President under the Constitution that are subject to modification and diminution by congressional statute.

FN22. See U.S. CONST. art. II, § 3; art. I, § 7.

FN23. Once again, our logic tracks the Court's:

> [T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.
>
> Spalding, 161 U.S. at 498. Consider also the words of Framer James Wilson:
>
> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.
>
> JAMES WILSON, Of the Constitutions of the United States and of Pennsylvania --of the Legislative Department, in I THE WORKS OF JAMES WILSON 399, 421 (Robert G. McCloskey ed., 1967). Wilson saw members of all three branches as representatives of the public. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 597 (1969).

FN24. We do not here address what, if any, immunities might be appropriate for state officials under the federal Constitution. These immunities raise different issues, because unlike the President and federal judiciary, state officials are not coordinate to Congress.

We also bracket the issue whether state governors should enjoy immunity under state constitutions from state law suits. Although many state constitutions feature clauses for state legislators analogous to Article I, § 6, these constitutions differ from the federal template in two key respects. First, most have historically lacked a strongly unitary executive analogous to the one created by Article II. See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 47 ARK.L.REV. (forthcoming 1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM.L.REV. I, 49-50 (1994). Second, in no state does the governor enjoy foreign affairs duties akin to the President's. As will become clear below, the unitary language of Article II and the centrality

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of the President's foreign affairs duties are key features of our structural analysis of the federal Constitution.

Finally, we do not analyze the issue of what, if any, Arrest Clause-like immunity should be enjoyed by federal judges. Compared with Presidents, see infra pp. 713-14, and members of Congress, see infra pp. 711-12, judges may be more fungible from the perspective of democratic representation and democratic skew. Unlike a President, a judge is not always in session, twenty-four hours a day, every day; and unlike Congress, judges can reschedule their hearings and sessions with relative ease.

FN25. In the absence of Article I, § 6, legislators could have tried to enact similar statutory immunity, but an unpopular legislative minority might have been at the mercy of a partisan majority. The President might have vetoed such a law, and until such a law passed, members of the First Congress would have been vulnerable. Partisanship was seen as much less likely among a cadre of professional judges. See THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 224-28 (1985) [hereinafter Two Tiers].

On the self-protective powers of executive and judicial branches, see THE FEDERALIST No. 51, at 320-23 (James Madison) (Clinton Rossiter ed., 1961); 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION ON THE FEDERAL CONSTITUTION 245-46 (Jonathan Elliot ed., 1830) (remarks of James Wilson at Pennsylvania Ratifying Convention); and Bill of Rights, supra note 7, at 1194.

FN26. See Butz v. Economou, 438 U.S. 478, 511-12 (1978); supra note 20.

FN27. 5 U.S. (I Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

FN28. See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 781 (1994) [hereinafter Fourth Amendment].

FN29. 457 U.S. 731, 750 n.31 (1982); see also United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) ("Nixon tapes case") (rejecting explicitly an expressio unius reading of the Speech or Debate Clause and embracing the notion of implicit presidential privileges).

FN30. The opinions in the case are rife with references to the Speech or Debate Clause as a benchmark for assessing presidential immunity. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 750 n.31 (1982); id. at 759 (Burger, C.J., concurring); id. at 771 (White, J., dissenting). Justice White's dissent alone refers no less than six times to the Speech or Debate Clause. See id. at 765, 769, 771 & n.6, 777 n.22, 781.

FN31. See Nixon, 457 U.S. at 740. Note that our commonplace description of Nixon as a "First Amendment case" is based on the idea, taken for granted by virtually the entire legal community, that mere presidential action can violate the First Amendment notwithstanding the Amendment's reference to "Congress" and the expressio unius maxim. See supra Part I.A. In New York Times Co. v. United States, 403 U.S. 713 (1971), a case involving unilateral presidential attempts to suppress publication of the so-called Pentagon Papers, no Justice argued that the absence of a congressional law meant that the First Amendment was inapplicable or irrelevant.

FN32. See Nixon, 457 U.S. at 749, 751 n.31.

FN33. See infra Part I.C.

FN34. See Nixon, 457 U.S. at 754 n.37, 758 n.41.

FN35. See id. at 745-46.

FN36. The idea here may be that, in order to bring the outside world under the rule of law, courts must exist and

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function; but in order to function, they must adopt special rules for in-court wrongs. One can also argue that a judicial action, even if egregiously wrong, is not "unconstitutional" so long as the erring judge has "jurisdiction." Jurisdiction is the right to decide --either way -- and thus, in effect, the right to be "wrong."

FN37. See, e.g., Nixon, 457 U.S. at 745-47 (relying on "good faith" immunity cases).

FN38. For a very different view of immunity and Marbury than Nixon's, see Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1484-92 (1987) [hereinafter Of Sovereignty].

FN39. See Nixon, 457 U.S. at 736-39 & n.17, 754 n.37.

FN40. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1366-70 (1953).

FN41. Impeachment provided a remedy against Nixon but not one for Fitzgerald --not one that fully compensated him for the deprivation of his personal constitutional rights. The Nixon majority's emphasis on impeachment, see 457 U.S. at 757, 758 n.41, was thus unresponsive to the guiding principle of Marbury. Contrary to the Nixon five's intimations, see id. at 754 n.37, the Marbury Court did give William Marbury a remedy rather akin to the commission he sought: the Court's opinion was itself, like a commission, an official government document that declared that Marbury was indeed a justice of the peace. In addition, the Court's opinion on the merits supporting Marbury could serve as guidance to any other court in which Marbury might choose to refile. Marbury in word and deed upheld a plaintiff's right to a judicial remedy; Nixon did not.

FN42. See id. at 797 (White, J., dissenting).

FN43. For an excellent discussion, see Williamson v. United States, 207 U.S. 425, 436-46 (1908). See also Gravel v. United States, 408 U.S. 606, 614 (1972) ("History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only."); United States v. Brewster, 408 U.S. 501, 521 (1972) (arguing that treason, felony, and breach of the peace encompass all crimes); Long v. Ansell, 293 U.S. 76, 83 (1934) ("When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." (footnote omitted)); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 862 (Boston, Hilliard, Gary & Co. 1833) ("Now, as all crimes are offences against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses . . . .").

Williamson relied in part on Blackstone:

> It is to be observed that there is no precedent of any such writ of privilege, but only in civil suits . . . . And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it has been frequently expressed, of treason, felony and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any crime whatsoever, for all crimes are treated by the law as being contra pacem domini regis.

Williamson, 207 U.S. at 439-40 (quoting I WILLIAM BLACKSTONE, COMMENTARIES * 166). Despite Williamson's correct use of Blackstone, the Court elsewhere quoted language that first appeared in the 1773 fifth edition and was refined in the 1783 ninth edition, not in 1765, as the Court claimed. Compare I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (4th ed. 1770) (Oxford, Clarendon Press 1765) (omitting key sentence) with I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (5th ed. 1773) (Oxford, Clarendon Press 1765) (adding key sentence) and I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (8th ed. 1778) (Oxford, Clarendon Press 1765) (reprinting key sentence from fifth edition) and I WILLIAM BLACKSTONE, COMMENTARIES ON THE CONSTITUTION OF ENGLAND 165 (Richard Burn ed., 9th ed. 1783) (Oxford, Clarendon Press 1765) (revising key sentence).

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FN44. Despite a narrow interpretation of this Clause in Justice Brandeis's short opinion in Long, 293 U.S. at 82-83, a broader reading may square better with the understanding of the Clause at the Founding. In Geyer's Lessee v. Irwin, 4 U.S. (4 Dall.) 107, 197 (Pa. 1790), the Pennsylvania Supreme Court decided that a member of the Philadelphia General Assembly was "undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. . . . [H]is suits cannot be forced to a trial and decision, while the session of the legislature continues." Id. at 107. In Bolton v. Martin, I U.S. (I Dall.) 296 (C.P. Phila. 1788), a delegate to the Philadelphia Constitutional Convention was served with a summons. He pled privilege, and the plaintiff's counsel responded by arguing that "the protection of a member of the House of Parliament, extended only to the case of arrests, or personal restraint, and not to the service of a Summons." Id. at 297 (citations omitted). The court disagreed in language that is clear support for temporary immunity:

> [M]embers of Parliament were privileged from arrests, and from being served with any process out of the Courts of law . . . during the sitting of Parliament . . . . The act further directs, that where any plaintiff shall by reason of privilege of Parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by the statute of limitations, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall, upon the rising of Parliament, be at liberty to proceed.
>
> . . . . We cannot but consider our Members of Assembly, as they have always considered themselves, intitled by law to the same privileges. They ought not to be diverted from the public business by law suits, brought against them during the sitting of the House; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law suits. . . .
>
> The Defendant, therefore, must be discharged from the action.

Id. at 303-05. Functional reasons led this court to stretch immunity along another axis -- by protecting members of the Philadelphia Convention, who had no explicit textual provision to protect them: "The members of Convention, elected by the people, and assembled for a great national purpose, ought to be considered in reason, and from the nature, as well as dignity, of their office, as invested with the same or equal immunities with the members of General Assembly . . . ." Id. at 303. Fifty years later, another court agreed with the idea of temporary immunity from all civil process:

> For, antecedent to this statute, [sitting] members of parliament were not only privileged from arrest, but also from being served with any process out of the courts of law . . . . [The statute provides] what may be a just construction of the rule in this country -- "that the plaintiff is not to be barred by the statute of limitations" in the time consumed by the privilege, but is at liberty to proceed de novo after the cessation of privilege, which, being a public right, enjoyed for the benefit of the public, only so far interferes with private right as to secure the public good, on the termination of which the private right re-commences, unimpaired by the time of privilege, the statute of limitations ceasing to run when privilege commenced. . . .
>
> . . . [The privilege] is consistent with, nay, necessary to the universal equality established in a republic. It is inseparably connected with the fundamental maxim in all free governments, that where the public exigency renders it necessary, for common preservation, private right shall yield to public good.
>
> . . . . The privilege . . . protects them, while in attendance upon their public duties from arrest, summons, or any other civil process.

Lyell v. Goodwin, 15 F. Cas. 1126, 1127-30 (C.C.D. Mich. 1845) (No. 8,616). Lyell explicitly supported the temporary immunity idea, noting that the plaintiff could bring suit when the defendant had ceased his public duties:

> For the time being, while engaged in the public service, he is divested of self and of private concernment, and, as it were, dedicated in time and mind to the public service. Nor need there be private injury as a necessary consequence. There may be a time, when the privilege of these functionaries ceases, -- when the special duty, that

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> sets them apart to the public service has been performed, and their return to private life is clear and unquestioned, when the public interest no longer demands their protection, and the private right to their attention can commence, and they be held answerable as any other citizen.
>
> Id. at 1131.

The Wisconsin Supreme Court put a similar gloss on Article I, § 6:

> In order to render this provision available to the extent of its necessity, it will not do to construe the words privilege from arrest in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session of congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of the constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit.
>
> Doty v. Strong, I Pin. 84, 87 - 88 (Wis. 1840). Doty, in the spirit of Bolton, stretched Article I's immunity to cover delegates to Congress from territories. See id. at 88; see also Juneau Bank v. McSpedan, 14 F. Cas. 51, 52 (C.C.D. Wis. 1860) (No. 7,582) ("In England, the privilege from arrest has always been construed to include the service of a summons. So in this country from a very early period."); Nones v. Edsall, 18 F. Cas. 296, 297 (C.C.D.N.J. 1848) (No. 10,290) (Grier, Cir. J.) ("Members of congress are privileged from arrest both on judicial and mesne process, and from the service of a summons or other civil process while in attendance on their public duties."); Anderson v. Rountree, I Pin. 115, 117, 124 (Wis. 1841) (following Doty).

Later courts, in decisions such as Long v. Ansell, rejected this early broad reading of arrest. Long properly noted that the court in Bolton had quoted language from an early edition of Blackstone that had been changed in post-1773 editions. See Long, 293 U.S. at 82 n.3. But Long simply sidestepped the broader functional vision underlying all the early cases rooted in the democratic public interest served by the privilege.

FN45. 2 STORY, supra note 43, § 857 (footnote omitted). Note that Story explicitly extended the functional logic of the Arrest Clause beyond arrests to various "summons[es]," see id., as did Jefferson's Manual. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 15-22 (New York, Clark & Maynard 1873).

FN46. For many explicit expressions of this point, see note 44 above.

FN47. See Richard D. Friedman, Some Modest Proposals on the Vice-Presidency, 86 MICH.L.REV. 1703, 1720-21 (1988).

FN48. See U.S. CONST. art. I, § 3, cl. 4.

FN49. See id. art. I, § 5, cl. 1 ("[A] Majority of each [House] shall constitute a Quorum to do Business").

FN50. See id. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President") (emphasis added). On the importance of the vesting mandate and the unitary executive it creates, see Two Tiers, cited above in note 25, at 231-32 & n.92, 251-52 & n.151 (1985); and Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1175-79 (1992). See also Memorandum For the United States Concerning the Vice President's Claim of Constitutional Immunity, In Re Proceedings of the Grand Jury Impaneled December 5, 1972, at 18 (Civ. No. 73-965) (Brief filed by Solicitor General Robert Bork in Maryland District Court) ("[T]he President is the only officer whose temporary disability while in office incapacitates an entire branch of government.").

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FN51. Because of the common practice of "balancing" a ticket with presidential and vice-presidential candidates from different "wings" of a party, a shift of presidential power from President to Vice President can cause a serious democratic skew. For historical examples and discussion, see Akhil Reed Amar & Vik Amar, President Quayle?, 78 VA.L.REV. 913, 938-39 & n.76 (1992). For a general discussion of succession issues and the Twenty-Fifth Amendment, see Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap, 47 ARK.L.REV. (forthcoming 1994).

FN52. The issue raised by the Jones suit thus radiates far beyond Jones herself. The issue is one of precedents and slippery slopes: we must ask not merely what would happen if Jones's suit goes forth but what would happen if suits like hers can go forth and multiply.

FN53. This immunity is of course waivable. Surely the President in whatever spare time he has should be allowed to litigate civil damage actions -- or to watch basketball for that matter -- but he should not be legally obliged to do either. As a practical matter, politics may sometimes create strong pressure to litigate now -- or, again, to watch a basketball game -- but political pressure should not be confused with legal obligation. In a civil damage action in the early 1960s, then-President John Kennedy asserted litigation immunity under a statute. When that failed, he settled the case instead of asserting presidential immunity -- a choice wholly consistent with our analysis. See Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 29 n.19, Jones v. Clinton (E.D. Ark. July 21, 1994) (No. LR-C-94-290).

FN54. Beyond Marbury's vision that the ideal of "a government of laws, and not of men" entails that "the laws furnish [a] remedy for the violation of a vested legal right[,]" 5 U.S. (1 Cranch) 135, 163 (1803), there is perhaps another basic element of the rule of law: the idea of no "special treatment" based on status. But temporary immunity for a sitting President comports with this norm too: Bill Clinton can toll a suit not because of who he is, but because of what he does -- what he is now doing for the American people in serving them as their elected President. (Richard Nixon, by contrast, sought a lifetime pass from legal accountability even when he was serving no one but himself.) Presidential arrest immunity simply applies a general functional principle to the unique circumstances of a sitting President preoccupied with weighty affairs of state. Temporary tolling occurs in many other contexts in which similar hardship would be created by immediate litigation -- for example, cases involving military officers on duty, persons temporarily beyond the jurisdiction, and persons with temporary illnesses. See, e.g., Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-525 (1988 & Supp.1994).

FN55. U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . . ."). In rare cases, the Amendment would allow a person to serve as President for ten years. See id.

FN56. See infra Part II.

FN57. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

FN58. The circle of potential plaintiffs in a divorce or child custody case is, of course, much smaller than the circle of potential plaintiffs who might seek damages for any past act, public or private. Injunctive suits arising out of a sitting President's private business concerns are also imaginable -- consider, for example, a tort injunction to abate an alleged nuisance on land owned by the President. But if a sitting President deemed such nuisance suits a nuisance, he might well be able to place his business affairs in a blind trust and thereby free himself from distraction. This is not a realistic option for damage suits that arise out of past discrete acts rather than alleged ongoing harms.

FN59. See supra p. 710 (discussing the breach of the peace language of the Arrest Clause). Obviously, mere refusal to pay damages for a past discrete harm during the tolling of a suit should not be seen as an "ongoing harm."

FN60. 3 STORY, supra note 43, § 1563.

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FN61. In light of the rather precise parallels of language and logic between Justice Story's discussion of the Arrest Clause in §§ 856-62 and his discussion here in § 1563 of implicit presidential immunities, it is hard to see the parallels as wholly unconscious or coincidental. The same structural vision informs both passages. See 2 id. §§ 856-62; 3 id. 1563.

FN62. Nixon recognized presidential immunity in the absence of an express congressional statute to the contrary. See Nixon v. Fitzgerald, 457 U.S. 731, 748 & n.27 (1982). So too, we today propose only a Category Two arrest immunity. See supra note 21. Like the Nixon Court, we do not reach the question of the precise scope of congressional power to restrict this immunity.

FN63. The Nixon Court should have been aware of the real argument in the Story quote. Fitzgerald's brief declared:

> Mr. Nixon's countervailing citation from the 1830's, like his other authorities, concerns the amenability of an incumbent President to process in a civil suit. The "official inviolability" that Justice Story referred to in his Commentaries was, by its own terms, limited to acts -- arrest, imprisonment, and detention -- that would obstruct or impede the President "while he is in the discharge of his duties of his office." Neither Story nor any other source cited by Mr. Nixon supports the proposition that a former President, when out of office, is immune from civil liability for his acts while President.
>
> The distinction between an incumbent and a former President is important. It was recognized at the time the Constitution was ratified. And it was strenuously argued to this Court in 1867. Attorney General Stanbery then asserted on behalf of President Andrew Johnson that the President "is above the process of any court to bring him to account as President." But Stanbery acknowledged that this immunity ended with the President's removal from office. When "he no longer stands as the representative of the government," Stanbery said,
>
> > then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.
> >
> > Brief for Respondent at 19, Nixon (Nos. 79-1738 and 80-945) (footnotes omitted). Fitzgerald's brief acknowledged that a suit against an incumbent President would be altogether different:
>
> Nixon's arguments obscure a crucial fact about the lawsuit at issue in this case. It was not brought against an incumbent President. Mr. Nixon was named as a defendant in July, 1978, nearly four years after he resigned as President. Whatever drain on his time and resources the suit has caused occurred long after he left office; it had no effect on his performance of public duties.
>
> Id. at 26.

Indeed, Fitzgerald's brief conceded tolling: "The burdens of litigation are not as onerous for the President or a former President as petitioner claims. With respect to the incumbent, the district court can stay all proceedings until he leaves office." Id. at 28; see also Memorandum of Justice Powell, 6th Draft at 22 n.27, Kissinger v. Halperin, 452 U.S. 713 (1981) (No. 79-880), April 6, 1981 (unpublished draft opinion in pre-Fitzgerald case from Thurgood Marshall Papers, Library of Congress, Box 268, folder 2) (acknowledging in a footnote discussing Story, Ellsworth, Adams, and Jefferson that "[t]he statements quoted here concerning a President's amenability to process apply only to sitting Presidents").

FN64. See Nixon, 457 U.S. at 776 (White, J., dissenting) (conceding that the Story passage "clearly supports [Nixon's] position but it is of such a late date that it contributes little to understanding the original intent").

FN65. Nixon, 457 U.S. at 750 n.31 (quoting letter from Thomas Jefferson to George Hay (June 20, 1807), in I0 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford ed., 1905)).

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FN66. Id. (quoting WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789-1791 167 (Edgar S. Maclay ed., 1890)).

FN67. Letter from Thomas Jefferson to George Hay (June 17, 1807), in II THE WRITINGS OF THOMAS JEFFERSON 232 (Andrew A. Lipscomb ed., 1905).

FN68. U.S. CONST. art. I, § 3, cl. 6 ("[B]ut the Party convicted [in an impeachment court] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

FN69. In response to Maclay's statement that, "altho, President he was not above the laws," Ellsworth and Adams "declared You could only impeach him. [sic] and no other process Whatever lay against him." THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling & Helen E. Vett eds., 1972). Maclay then "put the Case suppose the President commits Murder in Streets. . . . But You can only remove him from Office on impeachment." Id. Listen carefully to Adams and Ellsworth's response: "Why When he is no longer President, You can indict him." Id. (emphasis added).

As with the Story quote, the Nixon Court ignored Fitzgerald's admonition about the applicability of the quote from Adams and Ellsworth:

> The statements made in the course of framing and ratifying the Constitution do not support Nixon's position. Nor do the observations of John Adams and Oliver Ellsworth . . . . These observations . . . addressed a question that is not before the Court in this case: namely, whether an incumbent President is amenable to process in a civil suit.
>
> Brief for Respondent at 18, Nixon (Nos. 79-1738 and 80-945).

FN70. See Nixon, 457 U.S. at 751 n.31. The Court introduced the Adams/Ellsworth quote with the -- embarrassingly untrue -- claim that Adams had served as a delegate at the Philadelphia Convention. See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 14-41 (1913) (discussing the delegates); id at 39 (noting that John Adams was in London).

FN71. In essence, all three were arguing for litigation immunity rather than substantive immunity for sitting Presidents -- immunity from claims made while President rather than for conduct occurring while President. (As Ian Ayres has pointed out to us, the distinction is akin to the claims-made/occurrence distinction in modern insurance policies.) Litigation immunity protects a worthy plaintiff (because it merely postpones suit), whereas substantive immunity does not (because it bars suit). Litigation immunity deters conduct while in office -- but conduct that is by hypothesis unconstitutional and should be deterred by the prospect of a later damage suit. Substantive immunity does not chill this conduct; instead it immunizes even clearly unconstitutional actions -- and that is why the Founders rejected it. See Of Sovereignty, supra note 38, at 1484-92 .

If we are concerned that mere litigation immunity will lead to a flood of frivolous lawsuits (or even nonfrivolous but ultimately unworthy ones) against ex-Presidents, we should not recognize a substantive immunity that bars worthy and unworthy claims alike. Instead we should provide for fee-shifting, which discourages plaintiffs with weak claims and yet fully preserves remedies for plaintiffs with winning claims. See id. at 1514 n.346. If Congress fears that the threat of liability for good faith mistakes will overdeter and paralyze Presidents (or other officials, for that matter), Congress need only provide for indemnification for good faith mistakes, for which government is in effect the better risk bearer than its employees in a Coasean world. See id. at 1515; Fourth Amendment, supra note 28, at 812.

In light of this analysis the real timing difference between Nixon and Clinton is not Eastland's and Meese's occurrence-based difference that favors Nixon, see supra pp. 701-02, but a claims-made difference that favors Clinton.

FN72. Nixon, 457 U.S. at 752 n.31. It is also worth noting that Justice White's dissent argued that United States v.

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**Burr,** 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692), demonstrates that the **President** is "subject to judicial process." Nixon, 457 U.S. at 781 (White, J. dissenting). The majority did not disagree with this conclusion. See Nixon, 457 U.S. at 753-54. These Nixon opinions overlooked the fact that **Burr** was not an unavoidable intrusion on the **President,** for the **President** had the power to dismiss the prosecution at any time if he considered **Burr's** request for exculpatory material too onerous. Put another way, by continuing to hold **Burr** in detention, Jefferson voluntarily incurred certain duties, the disregard of which would be a kind of ongoing breach of the peace as long as Jefferson insisted on holding **Burr** in jail for trial. Any **subpoena** against Jefferson would have been a true negative injunction -- provide evidence in your possession or let **Burr** go -- that could have been enforced, Marbury-like, without an awkward coercive order against Jefferson. Chief Justice Marshall could simply quash the indictment and let **Burr** free, much as he simply refused to take jurisdiction in Marbury itself.

Nor does the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974), preclude temporary immunity. As in Burr, the President could have avoided any court-ordered mandate merely by ending the ongoing prosecutions, via a Caspar Weinberger-like pardon or by formally rescinding via the Attorney General an executive regulation and dismissing both the special prosecutor and the underlying prosecutions, as the Nixon tapes Court explicitly allowed. See id. at 694-96. (Of course, these actions might have created a huge political backlash, but so might insisting on arrest immunity rather than waiving it; once again, we must distinguish between legal obligation and political pressure. See supra note 53.) The Nixon tapes case is also of course distinguishable from the Jones litigation because the former involved allegations of presidential criminal wrongdoing, Nixon, 418 U.S. at 687, which would overcome any arrest immunity deducible by analogy to the § 6 Arrest Clause, see supra p. 710. Thus, the Nixon tapes case is an awkward springboard for any assault on implicit presidential arrest immunity. See also supra note 29 (noting that the Nixon tapes case explicitly an rejects expressio unius reading of Article I, § 6 and affirms implicit presidential immunity).

The Nixon tapes case does contain some loose language, but all this must now be read in light of the later decision in Nixon v. Fitzgerald. Frankly, some of the loose language simply cannot be taken at face value today. See, e.g., Nixon, 418 U.S. at 694-96 & n.8 (1974) (treating as having "the force of law" a regulation that gave a kind of legislative veto to certain key congressional officials -- a regulation that, as a binding law, rather than a political promise, would plainly violate basic constitutional principles acknowledged a few pages later, id. at 704, and resoundingly affirmed a few years later in I.N.S. v. Chadha, 462 U.S. 919, 945-46 (1983)); Nixon, 418 U.S. at 709-13 (glossing over key differences between case at hand, in which the prosecutor was seeking to pierce presidential privilege to find inculpatory evidence and Burr-like cases in which defendant with due process rights sought exculpatory evidence). In the end, the Nixon tapes Court acquiesced in an untidy opinion by Chief Justice Burger that, on the facts of the case, reached the obviously right result. Richard Nixon was the head of an ongoing conspiracy to obstruct justice and was using the Oval Office itself as the hub of that conspiracy; and the Court had evidence under seal that made all this clear. See Nixon, 418 U.S. at 687 & n.4, 689, 700. The Court's occasionally strained readings of the Constitution, case law, and regulations must be analyzed in light of what the Court delicately described as the "unique setting" and "unique facts of this case." Nixon, 418 U.S. at 691, 697; see also id. at 700 (stressing material under seal as the basis for the Court's conclusion); Id. at 687-88, 701 (relying subtly on Nixon's status as an unindicted co-conspirator); id. at 712 n.20 (invoking by analogy a case in which the strong presumptive privilege of jury deliberation proceedings yielded in the face of credible claims of criminal misconduct).

FN73. To put the point slightly differently, we are suggesting that President Clinton's immunity should not turn on whether his alleged conduct towards Jones was an "official" duty or not (a holdover of viewing immunity through the prism of the Speech or Debate Clause), but rather should turn on whether the Jones suit and others like it, see supra note 52, could functionally "Arrest" the President while at "Session."

FN74. See supra p. 702.

FN75. See supra Part I.C.

FN76. One reason for a more flexible application of presidential arrest immunity stems from the greater potential

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hardship on plaintiffs than in the Article I context, since presidential "sessions" run much longer than congressional ones. See supra pp. 714-15.

FN77. "Well before" allows the case to be tried before Inauguration. Aware of the significance of Inauguration, the parties and the judges would probably expedite judicial proceedings.

FN78. Jones's case does not appear to be one of a repressed memory; her complaint claims that she told others about the alleged encounter with then-Governor Clinton within days of its occurrence. See Jones v. Clinton, Complaint, Civ. No. LR-C-94-290 (E.D. Ark. May 6, 1994).

FN79. See JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §1520 (4th ed. 1846) (Boston, Hilliard, Gray & Co. 1836) ("Courts of Equity . . . sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere, where there has been gross laches in prosecuting rights . . . .").

FN80. The doctrine is used to "aid[] the vigilant and not those who slumber on their rights." NAACP v. NAACP Legal Defense & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir.1985), cert. denied, 472 U.S. 1021 (1985). To prove laches, President Clinton would have to show that Jones delayed in asserting her claims, that the delay was not excusable, and that her delay unduly prejudiced Clinton. See AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1545 (11th Cir.1986), cert. denied, 481 U.S. 1041 (1987). Laches is not based "merely on time. Rather, laches is based upon changes of conditions or relationships involved with the claim." Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir.1987) (citations omitted). The laches period begins to run when the plaintiff discovers the facts that create her cause of action. See Coleman v. Corning Glass Works, 619 F.Supp. 950, 953 (W.D.N.Y. 1985), aff'd, 818 F.2d 874 (Fed. Cir.1987); see also Grant Airmass Corp. v. Gaymar Indus., 645 F.Supp. 1507, 1515 (S.D.N.Y. 1986) (explaining that courts consider whether a plaintiff had actual or constructive knowledge of the relevant facts in determining whether a claim is barred from laches).

President Clinton's laches claim is buttressed by the lack of an explicit federal statute of limitations for Jones's civil rights claims; rather, federal law provides that state statutes and the common law should govern. See 42 U.S.C. § 1988 (Supp. V 1993); cf. Nixon v. Fitzgerald, 457 U.S. 731, 748 & n.27 (1982) (distinguishing Nixon's case from one in which "Congress expressly had created a damages action against the President of the United States").

FN81. In Mackall v. Casilear, 137 U.S. 556 (1890), the Court opined:

> The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.
>
> The time for this son to have attacked his father on the ground of fraud was prior to that father's death . . . .
>
> Id. at 566 (citations omitted).

FN82. See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 430-31 (4th ed. 1992) ("[A]n equitable defense or counterclaim may be interposed to an action presenting only legal issues or vice versa.").

FN83. Federal Rule of Civil Procedure 8(c) explicitly recognizes the affirmative defenses of estoppel and fraud, as well as of laches. FED. R. CIV. P. 8(c).

FN84. In A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir.1992) (en banc), the court

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stated:

> [Plaintiff] is in error in its position that, where an express statute of limitations applies against a claim, laches cannot apply within the limitation period. In other areas of our jurisdiction, laches is routinely applied within the prescribed statute of limitations period for bringing the claim.
>
> . . . . . .[W]e are unpersuaded that the technical distinction between application of laches against legal damages and an equitable accounting which [plaintiff] asks us to draw should be made.
>
> Id. at 1030-31 (citations and emphasis omitted); see also Technitrol Inc. v. NCR Corp., 513 F.2d 1130, 1130 (7th Cir.1975) (adopting the district court opinion in Technitrol Inc. v. Memorex Co., 376 F.Supp. 828, 831 (N.D. Ill. 1974), which applied laches to damage suits).

FN85. Once again, we need go no further than to recognize a Category Two presidential privilege that Congress may perhaps have power to modify. See supra p. 705.

FN86. Venue and personal jurisdiction defenses are of course waivable. See FED. R. CIV. P. 12(h)(I).

FN87. See U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors . . . the supreme Court shall have original Jurisdiction"); Judiciary Act of 1789, § 13, 1 Stat. 73, 80 (1789) (declaring that the Supreme Court "shall have exclusively all . . . jurisdiction of suits or proceedings against ambassadors, or other public ministers").

FN88. See Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 469-78 (1989); Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499, 1560 n.222 (1990).

FN89. See THE FEDERALIST NO. 65, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

FN90. See supra p. 718

FN91. Until the appearance of the 1945 "minimum contacts" language of International Shoe v. Washington, 326 U.S. 310, 320 (1945), suits against D.C. officials were hard to bring because longarm jurisdiction did not exist. See Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

FN92. Letter from Thomas Jefferson to George Hay, supra note 67, at 232. To be sure, improved transportation technology facilitates travel and makes long distance litigation infinitely more feasible than at the Founding; but why should the presidential mountain be obliged to come to plaintiff Muhammad rather than vice versa? Until Congress speaks clearly to the contrary, should not litigation against a sitting President accommodate his unique need to operate from the nation's capital, supervising the government, and attending to the people's business -- at least if a plaintiff is responsible for the timing of a lawsuit and purposefully chooses to sue a President in session?

If the suit were brought in D.C., Jones's case may be dismissed. District of Columbia courts in such cases apply the District's statute of limitations, even if the underlying cause of action occurred elsewhere. See Steorts v. American Airlines, 647 F.2d 194, 197 (D.C. Cir.1981). However, Jones could argue that a transfer of venue motion will allow her to carry the Arkansas statute of limitations with her to Washington. If the reason for transfer of venue is based on forum non conveniens and 28 U.S.C. § 1404(a), she may be successful. See Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). But if President Clinton phrases the argument in terms of personal jurisdiction and venue (as we suggest), the D.C. statute of limitations may be used: an Arkansas transferor court lacking personal jurisdiction and venue could not support transfer under Van Dusen, and transferee law would apply. See PAUL M. BATOR, DANIEL J. MELTZER, PAUL T. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1744-45 (3d ed. 1988); 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3827, at 261-67 (2d ed. 1986). The D.C.

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statute of limitations for intentional torts in violation of § 1983, such as assault, is one year. See D.C. CODE ANN. § 12-301 (4) (1993); Hobson v. Wilson, 737 F.2d 1, 32 (D.C. Cir.1984) (distinguishing assault cases, which have a one-year statute of limitations, from First Amendment claims, which have a three-year limitations period), cert. denied, 470 U.S. 1084 (1985); Williams v. District of Columbia, 676 F.Supp. 329, 332 (D.D.C. 1987). The one-year limitation also includes actions for "libel." See D.C. CODE ANN. § 12-301 (4) (1993).

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gave sufficient evidence of a special contract by which payment for her services was postponed until the death of the decedent, James Pollock. The services for which she claimed to be paid were rendered to him before 1861, when she left his house. Of course, if there was no such special contract as alleged her demand was clearly barred by the Statute of Limitations.

Claims of this character against the estates of decedents, resting on mere oral testimony of declarations or admissions, are very dangerous, and ought certainly not to be favored by the courts. "The danger attendant upon the assertion of such claims requires, as was said by Chief Justice GIBSON, in reference to a somewhat similar contract, that a tight rein should be held over them, by making the quality, if not the sum of the proof, a subject of inspection and governance by the court, and by holding juries strictly to the rule prescribed." Per STRONG, J., in Graham *v.* Graham's Ex'rs, 10 Casey 481.

We think that both the quality and *sum* of the evidence in this case were entirely insufficient. The question ought not to have been submitted to the jury. All the declarations proved were only indicative of an intention to leave the plaintiff a legacy—to provide for her by will. Mrs. Gordon testified that Pollock said: "We intend to do as well by her as we do by our own child." He said, "if she lived after him he would do well by her at his death." Mrs. Ayers testified: "He said he intended to leave her and do as well by her as his own." "He said he intended to do well by her, and at his death he would make her as good as an heir. He said he would will it; did not use the word 'will' or 'heir;' he said he would do as well by her as his own; that is what he said. He just said he intended to leave her and do as well by her as his own." "I heard Esquire Pollock say he would do well by her, or he would pay her wages."

If the declarations had been to the effect that if the plaintiff would remain with him until his death he would then do well by her or pay her wages, there would be some plausibility in the contention that there was a mutual contract; she to serve him until his death, and he either to provide for her by will or pay her wages. It might possibly have been sustained under the case of Thompson *v.* Stevens, 21 P. F. Smith 161. This was not, however, pretended to have been the contract. Had she remained until his death it might perhaps have been implied. But in point of fact she left his service ten years before his death. There was no engagement on her part to remain a day. She might have left immediately and her case would have stood as strong on the evidence as it is now. There is not a scintilla of proof that she assented and agreed to postpone her claim until his death. Had she commenced an action in 1861, for wages then claimed to be due, it would scarcely be contended that the evidence given upon this trial would have prevented her immediate recovery.



There was manifest error in the admission of the evidence as to the amount of the estate of the decedent, and in that part of the charge in which the court instructed the jury, "if he promised to do as well by her as by his own child, his meaning might be that he designed to put her on an equality with his son, Nathaniel. In this view we have received evidence of the value of the decedent's property and leave it to you to say what plaintiff should have, regarding what Nathaniel might have received as the only heir of his father if he had survived him." As Mr. Justice STRONG has said, in Graham *v.* Graham's Ex'rs, 10 Casey 475, "what less is the result than the establishment of a parol will?" "It is a palpable error to say that the damages are to be regarded as a debt or liability of the estate. They are a distributive share and are claimed and recovered as an equivalent for an inherited portion or a legacy. If they are the fruit of a legal liability of the decedent, then the rule which the plaintiff invokes leads to a still greater absurdity than even a parol will; for under the contract which she sets up, she is only entitled to a share of what remains after all legal liabilities are discharged, and if those liabilities absorb the whole estate, she is entitled to nothing. The extent of her right varies with the residuum of the estate and is incapable of measurement until the residuum be ascertained; there is no possible meter for it." It is clear that if the plaintiff had succeeded in making out a clear and positive contract between her and the decedent that the payment of her claim should be postponed until his death, all that she could have recovered would have been what she was entitled to on a *quantum meruit* when she left his service.

Judgment reversed.

## Appeal of John F. Hartranft, Governor of the Commonwealth, *et al.*

1. The Governor is the absolute judge of what official communications, to himself or his department, may or may not be revealed, and is the sole judge not only of what his official duties are but also of the time when they should be performed.
2. The Governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity.
3. The powers and duties of grand juries and the essentials of a *subpœna ad testificandum* discussed.

November 1st 1877. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and STERRETT, JJ.



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[Appeal of Hartranft *et al.*]

*Certiorari sur appeal* to the Court of Quarter Sessions of *Allegheny county:* Of October and November Term 1878, No. 14.

This was the appeal of John F. Hartranft, Governor of the Commonwealth; M. S. Quay, Secretary of the Commonwealth; James W. Latta, Adjutant-General of the Commonwealth; General R. M. Brinton, and Major A. Wilson Norris, from the order of the Court of Quarter Sessions of the Peace of Allegheny county, allowing and directing attachments to issue against them in the matter of the investigation of the grand jury into the riots at Pittsburgh, of July 21st and 22d 1877.

The riots of July 1877 were inaugurated by a strike of the train men in the employ of the Pennsylvania Railroad Company, who proceeded to take possession of the trains of the company, and to stop all traffic over the road. Portions of the "National Guard" of the state were sent, under the charge of their regular officers, to open the road, and a collision took place between them and a mob led by the strikers, in which a number of persons were killed and wounded. Shortly thereafter large accessions were made to the mob, and a great riot ensued, in which all the buildings of the railroad company were burned, and thousands of cars, with their contents, were pillaged and destroyed. During the progress of this riot, a number of persons and several soldiers were killed and wounded.

At the next term of the Court of Quarter Sessions of Allegheny county, the court, Kirkpatrick, J., in charging the grand jury in relation to their duties, inter alia, said:—

"Secondly, you are 'diligently to inquire and true presentment make, * * * as well of those things which you know of your own knowledge.' By this is meant, that if of your own knowledge as a grand jury, or of the knowledge of either of you individually, or from the examination of witnesses in other cases, or if, from any source, offences and crimes are discovered by you, or any other matter by you deemed worthy of investigation, touching which no formal complaint has been made or indictment submitted to you, it is your duty to advise the court thereof, in writing, together with your wishes in the premises. This paper is called a *presentment*, and if, upon its submission and consideration, the court should be of opinion that your wishes should be complied with, they will direct a bill of indictment to be prepared accordingly and submitted to you, and it will be disposed of by you as if it had come before you in the usual and ordinary way. In the submission of your presentment * * * it is sufficient if it indicate your wishes and the substantial grounds on which they are predicated."

On the 1st of October 1877, the grand jury of Allegheny county presented a petition to the Court of Quarter Sessions, setting forth "that the citizens of said county are greatly concerned in having a careful investigation made of the riots of July 21st

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and 22d 1877, and all facts and particulars incident and relative thereto and connected therewith, and the grand jury, do respectfully pray your Honor to give the said matter in charge to them to inquire concerning, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine."

Upon this application was endorsed, "And now, 1st October 1877, the within presentment considered, approved, and ordered to be filed, *Per curiam.*

On the same day a subpœna issued to several witnesses, and among them the parties to this writ. The subpœna was as follows: "We command you, that laying aside all business and excuses whatsoever, you and each of you be and appear in your proper persons before our grand jury, at Pittsburgh, at our Court of Oyer and Terminer and Quarter Sessions, there to be held for the county aforesaid, forthwith, to testify all and singular those things which you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riots of July last in our said county, in our said court depending, and then and there to be tried, between the Commonwealth and ———, defendant, on the part of the ———. And hereof fail not, under penalty of one hundred pounds."

On October 12th 1877, after service of the above subpœna, the grand jury presented a petition to the court, stating that the witnesses had failed to appear after due notice, and praying the court "to adjudge the said parties and witnesses in contempt, and that further and compulsory process be awarded to said grand jury for the purpose of bringing the said recalcitrant witnesses to testify."

The court appointed the 15th of October to hear an argument on the application for an attachment, and at that time the following answer was filed:

"And now, October 15th 1877, George Lear, Attorney-General of the Commonwealth of Pennsylvania, comes into court, representing the said Commonwealth, and says that the Governor, as commander-in-chief of the army and navy of the state, Adjutant-General Latta, General R. M. Brinton, and Major A. Wilson Norris, against whom attachments have been applied for to compel their obedience to a subpœna to appear and testify before said grand jury, have no knowledge of the late riots in Allegheny county, except that which they learned in their military and official capacities, and which are privileged communications; and that he has learned this by an examination of their knowledge of the subject made personally of each of them on behalf of the Commonwealth; that, in their capacity of civil and military officers, they declare to him that, in the exercise of their official discretion, an examination into their acts in connection with said riots would be detrimental to the public service and injurious to the interests of the Common-

wealth; that they disavow any disrespect to the court or its process, and absent themselves on the ground that such matters as they could testify to are privileged communications, and not the subject of inquiry before a grand jury; that John F. Hartranft, Governer of the Commonwealth, and James W. Latta, Adjutant-General, are in constant correspondence with the army in the field in the disorderly and riotous regions of the state, and in daily expectation of being required at the front, and to be called to a distant county would endanger the interests of the public service; that all of said witnesses reside in counties remote from Allegheny, and not within the jurisdiction of process to answer, except in a matter or cause depending before the court. And the said Attorney-General further avers, that in the interest of public justice, and on behalf of the Commonwealth, he has, as the chief law officer of the state, examined the nature of the inquiry and the value of the testimony which these witnesses could give, and he is of the opinion that the interests of the state will be best subserved by their absence, and, therefore, he respectfully withdraws the application for attachment on behalf of the Commonwealth."

After the argument on the application for attachments, the court made the following order:—

"And now, 20th October 1877, after argument and upon consideration, the application is allowed, and attachments are hereby directed to be issued for and against the following named persons, being the same indicated by the grand inquest as in default, to wit: His Excellency John F. Hartranft, Governor of the Commonwealth; the Honorable M. S. Quay, Secretary of the Commonwealth; General James W. Latta, Adjutant-General of the Commonwealth; General R. M. Brinton, and Major A. Wilson Norris."

A writ of certiorari was thereupon taken in behalf of all against whom attachments were directed to be issued, and the following errors were assigned:—

1. The court erred in issuing a subpœna for witnesses beyond the limits of the county of Allegheny, to appear before the grand jury and not before the court, and in a matter not depending before the court.

2. In issuing a subpœna for witnesses to appear before the grand jury and testify in a matter touching a certain investigation now being had on formal presentment, by and before the said grand jury, relating to the late riots of July last, in our said county.

3. In allowing the attachments and directing them to be issued for and against the persons named by the grand jury, as in default upon a matter not depending before the court, or legally given in charge to the grand jury.

4. In issuing attachments against the Governor of the Commonwealth, Secretary of the Commonwealth, Adjutant-General, and other military officers of the state, in their official capacities, to testify



before the grand jury in an investigation touching riots which had occurred prior to the investigation, and in which no prosecution was pending before the court or grand jury.

5. In issuing an attachment against the chief executive of the Commonwealth.

*Thomas M. Marshall*, *Lyman D. Gilbert*, Deputy-Attorney-General, and *George Lear*, Attorney-General, for appellants.—This was not a matter or cause depending before the judges or any of them, but an investigation before the grand jury. The subpœna commands the witnesses to appear before the grand jury. But the record shows that it was not on formal presentment, and that it was not depending in court.

There is no allegation, in the paper presented to the court, that the grand jury possesses any personal knowledge on the subject, nor averment against any parties as being identified with the riots. The investigation was at the instance of the citizens, and not under the direction of the court. The paper was approved and ordered to be filed, but there was no direction or order for process to bring witnesses before the court, to be sworn, and sent before the grand jury, which would have been the regular mode, if the court had power to institute a prosecution in that manner, which is not admitted. The prayer of the petition is not for such witnesses as the court may designate, but for such as the grand jury "may consider necessary to examine."

In this state the better opinion is that the grand jury can act only upon and present offences of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court, and such as are sent up to them by the district-attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights: 1 Whart. Cr. Law, ed. 1868, § 458, and note.

If the object of this proceeding is to establish crime and to punish criminals, it is irregular, for the following reasons: There has been no arrest, and there is no prosecution returned to court to which the subpœna is applicable. The grand jury cannot inculpate in such cases by presentment. They cannot subpœna witnesses to appear before them in any case, but the witnesses must be required to appear in court, and be sent before the grand jury: Respublica *v.* Shaffer, 1 Dall. 236.

The proceeding by which a court of its own motion gives a matter in charge to a grand jury is to be resorted to only in extraordinary cases, and to existing evils, those in progress, in which the evil is to be corrected by preventive, rather than punitive justice: Lloyd *v.* Carpenter, 3 Clark 188; Citizens' Association, 8 Phila. Rep. 478; Grand Jury *v.* Public Press, 4 Brewster 313.

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The Governor and other officials are subpœnaed not as citizens, but by their official titles. Under these circumstances they cannot be compelled to testify.

The legislative, executive, and judicial departments of the government are distinct and independent, and each one should protect itself from the encroachments of the others: De Chastellux *v.* Fairchild, 3 Harris 18; Greenough *v.* Greenough, 1 Jones 489; Ervine's Appeal, 4 Harris 256; Burns *v.* Clarion County, 12 P. F. Smith 422; Richards *v.* Rote, 18 Id. 248; Commonwealth *ex rel.* Johnson *v.* Halloway, 6 Wright 446; Bagg's Appeal, 7 Id. 512.

Every department of the government has its secrets of state, or privileged comunications, which it is not only the right of the officers to refuse to disclose, but his duty to withhold: 1 Greenl. on Evidence, § 250, 251. The official transactions between the heads of the departments of state and their subordinate officers are in general treated as privileged communications. Thus, communications between a provincial governor and his attorney-general on the state of the colony, or the conduct of its officers; or between the governor and a military officer under his authority; the report of a military commission of inquiry, made to the commander-in-chief, and the correspondence between an agent of the government and a secretary of state, are confidential and privileged matters, which the interests of the state will not permit to be disclosed. The president of the United States, and the governors of the several states, are not bound to produce papers or disclose information communicated to them when, in their own judgment, the disclosure would, on public considerations, be inexpedient;" Gray *v.* Pentland, 2 S. & R. 23; Yoter *v.* Sanno, 6 Watts 156.

And the officers are themselves the judges of the question whether such disclosure would be prejudicial to the public interests: 1 Burr's Trial 186; Gray *v.* Pentland, 2 S. & R. 23; Cooper's Case, 1 Wharton St. Tr. 662; Beatson *v.* Skene, 5 Hurlst. & N. Rep. 837. It is not a question for the court, but for the officers themselves to determine; and the officers in this case having been subpœnaed by their official titles, it is to be presumed they are to testify in that capacity. The nature of the inquiry having been disclosed in the subpœna, the presumption is that the testimony required is concerning official action in reference thereto, and, in their answer filed for them, they say that such testimony would be prejudicial to the public service. They being the judges, that was a complete answer to the application for the attachment. Whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect, through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a



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judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to his agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination. In a military point of view, the contrary doctrine would be subversive of all discipline; and as it regards the safety and security of the United States and its citizens, the consequences would be deplorable and fatal: Vanderheyden *v.* Young, 11 Johns. 150, 158.

The courts cannot compel the Governor to perform any duties appertaining to his office; nor can they interfere with his discharge of them, nor control him in any matter of executive discretion: State of Louisiana, *ex. rel. v.* Warmouth, Governor *et. al.*, 22 La. Ann. Rep. 1; Mauran, Adjutant-General, *v.* Smith, Governor, 8 R. I. Rep. 192; The People, *ex. rel. v.* Bissell, Governor, 19 Illinois 229; The State, *ex. rel. v.* Towns, Governor, 8 Georgia 360; Hawkins *v.* The Governor, 1 Arkansas 570. Mott, *et. al. v.* Pennsylvania Railroad Co., *et. al.*, 6 Casey 33.

In the case of Thompson *v.* The German Valley Railroad Company, 22 New Jersey Eq. 111, the chancellor said: "An order to testify is an unusual, if not unheard of practice. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty in protecting the right and dignity of his office, he will not comply even if directed by an order. And in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed that the chief magistrate intends no contempt, but that his action is in accordance with his views of his official duty. And in the present case, that presumption amounts to a certainty. Chief Justice Marshall, on the trial of Burr, vol. 2, p. 536, remarks: 'In no case of this kind would a court be required to proceed against the President, as an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them.'"

The Governor can be punished in but one way for an abuse or misuse of his power, and that is by impeachment. If he can be subpœnæd into any Court of Quarter Sessions or before any grand jury to testify in behalf of the Commonwealth, and in his discretion, under the advice of the legal department of the state, concludes that the interests of the state in the administration of the criminal law, will not be subserved by answering, and especially where he is summoned to appear as Governor of the Commonwealth, and, if for his default he can be attached for contempt, then the barriers between the executive and judiciary are broken down, and one department will be shorn of its independence of the others.

If the executive can be called into one county, he can be called

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into them all; and, unlike the other departments, his is continually in session, and he is always on duty. If he can be called into any county as Governor, not to testify to what occurred in the county, but in the executive chamber, which no court or grand jury can inquire into, it will be greatly to the detriment of the public service. If he can be arrested, fined, and imprisoned for not obeying a subpœna in this case, it will be a great scandal on republican institutions, and will shake public confidence in the permanency of our government.

*E. A. Montooth*, District-Attorney, *Morton Hunter*, Assistant District-Attorney, *S. A. McClung*, and *George Shiras, Jr.*, *contra*.—Judge Kirkpatrick, in his charge to the grand jury, gave them this matter in charge; but, if not, the riot was undoubtedly within their personal knowledge, and hence, under their oaths, they were bound to present it. This they did in accordance with the instructions of the court, and asked for special power to investigate it. That the grand jury meant this as their own official act, and not merely that of individual citizens, is clearly shown by the beginning and conclusion of the presentment itself. They wished, as a grand jury, to obtain additional facts, for the purpose of presenting the offenders for indictment. Thus is this case clearly distinguished from that of the memorial of the citizens' association (8 Phila. 478), cited by the other side.

The endorsement of the court upon their presentment, taken in connection with the other circumstances of this case, was certainly sufficient to empower the grand jury to make the investigations.

But this question is immaterial, for, as the subpœna was in the proper form and regularly issued under the seal of the court, and as the appellants were duly served therewith, they cannot answer it by questioning the proceedings of the grand jury.

Are the Governor and the other appellants subject to subpœna? Chief Justice Marshall says, that "it is not known ever to be doubted, but that the chief magistrate of a state might be served with a *subpœna ad testificandum:*" 1 Burr's Trial 177, *et seq.*; 2 Id. 535.

That the others are subject to subpœna will scarcely be doubted. It became their duty, therefore, when subpœnaed, to make a proper response; and, as the law makes no exception in their favor, they should have responded in person. Instead of this, however, the Attorney-General filed an answer in their behalf. If such answer be permissible in any case, it should, at least, be made by the person subpœnaed and verified by affidavit.

In this answer, and in the argument before this court, it is assumed that the appellants were subpœnaed in their official character. This nowhere appears. The title follows the name, and may be regarded merely as *designatio personæ*. It is also assumed that it

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was intended to examine them wholly in regard to their official acts, and upon privileged matters. This assumption is likewise gratuitous; but even if it were true, the answer is still insufficient. It was due to the dignity of the judiciary that they appear in person, and if any such question had been asked them, they could have availed themselves of their privilege in the ordinary way.

But are official communications in regard to this riot privileged? The only ground upon which such matters can be privileged is that of public policy, and it seems scarcely reasonable to suppose that the public interest would be injuriously affected by their disclosure several months after the riot occurred.

If, then, the appellants have failed to make a proper response to the subpœna, the right to attach them would seem to follow; and even if the Governor should be excused on account of his official duties, the others should certainly be required to appear in person, and submit themselves fully to the process of the court.

It is not intended to reflect upon the official conduct of the Governor or the other appellants, but if any question should be asked which might be made the basis of impeachment or prosecution, they could, of course, refuse to answer it.

On November 12th 1877, the chief justice announced that it was the judgment of the majority of the court that the order of the court below, granting the attachments, should be reversed. Opinion to be filed thereafter.

Mr. Justice GORDON delivered the opinion of the court, January 7th 1878.

Grand juries have the power to make presentment, not only of such criminal offences as may be laid before them by the district-attorney, in the form of bills of indictment, and of such as may come within the personal knowledge of individual members thereof, but, also, of all such matters as may be given them in charge by the court. Neither is there any doubt about the power of the court to direct that body to make inquiry concerning affairs which directly affect the public peace and society; among which affairs may be instanced great riots, such as those which recently disturbed the well-disposed citizens of Pittsburgh and its vicinity. Matters of this kind may properly be referred to the consideration of the grand inquest in order that the instigators thereof and the participants therein may be brought to justice; and this is the more necessary, because, in times of public tumult and alarm, private prosecutors may be overawed through fear of personal violence.

Doubtless the proceedings in the case before us are very irregular, since there seems to be a total inversion of the proper order of things. It was the duty of the court, not of the grand jury, first to move in the matter. In a subject of so much importance, and one requiring the exercise of so much care and discretion, the court

should have instructed this jury as to what it was to investigate, and in what manner the investigation was to be conducted. Nothing of the kind, however, was done; but the court, having approved its petition, suffered it to proceed to the adoption of its own subjects, after its own methods, and, by this sufferance, it allowed an important public investigation to pass from its own control to that of a body of men, which, as it was governed by no regular instructions, resembled more a committee for the general investigation of public affairs, than a lawful constituent of the Court of Quarter Sessions. This, however, is really of small importance to the matter in hand; neither can the appellants call in question the regularity of the proceedings as between the court and its grand jury; for if they have been properly subpœnaed, and can present no lawful excuse for their want of obedience to the mandate of the Quarter Sessions, they must stand convicted of a contempt, and we cannot help them. The subpœna is the process of the Commonwealth, and there is no doubt about the court's power to issue that process in proper cases.

Our inquiry, then, is limited to two propositions: Were the subpœnas regular, such as an ordinary citizen would be bound to obey? If so, were the appellants liable to attachment for disobedience to this process? The subpœna we have before us, like the other proceedings in this case, is very irregular. It is, indeed, but a general mandate of the court, ordering the appellants to appear, "to testify, all and singular, those things which they may know touching a certain investigation being had, on formal presentment, by and before the grand jury, relating to the late riots of July last, in said county, in said court depending." It sets forth no case, present or prospective, nor does it state for whom, or at whose instance, the defendants were to be subpœnaed. As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, either civil or criminal; but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand. So this, as well as every other compulsory process, must show upon its face that it was issued for some person or party having a right thereto, otherwise it is nugatory and void, and disobedience to its mandate involves no penalty whatever. In the case before us, there was the use of the writ of subpœna, as a mere order of the court, without statement of party or case, commanding the defendants to appear before the grand jury, for the purpose of giving their testimony



touching the late riots. If there is any law authorizing such process, we have not been informed of it.

No doubt the court might have directed a subpœna to have issued for the Commonwealth, in any case where the Commonwealth was a party, or where it was apparent it was in some way interested in some case or transaction then depending. So might it have directed a warrant to have issued for the arrest of some one guilty of a crime or misdemeanor, but in such case, no one would contend, that the mere blank warrant of the court would, in itself be sufficient to detain a citizen for one moment; the authority for such warrant must appear upon its face or it is worthless. But the courts' subpœna is no more respectable than its warrant; if the subpœna exhibit no authority it may be disobeyed with impunity. Now, in the case before us, the Commonwealth was not a party in interest, or, if so, it is not now apparent. It seems, from the petition of the grand jury, that the citizens of the county of Allegheny "were greatly concerned in having a careful investigation of the late riots," but whether they were concerned in bringing the rioters to justice or not, is not stated, though this was the only matter in which the Commonwealth could be concerned. Moreover, as the grand jury was acting under no instruction, it was not possible, even for the court, to know what that jury was doing or intended to do, but, of this, the court should have been informed, before it undertook to interfere with the personal liberty of the citizen by its summary process of attachment, for, as the matter now stands, it is apparent that the subpœna was issued for no tangible cause or party and for no properly defined legal purpose; hence, no one was bound to obey it.

For the purposes of this case, however, we may admit the regularity of this subpœna and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one of this case. In order to resolve this, we must first understand who the persons are, against whom the court has directed its attachment and for what purpose they have been subpœnaed. They are the Governor of Pennsylvania, the Secretary of the Commonwealth, the Adjutant-General, chief officers of the Executive Department of the state government, and two officers of the National Guard; the latter subordinates acting under the orders of the former. The purpose, for which these officers are subpœnaed, is, that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpœnaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to

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their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the Attorney-General, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the Governor alone; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is, that whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents: Vanderheyden *v.* Young, 11 Johns. 158, per Spencer J.

It follows, if the Governor, as supreme executive, and as commander in chief of the army of the Commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge or information, coming into his department through himself personally or from his subordinates, may or may not be revealed, then such subordinates, without his permission, cannot be compelled to disclose, in court, any such matters or information.

What, then, are the duties, powers and privileges of the Governor? In the language of the constitution, art. 4, sect. 2, "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed." Also, same article, sect. 7, "The Governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States." He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency and to approve, or veto, bills submitted to him by the General Assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, the *supreme executive power* is vested in the Governor and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where



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does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the Commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts. In the case of Oliver *v.* Warmouth, 22 La. 1, it was held (per Taliafero, J.), that, under the division of powers, as laid down in the federal and state constitutions, the judiciary department has no jurisdiction over or right to interfere with, the independent action of the chief executive, in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for, in such case, no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the Governor to perform a duty, cast upon him by law, of a character strictly ministerial. We think, however, that the ground upon which this decision stands, is substantial; for, as the learned justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the Governor, and then to conclude that the former may be enforced by judicial decree; it is objected, however, that the doctrine is

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unsound in this, that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must, necessarily, have the unconditional power of deciding what acts his duties require him to perform, otherwise, his functions are trammelled and the executive branch of the government is made subservient to the judiciary. The principle, enunciated, in the above stated case, applies with greater force to that we now have under consideration; for if the Governor's discretion may not be interfered with, in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander-in-chief, in the discharge of which, the constitution makes that discretion his peculiar and absolute prerogative.

Again, the Governor, having a proper regard for the dignity and welfare of the people of the Commonwealth, is not likely to submit himself to imprisonment, on the decree of the Court of Quarter Sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. On this point, the case of Thompson *v.* The German Valley Railroad Co., 22 N. J. Eq. R. 111, furnishes us with a precedent well worthy of our consideration. In that case a *subpœna duces tecum* had been served on the Governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the Court of Chancery, and bring with him an engrossed copy of a private statute which had been passed by the legislature, and had been sent to him, as Governor, for his approval. He refused to obey the subpœna, informing the court, at the same time, that he did not refuse out of any disrespect to the court or to the law, *but because he thought his duty required him not to appear or produce the paper required, or to submit his official acts, as Governor, to the scrutiny of any court.* It will be seen that the case thus presented is quite as strong as that under discussion; for the Governor, upon his own opinion of duty, which, as it will appear, did not accord with that of the court, not only refused to appear or produce the required paper, but to submit any of his official acts to the scrutiny of the court. An order was granted on the Governor, to show cause why he should not appear and testify. After argument, Zabriskie, Chancellor, said: "The Governor cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion



that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty." If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the court. We are inclined to think the conclusion thus reached is wise and discreet; and it is supported by the best text writers of our times. These state the law to be, that the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment,* the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court, for its judgment as to whether they are, or are not, proper matters for revelation, is successfully met and settled in the case of Beaton *v.* Skene, 5 Hurlst. & N. 838, per Pollock, C. B. It was there held, that if the production of a state paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined? It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was or why its publication would be injurious to the public service. Just here, however, occurred this difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was, that from necessity, if for no other reason, the question must be left to the judgment of the officer.

A like case is that of Gray *v.* Pentland, 2 S. & R. 23. A subpœna had been issued from the court below and served upon Governor Snyder and Secretary Boileau, with a *duces tecum*; a rule was also entered for the purpose of taking their depositions in Harrisburg. They declined to appear in answer to the subpœna,

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or to permit their depositions to be taken under the rule, and refused to produce the paper or deliver it to the plaintiff. This paper was of very great importance, inasmuch as its production was necessary for the maintenance of the suit pending, the Supreme Court holding that, though it was beyond the plaintiff's power, parol evidence of its contents was not admissible. A motion was then made, on the part of the plaintiff, for a special *subpœna duces tecum* to compel the production of the paper, but this was refused. On argument in the superior court this action of the court below in refusing compulsory process against the Governor and Secretary of the Commonwealth does not seem to have been questioned; on the other hand, it was approved in opinions delivered by TILGHMAN, C. J., and BRACKENRIDGE, J. The latter was, as he said, inclined to think that the Governor could not be compelled to produce the paper transmitted to him; that it was within his own discretion to furnish or refuse it; and this on the ground of public policy. The chief justice observed, inter alia, that the Governor, who best knew the circumstances under which the charge had been exhibited to him, and could best judge the motives of the accuser, must exercise his own judgment with respect to the propriety of producing the writing. Thus the matter is treated as quite beyond the power of the court, and the judgment of the executive is regarded as absolute and final.

We next refer to the celebrated trial of Aaron Burr. Here is the case of one charged with treason; one who, by the express terms of the constitution, was entitled to compulsory process for obtaining witnesses in his favor. The judge before whom the examination was conducted was John Marshall, Chief Justice of the Supreme Court; a man renowned, not only for his legal learning, but also for his judgment and sagacity as a statesman; and the President was Thomas Jefferson, one not likely unduly to exalt executive prerogative or to refuse to the judiciary its just tribute of respect. We may, therefore, presume that whatever was done by the principal actors in the remarkable judicial drama then in progress, was well done. At the request of the defence a *subpœna duces tecum* was awarded and directed to the President requiring him to appear, and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. On discussion of the question, not whether compulsory process should be awarded against the President, for that was not so much as proposed, but whether the attorney-general should permit the defence to have the examination of a copy of the required letter which had been put into his possession, the chief justice said (as we find it set down in vol. 3, p. 37, Burr's Trial, as published by Westcott & Co., Washington City, 1807): "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the



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court in consequence of his not having attended, notwithstanding the subpœna was awarded agreeably to the demand of the defendant; the court would, indeed, not be asked to proceed as in the case of an ordinary individual." We find, also, in vol. 2, p. 536, of the same trial, published by Hopkins & Earle, Philadelphia 1808, the following recorded as the utterance of the chief justice: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * * In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge."

Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury, must be determined by the Governor himself: and the weight of the reasons influencing him in the conclusion at which he has arrived, is for himself and not for the court to consider.

Furthermore, as the Governor is the chief executive of the Commonwealth, and as such embodies the power of the people, for the conservation of the peace and the protection of the rights and property of the citizens of the state, as he is also part of the legislative branch of the government, it must be obvious to every one that there are times when he must be excused from the ordinary process of the courts. We presume it will not be contended that he would be obliged to obey the mandate of a subpœna during the sessions of the legislature, when his presence at the capitol is constantly required, or whilst engaged in the suppression of an insurrection. These, however, do not embrace all his duties as Governor; we must, therefore, go one step further, and concede that he is exempt from such process whenever engaged in any duty pertaining to his office. Granting that there may be times when he is not so engaged, and when he might be free to answer to a subpœna, who is to be the judge of his engagements or disengagements? May he be compelled to appear before a court and submit himself to the judgment thereof as to whether his duties, just then, require him to be in his office at Harrisburg, or at the head of the army in the field, or whether he may not have a few days of leisure, during which he may await the will and pleasure of a grand jury? It will be conceded that in all ordinary cases, he must himself judge as to what things he must do and what things he must leave undone, and that this is a duty imposed upon him by the constitution. But how then shall a court at any time, step in and assume the power of judging for him? This cannot be done except by an unwarrantable assumption of



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executive prerogative. The same reasoning which brings us to the conclusion that the Governor is the absolute judge of what official communications to himself or his department, may or may not be revealed, in like manner leads us to conclude that he must be the sole judge, not only of what his official duties are but also of the time when they should be attended to. The Governor, disavowing any disrespect to the court or its process, has answered that, in consequence of his constant communication with the state forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. This brings us face to face with the question, whether the executive, or the courts for him, are to determine the character of his official duties and the order in which they may be performed. For instance, is obedience to a subpoena one of his duties, and if so, shall he discharge that duty in preference to that which rests upon him as commander-in-chief? The answer to this question is easy, for if the courts can in any one instance or at any one time, control or direct the executive in the performance of his duties, they may do so in every instance and at all times. We need not waste time in the attempt to prove that this proposition is not allowable; that the Governor cannot thus be placed under the guardianship and tutelage of the courts. To the people, under the methods prescribed by law, not to to the courts is he answerable for his doings or misdoings. It is his duty from time to time, "to give to the General Assembly information of the state of the Commonwealth," but it is not his duty to render such an account to the grand jury of Allegheny or any other county. Whilst, therefore, the motives of the Court of Quarter Sessions in granting the process before us, are not to be lightly impugned, yet we have no doubt it exceeded its jurisdiction in attempting to interfere with the executive prerogative.

Let the attachment be set aside.

Chief Justice AGNEW and Mr. Justice STERRETT dissented, the chief justice filing the following opinion.

The question before us belongs to the enduring theme of civil liberty, and not to ephemeral interest, passion or feeling. It falls within the emphatic words of the Declaration of Rights that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their safety, peace, and happiness:" Sec. 2. The question is, whether any citizen, private or official, is above the process of that law, which protects and enforces these essential rights of the people—rights "excepted out of the general powers of government" in order to "guard against transgressions of the high powers delegated" to the mere organs of government: Sect. 26.

It is therefore a misfortune that this question has been marred



by false issues. The course of the railroad company, or its men; the behavior of the troops, near or remote; the action of the citizens of Pittsburgh, and the conduct of the Governor and his officers, have nothing to do with the question we must consider—a question belonging solely to the realm of law, and only obscured when false issues intervene. Like the glass of the astronomer, cleared of all distorting and prismatic rays, the judicial mind should be free from every divergent influence and discoloring bias.

The 21st and 22d of July last were days of great alarm in this city, and a series of fearful riots bore terror to the hearts of its inhabitants. In the midst of the tumultuous mass an armed military appeared. Pistols and muskets were fired, many were wounded, and more than twenty lives of citizens and soldiers were taken. Two millions or more of property were destroyed. A hundred locomotives were ruined, the roundhouse, and other railroad buildings, the great hotel, the grain elevator, and many hundred cars were burned. Vast amounts of merchandise of distant owners were consumed or stolen, and for nearly a mile the railroad tracks were covered with car-wheels, bars, bolts, and iron machinery of every kind.

A monstrous crime was committed. Blood ran in streams. Was this murder, manslaughter, or excusable or justifiable homicide? Property was despoiled. Was this arson, robbery or theft? Whose was the crime? Wrongheaded men united to remedy grievances by conspiracy and violence. A military force intervened. Death and spoil ensued. Were they called thither by lawful authority; or did they come at private bidding? Did the military attack, or were they attacked? Did they fire at command or by individual will? These were the fearful questions to be answered by some competent lawful authority. The state and distant communities are involved in the answer. The laws of the state have been violated, the "peace" of the people broken, and their "safety and happiness" endangered. To whom is inquiry given to obtain the facts, and present the guilty for trial and punishment? Not to the legislature. It has no judicial power. Not to the Governor. His duty is to "take care that the laws shall be faithfully *executed*." He can neither try nor punish crime. Even a coroner's inquest, *super visum corporis*, is totally inadequate to determine the full scope, character and purpose of a riot of this immense magnitude, and the various parts played by all the actors. No individual pursuit can suffice, for private prosecutors have neither the interest, the inclination, nor the ability to reach the breadth and scope of such a scene of bloodshed and ruin.

To the judiciary alone belongs this power and duty; to it only is the means given to summon juries and witnesses for both inquiry and trial. Under the constitution and laws of the land, it [illegible] Hence, the Act of 16th June 1836, "relating to

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the jurisdiction and powers of the courts," and embracing all courts, commits to the Oyer and Terminer authority "to *inquire* by the oaths and affirmations of good and lawful men of the county of all crimes committed or triable in such county," and also "to hear, determine, and punish the same:" Sect. 14. To the Court of Quarter Sessions is given "the jurisdiction and power" "to *inquire* by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors, *and offences whatever*, against the laws of this Commonwealth, which shall be triable in the respective county:" Sect. 16. It is then empowered to certify into the Oyer and Terminer all offences cognizable there, and to try those over which it has jurisdiction. After the distribution of powers to the several courts—Common Pleas, Quarter Sessions, Oyer and Terminer and Orphans' Court—the act then gives to all alike certain powers, viz.: to levy and recover fines, forfeitures, &c.: Sect. 20. To make rules of practice, &c.: Sect. 21. The 23d section proceeds: "Each of said courts is empowered to issue writs of subpœna under their official seal into *any county* of this Commonwealth, to summon and bring before the respective court *any* person to give testimony in *any* cause or *matter* depending before them, under the penalties hitherto appointed and allowed, in any such case by the laws of this Commonwealth." The Act of 14th April 1834, "relating to the organization of the courts of justice," makes the grand, as well as the petit jury, a lawful part or arm of the court for the administration of justice. The power to compel witnesses to come before the grand jury is, therefore, precisely on the same footing, as to require them to appear before the petit. Both are derived from the same law, and stand on the same power, the act being careful to command *any* person to appear to testify in *any matter* as well as *any cause*. And if the law had not been so precise, the power would necessarily flow from the "jurisdiction and power" conferred to "*inquire* by the oaths and affirmations of good and lawful men of the county, of all crimes, misdemeanors, and offences whatever against the laws of this Commonwealth." There is common-law authority also. Says Hawkins, in his Pleas of the Crown (vol. i., ch. 6, p. 65): "It is also a high crime to disobey the king's lawful command or prohibition, as for refusing to give evidence to a grand jury concerning a crime, for which the court may impose an immediate fine." This was decided by Lord Holt in The King *v.* Lord Preston, committed by the Court of Quarter Sessions for refusing to give evidence to the grand jury: 1 Salk. 27–8. The same law is stated by Mr. Chitty, vol. i., Cr. Law 320. Another evidence that the source of this power arises in the jurisdiction of the court acting by means of its grand jury arm, is the fact that the court will, in delicate cases, direct the evidence to be heard in the court, so that the grand jury may be

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better assisted in the performance of their duties: 1 Chitty Cr. Law 312, 313.

An immense riot, involving high crimes, and a multitude of persons whose identity, names, participation and guilt or innocence must be ascertained, in order to proceed to trial and punishment, can be brought to legal knowledge only by a grand jury charged with this duty. A riot is one of those great public offences which is conceded by the authorities to be the special subject of inquiry in this mode. If, then, the court can charge the grand jury as its legally appointed means, expressly given by the Act of Assembly, to make inquiry, it follows, as a necessary logical consequence, that the inquiry must be made *per testes* brought before them by due process of law; for the scope, and all parties to such a riot, cannot be a matter of personal knowledge.

This much said upon the grand jury as a constituent in the administration of criminal jurisprudence ought to be sufficient. But its powers have been denied, rendering something more necessary. It is one of the boasted bulwarks of English liberty handed down to us, and protected by the Declaration of Rights. No man can be tried for a crime except upon a bill of indictment duly found by a grand jury. Hence, the accused may challenge the array or individual jurors: Brown *v.* Commonwealth, 23 P. F. Smith 321; Id., 26 Id. 319; Lynch *v.* Commonwealth, 27 Id. 205. "Our laws (says a well-known writer) have therefore wisely and mercifully placed the strong twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown:" 2 Tomlin's Law Dict. 307. Therefore the constitution declares: "The trial by jury shall be as heretofore, and the right thereof remain inviolate." Sect. 6. "Heretofore" means according to the course of the common law: Van Swartow *v.* Commonwealth, 12 Harris 131. The oath of the grand jury is, "diligently to inquire, and a true presentment make, as well of all such matters as shall be *given them in charge* as of those things which they *may* know of their own knowledge." "Grand juries (says Judge Addison) inquire only into crimes, but they inquire of *all* crimes." "No criminal charge can be brought into a court of justice in this state unless it have acquired the sanction of a grand jury:" App. 36. "To the grand jury (he says) is committed the preservation of the peace of the county, the care of bringing to light for examination, trial and punishment, all violence, outrage, indecency and terror, everything that may occasion danger, disturbance or dismay to the citizens. Grand juries are watchmen stationed by the laws to survey the conduct of their follow-citizens, and inquire where and by whom public authority has been violated, or our constitution and laws infringed:" App. Speaking of the judicial branch of the government, he says: "This branch consists of two superior parts, a court and

jury." * * * "Juries selected from the people by an officer of their own election are so numerous and so frequently changed, that they may well be considered as the people themselves exercising this branch of the administration:" App. 55.

A *charge* to a grand jury to inquire of a matter is either oral by the court, or in writing by the district-attorney in the form of a bill. The oral charge is where criminal courts (says Judge King) "of their own motion call the attention of grand jurors to, and direct the investigation of matters of general import, which from their nature and operation in the entire community justify such investigation." "Such (he says) as great riots that shake the social fabric, carrying terror and dismay among the citizens:" 1 Whart. Cr. Law, sect. 458, note.

Thus the constitutional power of the grand jury to inquire into the riots of July 21st and 22d being fully established, the inquiry implies evidence, evidence implies witnesses, and witnesses the process to bring them. Here I must notice two technical objections, one that the subpœna commands attendance before the grand jury itself. This is wholly unsubstantial. According to ancient practice the grand jury having no power to administer oaths, the witnesses came into open court, were sworn there, and then orally commanded to go before the grand jury: 1 Chit. Cr. Law 312, 313. This is noticed in the note to 7th Smith's Laws 686, and the practice of other states recommended to be adopted, of sending the witnesses at once before the grand jury, and saving the time of the court. Accordingly long ago a law was passed (now incorporated into the Criminal Procedure Act of 1860) authorizing the foreman to administer the oath. The witnesses are now sent immediately up. The subpœna, therefore, under the seal of the court, tested by the judge and signed by the clerk, was strictly correct in commanding the witnesses to appear before the grand jury. It is the written, instead of oral, order of the court.

Another objection is that it states no parties. This is made without adverting to the fact that it is process awarded upon an inquiry, and before parties are known. The very purpose of the inquiry is to ascertain the parties to be presented for indictment. It is strictly proper and fully to the purpose, viz: "To testify all and singular those things you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riot in July last in our said county." This is sufficient for the purpose of inquiry. The remainder of the printed form used by the clerk was necessarily left a blank, there being no parties to be named in it. It was necessarily on the part of the Commonwealth, for a defendant cannot appear with witnesses before the grand jury. It was asserted in argument that the grand jury had no special charge to ground the inquiry. This is wholly incorrect. I have read the able charge



of Judge Kirkpatrick, and find it direct and pointed upon these very riots, and very full of instruction upon the entire subject of riots, routs, and unlawful assemblies. But if it were not so clear and pointed, it was followed by a special written request of the grand jury, "to give the said matters (these riots) in charge to them, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine." This paper was endorsed by the judge himself, "considered, *approved*, and ordered to be filed." Here then was a direct committal to the grand jury, and the process was issued accordingly.

Much space has been devoted to a vindication of the jurisdiction of the court and the province of a grand jury. But the lustre of this great common-law heritage for the protection and security of the people, aud the light it has borrowed from our own legislation, have been so dimmed by denial and obscured by doubt, it has seemed to be necessary. The labor, moreover, is not vain, for all this bears directly on the great question to be considered, to wit: the constitutional power of the court to require the Governor of the state to appear for examination before this arm of its jurisdiction.

We come now to this immediate question, and the first point to be noticed is the argument that he is exempt from a subpœna because he is a *co-ordinate* branch of the state government. What is co-ordination or *equality of rank*, under the constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not co-exist in unity, as essential parts of the same common whole. The constitution is the written will of the people, in its entirety, and all its parts must necessarily cohere without jarring, in order to effectuate that will. Equality of rank implies no superiority, except in the exercise of the particular function confided to that rank. Co-ordination is merely the vesting of the separate functions of making, determining and executing laws, in different persons, that thereby the union of all in one person or body may not work injury to the public welfare. The Assembly cannot try causes or execute process, the Governor cannot legislate or decide judicial controversies, and the Judges cannot make and execute laws. This is the general distribution of the powers of the government, yet the constitution itself does not strictly adhere to it. Thus the legislature may make certain inquiries, and try certain cases, *e. g.*, the election and qualification of members, contempts, expulsions. The Governor approves or vetoes bills, and the courts superintend and enforce the execution of process. But from the very nature of co-ordination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if obstructed by the other. For example, *the judiciary*

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*cannot control or interfere with the discretion of the Governor in the exercise of an executive function.* And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the legislative or executive can oppose or obstruct the exercise of an appropriate judicial power the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial and punishment of offenders against the law. On the true principles of constitutional co-ordination, therefore, the Governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repository of the power conferred by the people themselves. When arguments are properly drawn from the distribution of the powers of government among co-ordinate branches their force must be conceded. But when their use is inconsistent with the rights of the people who have made this distribution for their own benefit, the argument is fallacious. Then it flies in the face of the Declaration of Rights (sect. 2, already quoted), "that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness." This right being reserved by the 26th section out of the powers conferred in the constitution, it follows no use can be made of the distribution of powers prejudicial to their "peace, safety and happiness." The appropriate function of the judiciary being the detection, trial and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear the Governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this.

This superior function of the judiciary is to be seen in another aspect. There never was a time when it has not been engaged in passing upon the acts of both the other branches, in resolving the constitutionality and interpretation of laws, and the regularity of executive acts. This needs no citation of authority. "It is idle," says C. J. GIBSON, "to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce its limitation." "From its very position it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency." "It has become," he adds, "the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small:" De Chastellux *v.* Fairchild, 3 Harris 18. How futile would be the judicial power to punish crime, or vindicate innocence, if the Governor, having exclusive knowledge of facts bearing upon either, could defy the process of the law at pleasure. To argue that his official character is a ground of denial of obedience, is to rob the people, whose servant he is, of their undeniable right to the due administration of justice, through that department of the government to which they have committed the right of judgment. To say he may be liable in an action for damages, is no response. If not bound to appear, no right of action can exist, for he is under no duty to the party. If it be a criminal prosecution, there is no party to whom he could respond. So impeachment cannot reach him, for that is no impeachable offence which is no violation of duty. An obligation to answer the subpœna is the postulate in either case. To say he must appear upon an indictment, and need not upon a legal inquiry, is equally unsound. For the inquiry of a grand jury is, as we have seen, the constitutional exercise of the power of the court, in order to try and punish offenders. To discriminate between inquiry and trial, as a question of power, is to emasculate judicial rights, and dethrone those of the people.



And now we may crave aid from other sections of the Declaration of Rights. "In all criminal prosecutions, the accused hath a right inter alia to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage:" Sect. 9. "All courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay:" Sect. 11. These may be taken in connection with the 6th sect.: "that trial by jury shall be as heretofore, and the right thereof remain inviolate." Trial as *heretofore*, we have seen, implies inquiry and indictment. Now, the private rights of individuals, as thus enforced, are manifestly not superior to the administration of public justice for the welfare of the people as set forth in the 2d sect. already quoted. Indeed, public rights are in many respects superior to individual rights, and the enforcement of the private right of a speedy trial implies the public duty, as well as right, to prosecute offenders, and consequently the means of doing so. Thus in every aspect the constitution, as the supreme law, commands the presence of every person, in private or official life, when his testimony is necessary for the due administration of justice. If, then, he be liable to process, and bound to appear, it is a necessary corollary, that he is liable to attachment for his disobedience to the command of the law.

The argument *ab inconveniente*, that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on his way to California, at the time of these riots, is an apposite example

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When his presence is needed elsewhere, no court in the state would soil its ermine by a rude assault on his person. In all governments, composed of co-ordinate organs, there will be some friction; but right-minded men, mindful of their just powers, and their own dignity, are ever ready to pour oil on the points of contact.

Coming now to the practical test of the question, let us return to the facts. There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law; to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty? Who were innocent? By the 22d section of the Declaration of Rights, it is declared that the "military shall in *all cases*, and *at all times*, be in *strict subordination* to the *civil* power." The military took many lives—the multitude some. Did the military act under the authority of the civil power? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the Governor, as commander-in-chief, command their presence, and aid in quelling the violence of the mob? Or was his authority assumed by unauthorized persons? These are questions which the Governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common law proceeding. They are not state secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The right of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeoparded. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent Governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right—an inference which his absence in California very naturally raises—and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no state secret as to them, but its concealment is a crime against society, which no one who knows the Governor would attribute to him, if aware of his duty.

At this point the case of Gray *v.* Pentland, 2 S. & R. 23, may be noticed. There the deposition sent to the Governor affecting Pentland's character was a privileged communication, and protected by the Governor's discretion, for otherwise he might be deprived of necessary information in the performance of official duty. Hence the court in an exercise of sound discretion would not compel its production. But, here, the authority of the Governor to call out



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the troops to aid in suppressing a riot is in its nature a public act, and his testimony is necessary to vindicate their rights, or to reach others if unauthorized by him. In every aspect of personal and official duty, the state has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights.

Analogies also prove the truth of the general doctrine, that no officer, high or low, is above the demands of justice, or above the process of the law. For example, if the Governor's pardon, or other official acts be forged, or stolen, or procured by fraud or duress, is it possible he is not liable to be summoned before a jury, grand or petit, inquiring into the fact? His deposition cannot be taken in a criminal prosecution. Indeed there is no difference between a civil and a criminal issue, for the power to subpœna him to give his deposition is just as essential. So he is called to perform many acts of statutory duty. Is he exempt from subpœna when any of these acts become the subject of judicial inquiry? And if by courtesy he be permitted to be excused, on what principle does this apply to his chief officers of state? The cases in Pennsylvania abundantly prove that a *mandamus* will lie to them to compel the performance of ministerial duties: Griffith *v.* Cochran, 5 Binn. 87; Commonwealth *v.* Cochran, 6 Id. 456; Commonwealth *v.* Cochran, 1 S. & R. 473. So the court will restrain by injunction: Mott *v.* Pennsylvania Railroad Co., 5 Casey 33, 41. Doubtless this court cannot interfere with the *discretion* of the Governor in the performance of any proper executive function, for in that his province is superior. Argument is not needed to prove this, yet it is the great work of the opposite opinion, while no labor is bestowed to vindicate the power of the Governor to obstruct the punishment of crime, by a refusal to testify. A subpœna to testify is not an interference with that discretion. It has the force of a summons or notice, not an arrest. This has been decided in two cases: United States *v.* Cooper, 4 Dall. 341, and Respublica *v.* Duane, 4 Yeates 347. In the former, Judge Chase said he knew of no privilege to exempt members of Congress from the service of a subpœna, though by the constitution they are exempt from *arrest* in all cases except treason, felony, and breach of the peace. In the latter case, Judge Yeates, citing a similar provision in the constitution of the state, held that the service of a subpœna is not an arrest, and that the court may grant an attachment or not according to the existing circumstances. These decisions bear directly on the question before us, for as to members of the assembly there is an express provision against arrest in all cases except treason, felony, breach and surety of the peace, and violation of their oath of office. Now the constitution makes no exemption whatever of the Governor, and he is brought directly within the maxim *expressio vel designatio personæ est exclusio alterius:* Co. Litt. 210, a. The decision in Respublica *v.* Duane, *supra*, is, therefore, strongly in point. But

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a case exactly in point, decided by that great judge and statesman, Chief Justice Marshall, is found in the trial of Aaron Burr for high treason: vol. 1, pp. 177 to 188. The following points were adjudged: 1. That a subpœna to the President of the United States can be issued. 2. That it can go with a clause of *duces tecum* to bring a letter in the possession of the President. 3. That it can be issued before indictment found. 4. That the refusal of the President is a subject for the exercise of the sound discretion of the court. On page 181 the chief justice, after stating that he is not aware of any decision that a subpœna cannot issue to the President, says that "it is not known ever to be doubted, that the chief magistrate of a state might be served with a subpœna *ad testificandum.*" A prominent feature of that case was that Col. Burr was prosecuted with intense earnestness, I might say bitterness, by the most eminent counsel in the United States (friends also of President Jefferson), who conceded the power to issue the subpœna. The same question arose again on the subsequent trial for a misdemeanor, and the same decision was made. Said Chief Justice Marshall: "That the President of the United States may be subpœnaed and examined as a witness, and required to produce any paper in his possession is not controverted:" Burr's Trial, vol. 2, 535. He then discusses the question of the propriety of compelling the production of the letter of General Wilkinson, stating some reasons very similar to those in our case of Gray *v.* Pentland, *supra*, for which a court would refuse compulsory process.

But assuming a case where the court would decline to compel the production of a paper or an answer to an oral question, it does not dispense with the Governor's attendance for examination, unless no other ground were alleged. But how does the governor know in advance what will be the subject of his examination? *Non constat* that any question will be asked on a privileged matter. If such be asked, he can decline answering and refer the privilege to the court, which will decide it, just as it will the privilege of counsel, without requiring disclosure of the matter itself. Its nature is all the court need know.

Another point may be noticed. It is said the imprisonment of the Governor under the attachment would leave the state without a head. The case is hardly supposable, for when the Governor knows it is his duty to obey he will do so. Certainly Governor Hartranft is not a gentleman who would be guilty of a *voluntary* contempt. If *voluntarily* guilty, he would deserve attachment for the dereliction of the law, which his own oath requires him to see faithfully executed. Impeachment, which has been insisted upon, is a harsher remedy; for the undeniable fact of his refusal to obey the process, would be the inevitable ground of removal from office. If, however, his disobedience be *involuntary* in consequence of pressing official duties, a court which would disallow his excuse would be visited



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with the highest censure. But assuming a voluntary contempt and imprisonment still the position is untrue. The state is not without a head, for the 13th sect. of the 4th art. of the constitution provides: "in case of the death, conviction on impeachment, failure to qualify, resignation, or *other disability* of the Governor, the power, duties and emoluments of the office for the remainder of the term or *until the disability be removed*, shall devolve upon the Lieutenant-Governor." The 14th section provides for the disability of the Lieutenant-Governor, and devolves these duties on the Speaker of the Senate. It is said imprisonment is no disability, which is as much as to say the Governor may be in prison in Allegheny county and at the same time, at the seat of government, signing or vetoing bills or performing other duties. If no disability, then the state retains its head. But if the Governor be disabled from being in two places at the same time, then the disability brings the 13th sect. into play, and the state is provided with a constitutional substitute. *Quacunque via data*, there is a chief executive.

It is said the Governor is the representative of the people, and therefore not responsible. *This is true of executive duties*, for therein the constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people, by the same warrant of authority; and if he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do nothing wrong; and therefore there can be no representation of their dignity such as can strike down their law and prevent its administration by its appropriate functionary.

On no ground of the constitution, law, public justice, state policy, or sound reason, can I discover any exemption of any officer in the state, high or low, from the common duty all citizens owe to the due administration of justice. With these views, I cannot consent to rob the judiciary of its constitutional powers, and exalt the executive above the demands of justice and the safety and welfare of the people. I cannot abnegate a power intrusted to me by the people, and will return to them a commission, soon to expire, unsullied by any dereliction of duty, or obeisance at the shrine of unwarranted power.[1]

[1] NOTE.

C. J. AGNEW.—In my opinion I corrected the error of statement of counsel that there was no special charge to the grand jury committing to them the subject of the riots. Finding that the opinion of the court has followed the erroneous statement, I append hereto several paragraphs exhibiting the careful instruction of his Honor Judge Kirkpatrick, whose MSS. charge I have read, filling, on this particular subject, more than two columns of a newspaper closely printed in fine type, and containing the most special instructions on

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the subjects of *strikes, conspiracy, arson, riotous arson, riot and riotous homicide.* It is but sheer justice to the judiciary and grand jury of Allegheny county that no such error should be perpetuated against them.

EXTRACTS.

"*A class of cases and offences, however*, to which as yet I have made no allusion, *compel themselves upon our attention*, and which very recent events would seem to indicate, *will of necessity have to be passed upon and considered by you.* I allude, of course, to such cases as have their origin in and grow out of the recent riots and disturbances with which we are all, unfortunately, too painfully familiar. It is a matter of most unenviable notoriety that, on the occasion referred to, our always heretofore peaceable and law-abiding community was shocked and startled as by 'a fire bell at night,' by the fact that upon the streets of this peaceful and peace-loving city a great riot was in full progress, which, in the numbers of its participants, the wide-spread extent of their operations, and in the absolutely appalling nature and character of its apparent results, was calculated to strike terror into the very heart of our community. It seemed, indeed, for a time at least, on that not soon to be forgotten mid-summer Sabbath day, as if the very rankest communism of Paris had been let loose in our midst, and that the bloused *petroleuse* of the faubourg San Antoine and the heights of Mont-Martre were at their work, and plying their terrible vocation in the very streets of Pittsburgh. Surely there are no terms and no forms of speech or expression too broad by which to speak of and denominate such crimes, and no punishment too severe which can possibly await their clearly proven guilty perpetrators."

* * * * * * * * *

"*Let me now call your attention to a still darker page in the history of this 'reign of terror,' and some of the crimes and consequences which followed from its brief existence.* I allude to the events transpiring about the Union depot, the round-houses, Twenty-eighth street and their adjacent neighborhood. In so calling it a 'reign of terror,' I speak advisedly and upon deliberation, for so to all who witnessed it, it certainly was. For if we had not with us in the flesh that triumvirate of infamy, Danton and Robespierre and Marat, we at least had them with us in spirit, brooding and hovering over our saturnalia of crime, and directing their most legitimate and bloody successors, whomsoever you may discover them to be, to destroy property, to commit pillage and riot, to light the incendiary's torch, and to cause (as did they in the highways and byways of Paris) the blood of innocent men and women, aye, and of children, too, to stain the stones and streets of this quiet and law-loving city."

* * * * * * * * *

"'This general duty, this universal obligation,' continues the same learned Judge King, from whom we have already quoted, 'extends to the *citizen soldiers*, who, in common with all other members of the community, are required to be assistant in the maintenance of the public peace on the call of the civil magistrate. They are subject to the same penalties in case of neglect or refusal to appear as any other citizen summoned by the sheriff. They do not on such occasions act in their technical character as military. *When assembled, they are but a part of the sheriff's posse, and act in subordination to and in aid of that officer*, who is the true and responsible chief of all forces summoned under his authority. If the soldiers act in any manner not authorized by law they are amenable for such acts, not to the military but the civil law. In brief, as to all rights and authorities they stand on the same footing with other citizens summoned by the sheriff, and compose, with them, his posse."



## Appeal of C. G. Christie and R. P. Scott.

1. C. was the owner of a leasehold property of five acres with an oil-well and machinery, &c., on it, and leased it to D. for ten months, with conditions for a sale. D. paid two hundred dollars in cash, and agreed to pay the balance of the purchase-money in several payments, and when all were made C. agreed to make a bill of sale of the property to D. If D. failed to make the payments at the times specified his rights to the premises were to cease and determine and the payments made prior to such default were to be treated as liquidated damages. D. went into possession and made but one payment. The property at the suit of M. was levied upon and sold by the sheriff as the property of D. *Held*, that the agreement was a lease, with a condition for a sale at the end of the term, provided that the payments were made at the times specified, and a failure so to make them resulted in a forfeiture of D.'s rights and a reinvestment of the same in C., and that the sheriff's vendee took no title under the levy and sale as the property of D.

2. This case is distinguished from Martin *v.* Mathiot, 14 S. & R. 214, as the property in that case consisted of personal chattels and in this of chattels real.

November 13th 1877. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and STERRETT, JJ.

Appeal from the decree of the Court of Common Pleas of *Butler county:* Of October and November Term 1876, No. 226.

After the bill in equity and answer were filed in this case it was agreed to submit the whole case, as stated in the bill, and the title to the property, to the court, without the intervention of a jury, with the right of either party to take testimony. The bill was filed by Edward Bailey against the appellants, and averred that, on February 17th 1876, plaintiff purchased from one R. L. Carlin a certain leasehold, containing about five acres of land, situate in Butler county, together with machinery, &c., and an oil-well, known as "the Emery & Caldwell" well, for $1900 in cash, and received on that day from the vendor possession of the property so purchased; that on February 18th 1876, plaintiff was arrested at the instance of defendant, Christie, for forcible entry and detainer, and at the time of the arrest defendant, Scott, took possession of the property; that on February 2d 1876, defendant, Christie, purchased at a sheriff's sale, for $50, all the right and title of one Cranmer of, in, and to the said property; that all the right that he (Cranmer) had was under certain articles of agreement, dated December 10th 1875, in which said Carlin, in consideration of one dollar, leased for ten months to said Cranmer the said five acres, well and fixtures, &c.; $200 were to be paid at the time of the execution of the lease, $500 in two months from its date, $500 in four months, $500 in six months, $500 in eight months, and $175 in ten months. Upon the payment of the aggregate of said sums of money Carlin agreed to execute to Cranmer a bill of sale of said property. It was agreed that, upon a failure to pay at the times specified, all the right of Cranmer in the property should cease and determine, and that all payments previously made should be con-

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# PRESIDENTS AND EX-PRESIDENTS AS WITNESSES: A BRIEF HISTORICAL FOOTNOTE

*Ronald D. Rotunda**

WHEN Richard Nixon resigned the Presidency, it was clear that his legal problems were only beginning. Although he has now been granted immunity from federal prosecution by President Ford's surprise pardon, Mr. Nixon remains subject to civil liability and state prosecution for past acts. He has already been subpoenaed to testify in a civil deposition. Assuming that his appearance is not excused because of ill health, he may well be called in other civil and criminal trials, as well as future grand jury or congressional investigations, although he was not a witness in the main Watergate trial.[1]

On the eve of Mr. Nixon's resignation, some political leaders urged that he be spared these legal obligations.[2] Even now, many people believe that subjecting Mr. Nixon to the burden of testifying before various judicial or congressional bodies would be vindictive, and demeaning both to him and to the institution of the Presidency. Such beliefs are groundless when placed in historical perspective. Several American Presidents and former Presidents have given testimony under oath in judicial or quasi-judicial settings. In the past, both former Presidents and sitting Presidents have submitted, either voluntarily or pursuant to subpoena, to questions under oath. In so doing they implicitly recognized the common law rule that

> . . . [t]he public (in the words of Lord Hardwicke) has a right to every man's evidence. Is there any reason why this right should suffer an exception when the desired knowledge is in the posses-

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1. United States v. Mitchell, Crim. No. 74-110 (D.D.C., filed May 20, 1974). In addition to Watergate-related matters, Mr. Nixon may be summoned for other investigations. Senator Baker has hinted Mr. Nixon may be called to testify in the probe of CIA domestic surveillance. Wash. Post, Jan. 28, 1975, at A11, col. 1.
2. *See, e.g.*, Wash. Post, Aug. 9, 1974, at A7, cols. 4-5, A23, col. 1.



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sion of a person occupying at the moment the office of *chief executive* of a state?

There is no reason at all. His temporary duties as an official cannot overcome his permanent and fundamental duty as a citizen and as a debtor to justice.[3]

This article does not set out all the circumstances under which a former or sitting President may legally be compelled to give evidence before a congressional or judicial body. Rather the purpose is only to make some historical observations that should prove helpful to the debate. A collection of these historical examples,[4] many of which have heretofore been lost in the dust of the National Archives, should also serve to demythologize the Presidency. It is to this history that we now turn.

Several Presidents have appeared voluntarily as witnesses in a variety of contexts. One of the most interesting appearances before a congressional body occurred in the midst of the Civil War, when President Lincoln made a surprise visit to the House Judiciary Committee.

*President Abraham Lincoln.* Prior to delivery, one of Lincoln's messages to Congress was leaked to the *New York Herald* and promptly published. It was immediately alleged that Mrs. Lincoln, often suspected of being a Southern sympathizer, had given the speech to one Henry Wycoff, who telegraphed it to the *Herald*.[5] In an investigation conducted by the House Judiciary Committee, Wycoff admitted that he had sent part of the speech to the *Herald*, but refused to reveal his source. Then Lincoln, to still the rumors and protect his wife, appeared before the Committee. A newspaper of the day reported:

> Mr. Henri Wikof yesterday (Feb. 13, 1862) went before the Judiciary Committee, the President having previously been with the same Committee, and answered the question as to the person who surreptitiously furnished him with an advance copy of the President's Message. Though it is not certainly known what the answer was, it is understood that the White House gardener, Watt, was the delinquent.[6]

Unfortunately, the original hearings, which have never been published, are ambiguous on the question of Lincoln's presence.[7] Nevertheless, several other contemporary newspapers refer to the same incident, and this corroboration should suffice to establish its authenticity.[8] After Lincoln's appearance and Wycoff's accusation of the gardener, the matter was dropped.[9]

*President Ulysses S. Grant.* President Ulysses S. Grant once eagerly submitted to a criminal deposition to aid his confidential secretary and close friend, General Orville E. Babcock. In 1875, Grant's Secretary of the Treasury, Benjamin Bristow, uncovered extensive distillery rings that had been defrauding the federal government of millions of dollars. Two of Grant's closest friends, General John McDonald and General Babcock, were indicted as a result of these disclosures. McDonald was eventually convicted for his role in the so-called Whiskey Fraud Cases; but the President, perhaps out of misguided loyalty, was determined to aid Babcock. Grant announced to his Cabinet that he planned to go to St. Louis to testify on behalf of Babcock. Dissuaded of this plan, he gave a three hour deposition attended by the Chief Justice, the Attorney General, and Treasury Secretary Bristow. Grant testified that Babcock never talked to him about the Whiskey Frauds and that he knew of nothing connecting Babcock with the frauds.[10] Babcock was acquitted.

*President Theodore Roosevelt.* Theodore Roosevelt, quoted several times by the departing Nixon, twice testified before congressional committees investigating events that occurred during his Presidency. He testified in 1911 before a special House committee about a questionable acquisition by United States Steel, which he had allowed while he was President. In 1912 he testified before a Senate subcommittee about the propriety of certain corporate contributions to his 1902 presidential cam-

3. 8 WIGMORE, EVIDENCE § 2370(c) (McNaughton ed. 1961) (emphasis in original).

4. Excluded from this historical analysis are those instances in which selected Congressmen have met with the President at the White House or a similar place such as Camp David. In those instances, of which there are many, Congress is meeting at the call of the President; the President is not meeting at the call of the Congress. Similarly excluded are appearances by the President before Congress to deliver a formal address and appearances not intended to give evidence about factual matters. The most obvious example is the State of the Union Address. A less well-known incident is President Washington's only appearance before the full Senate in August 1789 for its advice and consent to some propositions respecting a treaty with the Southern Indians. *See* THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789-1791, at 124-30 (1965); W. HOLT, TREATIES DEFEATED BY THE SENATE 28-33 (1933). Washington was displeased that the Senate did not approve the treaty forthwith, and aside from his reappearance the following Monday, "no President of the United States has since that day ever darkened the doors of the Senate for the purpose of personal consultation with it concerning the advisability of a desired negotiation." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 56-57 (3d rev. ed. 1948).

5. J. TURNER & L. TURNER, MARY TODD LINCOLN: HER LIFE AND LETTERS 97-98 (1972).

6. N.Y. Tribune, Feb. 14, 1862, at 4, col. 2.

7. *See* The Manuscript Hearings of the Judiciary Committee, National Archives Bldg., Record Group 233.

8. N.Y. Times, Feb. 14, 1862, at 8, col. 1; Philadelphia Inquirer, Feb. 14, 1862, at 1; N.Y. Herald, Feb. 14, 1862, at 1, col. 2; Boston Morning J., Feb. 18, 1862, at 4.

9. Popular history refers to other supposed appearances by Lincoln, but these have never been authenticated. President Ford's recent personal appearance before a House subcommittee to answer questions that had been raised concerning his pardon of Mr. Nixon should, like Lincoln's appearance, serve to allay the fears of those who believe a stigma attaches to a President or former President who assumes the role of an ordinary witness. Ford's appearance may thus serve to demythologize the Presidency.

10. *See* N.Y. Times, Feb. 13, 1876, at 1, col. 4; *id.*, Feb. 14, 1876, at 1, col. 7.



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paign.[11] During the United State Steel hearings, he said that "an ex-President is merely a citizen of the United States, like any other citizen, and it is his plain duty to try to help this committee or respond to its invitation."[12] For a former President to testify voluntarily about the circumstances surrounding a questionable corporate acquisition or campaign contribution is hardly without precedent.

In several instances, the appearance or production of evidence by a President or former President has been involuntary. Nonetheless, compliance with the subpoena was effected without noticeable damage to the Office of the Presidency.

*President Thomas Jefferson.* Prior to the recent decision in *United States v. Nixon*,[13] perhaps the most famous case in which a President was required to give evidence was *United States v. Burr*.[14] In *Burr*, Chief Justice Marshall, sitting on circuit during the treason trial of Aaron Burr, held the President was subject to subpoena.[15] The treason trial of the former Vice President was in its third week when Burr announced that he intended to "issue a subpoena to the President of the United States, with a clause requiring him to produce certain papers; or in other words to issue the subpoena duces tecum."[16] Burr intended to obtain a letter from General James Wilkinson to President Jefferson on October 21, 1806, as well as documents containing instructions to the army and navy "to destroy" the "person and property" of Burr.[17] After argument and several days of debate in court,[18] Marshall firmly rejected the notion that President Jefferson en-

11. *See House Special Comm. Hearings on the Investigation of the United States Steel Corporation*, 62d Cong., 1st Sess. 1369-92 (1911); *Subcomm. of Senate Comm. on Privileges and Elections, Campaign Contributions, Hearings pursuant to S. Res. 79 and S. Res. 386*, 62d Cong., 2d Sess. 177-96; 469-527 (1912).

12. *House Special Committee on the Investigation of the United States Steel Corporation*, 62d Cong., 1st Sess., at 1392.

13. 418 U.S. 683 (1974). *See generally* Freund, *The Supreme Court 1973 Term, Foreward: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974).

14. 25 F. Cas. 30 (No. 14,692) (C.C. Va. 1807). *See generally* T. CARPENTER, THE TRIAL OF COLONEL AARON BURR ON AN INDICTMENT FOR TREASON BEFORE THE CIRCUIT COURT OF THE UNITED STATES, HELD IN RICHMOND, MAY TERM 1807: INCLUDING THE ARGUMENTS AND DECISIONS ON ALL MOTIONS AND TRIAL, AND ON THE MOTIONS FOR AN ATTACHMENT AGAINST GENERAL WILKINSON (1808).

15. United States v. Bu r, 25 F. Cas. 30, 34-35 (No. 14,692) (C.C. Va. 1807). In 1800 Justice Chase had refused to subpoena President Adams in the Cooper libel trial on the grounds that truth of the libel may not be proved by compelling the victim's testimony. Chase denied that Adams was immune from subpoena simply by virtue of his office. *Compare* United States v. Cooper, 25 F. Cas. 631, 632-33 (No. 14,865) (C.C.D. Pa. 1800) *with* T. COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER, OF NORTHUMBERLAND; ON A CHARGE OF LIBEL AGAINST THE PRESIDENT OF THE UNITED STATES 10 (1800).

16. D. ROBERTSON, REPORT OF THE TRIALS OF COLONEL AARON BURR FOR TREASON AND FOR A MISDEMEANOR 113-14 (1808).

17. *Id.* at 114.

18. After Burr's announcement, Marshall explained, "I am not prepared to give an opinion on this point." *Id.* at 118.



joyed the prerogatives of a monarch, who may be absolutely immune from judicial process or judicially compelled disclosure. The Chief Justice did recognize, however, that a subpoena to the President should not be issued lightly and that the President's official schedule and obligations must be taken into account.[19] The final decision on the validity of any claim of privilege was to be made by the court, not the Executive. If a sitting President can be compelled by subpoena, a former President should be entitled to little protection by virtue of the respect due his former office or the press of his unofficial schedule.

*President James Monroe.* A virtually unknown case of a judicially upheld subpoena against a President involved President James Monroe. On January 3, 1818, Monroe became the second President of the United States to be served a subpoena while in office.[20] He was summoned as a witness in behalf of the defendant in the court-martial case of Dr. William C. Barton. On two occasions, Dr. Barton had pressed President Monroe for a position at the Philadelphia naval hospital. Barton eventually received this appointment, leading one Dr. Thomas Harris, whom Barton replaced, to bring charges of "intrigue and misconduct" against Barton. Because Barton's meetings with the President were cited as contributing factors in the accusation, a summons was issued to the President. Secretary of State John Quincy Adams, on behalf of President Monroe, solicited Attorney General Wirt's legal opinion on the matter.[21] An unpublished, previously undiscovered, handwritten opinion of the Attorney General concluded that a subpena *ad testificandum*[22] could properly be issued to the President. He advised Monroe:

> A subpoena *ad testificandum* may I think be properly awarded to the President of the U.S. My reasons for this

19. *Id.* at 181-82; *See also* T. ABERNATHY, THE BURR CONSPIRACY 238 (1968); FAULKNER, JOHN MARSHALL AND THE BURR TRIAL, 53 J. AM. HIST. 247, 257 (1966).

20. A copy of the summons to President Monroe is found in Attorney General's Papers: Letters Received from State Department, National Archives Bldg., Record Group 60. *See also* Letter from Richard Bush to the President [Monroe], Nov. 6, 1817, Records of the Office of Judge Advocate General (Navy), National Archives Bldg., Record Group 125 (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282); P.L. Pleadwell, *William Paul Crillon Barton (1786-1856), Surgeon, United States Navy—A Pioneer in American Naval Medicine*, 46 THE MILITARY SURGEON 260-62 (1920). The Senate Watergate Committee relied upon the Monroe subpoena in its amicus brief in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). The court cited the relevant documents. *Id.* at 710 n.42.

21. I uncovered the Wirt letter with the assistance of Stephen Stathis, an analyst in American History and American National Government with the Library of Congress. After we had unsuccessfully tracked down the opinion letter to a missing microfilm, we finally found the original manuscript by Wirt.

22. A subpoena *ad testificandum* is different from a subpoena *duces tecum*. The latter requires the witness to bring with him documents, papers, or other material that may be in his possession, custody, or control. *Compare* Catty v. Brochelbank, 124 N.J. Law 360, 362-63, 12 A.2d 128, 129 (1940), *with Ex parte* Hart, 240 Ala. 642, 645, 200 So. 783, 785 (1941).

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opinion are stated by the Chief Justice of the U.S. in the case of Aaron Burr . . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . .

The return, however, which I would advise is this: if the process has been executed on the President in the usual form, by an officer or an individual, let the person serving it be instructed to make an endorsement like this—"January 1818, executed on the President of the U.S. who stated that his official duties would not admit of his absence from the seat of government, but that he would hold himself ready, at all times, to state, in the form of a deposition, and facts, relevant to the prosecution, which were within his knowledge, and which might be called for by the court or the party." I would farther recommend, *ere abundanti cautela* [with extreme or abundant caution], that this return should be accompanied by a respectful letter from the President to the Judge Advocate, taking the grounds presented by Mr. Jefferson, in the letter to which I have already referred you.—If the process has not been served on the President in the usual form, but sent to him as a letter, I would recommend that he should endorse on it an admission of its service annexing to that admission a similar statement with that which I have before recommended in the case of it having been served; and enclosing the process, thus endorsed in such a letter as I have advised.

It is clearly inferable from the argument of the Chief Justice, that he would require the excuse for non-attendance to be on oath, but I can scarcely think this necessary when the excuse is written on the face of the Constitution and founded on the fact that Mr. Monroe is the President of the U.S. and that Congress is now holding one of its regular sessions, during which his presence is so peculiarly necessary at the seat of government.[23]

Monroe indicated on the back of the summons that because of official duties and his inability to leave "the seat of government" he would hold himself ready to give his testimony in the form of a deposition. Monroe subsequently submitted answers to interrogatories forwarded by the court. This procedure was apparently satisfactory to all parties, though his answers did not arrive until after the court had already dismissed the case.[24]

23. The original handwritten manuscript of the Opinion of Attorney General Wirt, dated January 13, 1818, may be found in the Records of the Judge Advocate General (Navy), Record Group 125, National Archives Building. Wirt's Opinion Letter is important evidence of the law because it was issued in the early days of the Republic. *See* Stuart v. Laird, 5 U.S. (1 Cr.) 299, 308 (1803).

24. The delay in the arrival of the depositions underscores the poor transportation

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*Presidents John Quincy Adams and John Tyler.* Aside from the Jefferson and Monroe episodes, history furnishes several other instances of compelled presidential disclosures. In 1846, Representative Ingersoll accused Daniel Webster of making improper disbursements from a secret service fund while Secretary of State. The charges led to subpoenas against former Presidents John Tyler and John Quincy Adams. The confidential "contingent fund" was to be used by the President for clandestine operations relating to foreign affairs. Disbursements were approved by certificates signed by the President. Ingersoll, who was Chairman of the House Foreign Affairs Committee, wanted the certificates dating from Webster's first term as Secretary of State. Some congressmen thought that the certificates were confidential.[25] On April 20, President Polk sent to the House a list of the amounts in the contingent fund for the relevant time period, which was prior to his term, but he refused to furnish documentation of the uses that had been made of the money. He grounded his refusal on the statute creating the fund, which provided for confidentiality, and on the theory that a sitting President should not publicly reveal confidences of his predecessors.[26]

One week later Congress established two Select Committees to investigate the charges against Webster.[27] Polk's refusal to provide information about his predecessors' actions was quickly mooted. The House, through its investigating committees, subpoenaed the previous Presidents allegedly implicated in the charges of corruption. Both Select Committees questioned former President Tyler, who had been President and keeper of the contingent fund during the period relevant to the Ingersoll accusations.[28] Former President John Quincy Adams filed a deposition with one of the Select Committees and provided information about the uses of the contingent fund during his Presidency.[29] President Polk's Secretary of State, James Buchanan, was also subpoenaed and testified.[30] The House, having conducted the thorough investigation Polk had unsuccessfully sought to prevent, apparently concluded that Webster was innocent of wrongdoing and

of that period. In light of the transportation difficulties, President Monroe's fear of leaving the seat of government for any length of time was well-founded. *Cf. Hantraft's Appeal*, 85 Pa. 433, 449 (1877), in which the governor of Pennsylvania was held immune from grand jury subpoena, in part because the court was reluctant to force him to leave the seat of government. *See generally* Comment, *Executive Privilege at the State Level*, 1975 U. ILL. L.F. 631.

25. CONG. GLOBE, Apr. 9, 1846, at 636-38.

26. *Id.*, Apr. 20, 1846, at 698.

27. *Id.*, Apr. 27, 1846, at 733-35.

28. H.R. REP. No. 684, 29th Cong., 1st Sess. 8-11 (1846); H.R. REP. No. 686, 29th Cong., 1st Sess. 22-25 (1846).

29. H.R. REP. No. 686, 29th Cong., 1st Sess. 22-25 (1846).

30. *Id.* at 4-7. Buchanan's compliance with the Congressional subpoena could hardly have been fatal to his political career; he was later elected President.

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that nothing further need be done.[31]

History shows that assuming the role of a witness is not demeaning or unprecedented for a President or former President. This does not mean, however, that a President or former President is at the beck of any person or group that has access to a subpoena. The reaction of former President Truman to a subpoena by the House Un-American Activities Committee illustrates this distinction.

*President Harry S. Truman.* In July of 1973, when President Nixon refused to appear before the Senate Watergate Committee (a refusal which occurred before he was ever invited to appear), he relied on a letter President Truman had written to the Chairman of the House Committee on Un-American Activities (HUAC) on November 12, 1953. President Nixon wrote Senator Ervin:

> I have concluded that if I were to testify before the Committee irreparable damage would be done to the Constitutional principle of separation of powers. My position in this regard is supported by ample precedents . . . . It is appropriate, however, to refer to one particular occasion on which this issue was raised.
>
> In 1953 a committee of the House of Representatives sought to subpoena former President Truman to inquire about matters of which he had personal knowledge while he had served as President. As you may recall, President Truman declined to comply with the subpoena on the ground that the separation of powers forbade his appearance . . . .[32]

Unfortunately, Mr. Nixon did not elaborate on the circumstances surrounding the subpoena issued to former President Truman. The subpoena was prompted by charges made by Attorney General Herbert Brownell in a speech on November 6, 1953. Brownell charged that at the time Truman's nomination of former Assistant Secretary of the Treasury Harry Dexter White to a post with the International Monetary Fund was confirmed, Truman knew that White was a "Russian spy." Truman denied the charges the same day. On November 10, the Republican majority of HUAC subpoenaed Truman; his former attorney general, then Justice Tom Clark; and his former Secretary of State, James F. Byrnes, then Governor of South Carolina. The next day, President Eisenhower said that he would not have subpoenaed Truman or Justice Clark, and the ranking Democrat on HUAC protested the slur on Truman's patriotism. On November 12, Truman sent the letter relied on by Mr. Nixon, in which Truman refused to comply with the subpoena because of the separation of powers doctrine. On November 16, Truman spoke in his defense on national television and radio, explained White's appointment and resignation,

31. *See* 2 G. TICHNOR, LIFE OF DANIEL WEBSTER 283 (1870).
32. Letter frim Richard Nixon to Senator Sam Ervin, July 6, 1973.



charged that the Eisenhower Administration was embracing McCarthyism, and accused Brownell of lying. HUAC never pressed for Truman's appearance, and neither Governor Byrnes nor Justice Clark ever appeared.[33]

Truman's refusal to testify is troublesome and not entirely defensible. He was apparently not concerned about executive privilege or national security; after all, he spoke about the White appointment and defended himself in a nationwide speech. Because he was willing to give the speech, perhaps he should have testified before the congressional committee. Truman's desire to choose a favorable forum for his defense hardly rises to the level of an evidentiary privilege. This argument, however, overlooks the unique circumstances under which the refusal to testify took place. Although the doctrine of separation of powers would not have suffered if Truman had appeared, he was probably concerned about dignifying not only the charges but also the tribunal, thus aiding McCarthyism by giving added prestige to HUAC. One may agree that normally Presidents and ex-Presidents should err on the side of providing testimony, yet defend Truman's refusal to testify given the special circumstances with which he was presented.

The Truman episode does not mean that Presidents are immune from giving testimony about presidential activities. Blanket immunity should not be inferred from the occasional refusal of Presidents or former Presidents to testify, or from the failure of those seeking the testimony to press the matter to contempt. Rather, the historical examples presented here indicate that such testimony is normally given when two conditions exist. First, the President must have possible knowledge relating to charges of criminal wrongdoing and corruption in the executive branch. Second, these charges must be supported by credible, reasonable evidence. Cases in which the President or former President refuses to comply with a request for information based on unsupported[34] charges of presidential complicity are distinguishable. President Truman's refusal to appear before HUAC in the hysterical atmosphere of 1953, probably falls into this category and may be justified, if at all, on that ground, not on the basis of a broad doctrine of separation of powers.

The historical evidence shows that voluntary or involuntary submission to interrogation by a former President will not offend the

33. On Nov. 11, 1953, Byrnes wired his rejection, stating that he could not "as chief executive of a State admit your right to command a governor to leave his state and remain in Washington until granted leave." Justice Clark, on the 13th, explained his refusal on the ground that the Judiciary was independent of the Legislature. *Congress and the Nation: 1945-1964: A Review of Government and Politics in the Postwar Years*, CONG. QUARTERLY SERV. 715 (1965). *See also* N.Y. Times, Nov. 11, at 1, col. 8; *id.*, Nov. 15 at 1, col. 1; *id.*, Nov. 16, at 1, col. 8; *id.*, Nov. 17, at 1 (1953).

34. For a description of how unsupported the charges were see H. MESSICK, JOHN EDGAR HOOVER 141-42 (1972). In fact White had been cleared in 1948 by a grand jury that indicted scores of people as Communist leaders. *Id.*

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separation of powers doctrine nor do lasting damage to the Office of the Presidency—even if the ex-President undergoes vigorous or hostile cross-examination by a government attorney, an attorney of one of his former colleagues in a criminal case, a private lawyer in a civil suit, or a congressman or staff attorney in a congressional hearing. When a President or ex-President had knowledge relating to colorable charges of executive misconduct, he has made his testimony available.

These historical examples do not of themselves establish a President's legal duty to testify; that has not been the purpose of this piece. These examples do show that any legal argument asserting that compelled testimony from a President or former President will cause the downfall of the body politic, is groundless. The weight of history is otherwise, and fully supports Lord Hardwicke's dictum that the public has a right to every man's evidence.[35]

35. *Cf.* C. ANDERSON, OUTSIDER IN THE SENATE 83-84 (1970). Even royalty has been called upon to testify. King Edward VII of England, when he was Prince of Wales, once was summoned and testified in a civil case about the plaintiff's possible cheating at cards. A commoner from the jury was allowed to ask a question. 8 J. WIGMORE, EVIDENCE § 2371, at 749, *quoting* NOTABLE BRITISH TRIAL SERIES, THE BACCARAT CASE 3, 75 (Shore ed. 1932). *See also* R. ABINGER, FORTY YEARS AT THE BAR 84, 85 (1930). The Prime Minister is also liable to subpoena. Rex v. Baines, 1 K.B. 258, 261-62 (1909).

# THE RIGHT TO A SPEEDY TRIAL: BARKER v. WINGO IN THE LOWER COURTS

*David Stewart Rudstein**

## I. THE RIGHT TO A SPEEDY TRIAL, BARKER, AND THE BALANCING PROCESS

THE SIXTH AMENDMENT to the Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."** The history of this guarantee can be traced from the 12th century to Magna Carta, through the common law of England, and into American law.[1] The speedy trial clause was designed to prevent undue pretrial incarceration, minimize anxiety accompanying public accusation, and limit the possibility that long delay will impair the accused's ability to defend himself.[2] The clause is intended to protect not only the accused, but also society. As Mr. Justice Brennan has stated:

> The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case . . . . Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commis-

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** *Since this article was written, Congress passed, and President Ford signed, the Speedy Trial Act, Pub. L. No. 93-619, Jan. 3, 1975. The act sets specific times within which an accused must be brought to trial if the action arises in the federal courts. Of course this does not affect the constitutional issues in any way, but hopefully the problems discussed herein will arise with less frequency, especially as the states begin to follow the lead of the federal government, and of the states cited in note 9 infra.*

1. Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967); United States v. Provoo, 17 F.R.D. 183, 196-97 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955). *See generally* F. HELLER, THE SIXTH AMENDMENT (1951).
2. United States v. Ewell, 383 U.S. 116, 120 (1966).



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# EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH

RAOUL BERGER

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issue was whether the Supreme Court could require an official to answer, but the doctrine is equally applicable to the case of an investigation by a congressional committee."[136] Even within *judicial* compass, as we have seen, this reads *Marbury* much too broadly. In truth, *Marbury* is utterly irrelevant to *congressional* inquiry. That was a suit by a private individual, and Marshall stated that the "province *of the court* . . . is not to inquire how the executive or executive officers perform duties in which they have a discretion."[137] Precisely that function, however, does lie within the *province of the legislature*, as parliamentary history makes clear, and as Montesquieu and James Wilson perceived. President Washington, it will be recalled, welcomed an investigation of the Secretary of the Treasury, and he turned over all documents in the investigation of General St. Clair. The congressional power to investigate into the executive branch was confirmed by the Supreme Court in *McGrain v. Daugherty*.[138] No comparable judicial power exists, as Marshall justly remarked. The claim that communications and advice to the President by his advisers are shielded from congressional inquiry is without constitutional warrant. Whether Congress should respect such advice as a matter of comity, as it has done from time to time, is something else again.

### G. *The Trial of Aaron Burr*

#### 1. *Production of Documents*

Secretary of State Rogers, testifying before a Senate Committee in 1971, alluded to "President Jefferson's refusal to comply with Chief Justice Marshall's subpoena in the trial of Aaron Burr."[139] Apparently this was patterned after Corwin's statement that Jefferson "refus[ed] to respond to Chief Justice Marshall's subpoena in Aaron Burr's Trial for Treason."[140] This is demonstrably wrong.

Preliminarily it needs once more to be emphasized that in any event judicial power over the President is not the measure of con-

136. Corwin, *President* 138.
137. 5 U.S. at 168–170; emphasis added.
138. 273 U.S. 135 (1927).
139. Ervin Hearings 473.
140. Corwin, *President* 139. At another point Corwin alludes to "Jefferson's defiance of the *subpoena duces tecum*, which Chief Justice Marshall issued during the trial of Aaron Burr for treason ordering the President to produce certain documents in court"; ibid. 383. For additional discussion of Burr, see infra, Epilogue at nn. 49–73.

gressional power. The judicial power in question was the general power to compel testimony, and Marshall held that the President was not exempted from that authority.[141] The source of congressional power is the inquisitorial function and the fact that the President was made subject to impeachment. Iredell exulted in the provision that made the President triable.[142] Congress, said Corwin, "has power to investigate his every official act."[143] President Andrew Jackson "cheerfully conceded" the constitutional right of Congress to "inquire or decide upon the conduct of the President."[144] No British minister was exempt from inquiry, and inquiry without a power to compel testimony would be enfeebled.[145]

Notwithstanding that *Burr* is thus irrelevant to congressional investigation, consideration of the case will point up Rogers' inveterate tendency to distort the cases. According to his memorandum, Marshall ruled that the President "was free to keep from view such portions of the letter which the President deemed confidential in the public interest."[146] At the outset it is necessary to separate what Jefferson wrote to his counsel[147] from what he did. In fact Jefferson went a long way toward full compliance.[148]

The argument had revolved almost entirely about a letter to Jefferson from General Wilkinson; and it had been argued for Jefferson that it was

141. See infra, text accompanying nn. 154–156.

142. 4 Elliot 109.

143. Corwin, *President* 365; cf. supra, Ch. 2.

144. Quoted supra, text accompanying n. 112.

145. "Without the power to investigate—including of course the authority to compel testimony . . . Congress could be seriously handicapped in its efforts to exercise its constitutional functions"; Quinn v. United States, 349 U.S. 155, 160–161 (1955).

146. Rogers memo 35.

147. See 9 Jefferson, *Writings* 55–62 n. 1, for his correspondence concerning the subpoena.

148. Jefferson, on June 12, 1807, wrote George Hay, the United States District Attorney, that he had delivered the papers to the Attorney General, and instructed the War and Navy Departments to review their files with a view to compliance. 1 David Robertson, *The Trial of Aaron Burr* 210–211 (Philadelphia, 1808). On June 17, 1807, Jefferson wrote Hay that "the receipt of these papers [by Hay] has, I presume, so far anticipated, and others this day forwarded will have substantially fulfilled the object of a subpoena from the District Court of Richmond"; ibid. 254.

When Jefferson learned that the Attorney General did not have the Wilkinson letter that Burr had subpoenaed, he wrote Hay on June 23, 1807, "No researches shall be spared to recover this letter, & if recovered, it shall immediately be sent on to you"; 9 Jefferson, *Writings* 61. Hay advised the court that "When we receive General Wilkinson's letter, the return will be complete"; 1 Robertson 256. Jefferson also stated that if Burr should "suppose there are any facts within the knowledge of the heads of the departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition"; 1 Jefferson, *Writings* 57. Notwithstanding Jefferson's attempts to comply with the subpoena, Rogers states that Jefferson "paid no attention to the subpoena"; Rogers memo 35.

improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain *state secrets*, which could not be divulged without endangering national safety.[149]

Mark that this was not so much a claim for "confidentiality" per se as against disclosure of "state secrets" which might endanger the "national safety," a much narrower ground. Jefferson left it to his counsel, George Hay, "to withhold communication of any parts of the letter which are *not directly material* for the purposes of justice."[150] Hay emphasized that he was willing to disclose the entire letter to the court, and to leave it to the court to suppress so much of the letter as was not material to the case.[151] This was reemphasized on his return to the subpoena duces tecum wherein he supplied a copy of the letter

excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused, or pertinent to the issue now about to be joined. . . . The accuracy of this opinion I am willing to refer to the judgment of the court, by *submitting the original letter* to its inspection.[152]

149. United States v. Burr, 25 Fed. Cas. 30, 31 (No. 14692d) (C.C. Va. 1807); emphasis added.

150. 1 Robertson, supra, n. 148 at 210; emphasis added.

Because Jefferson had thus devolved on Hay the exercise of "discretion" to withhold nonmaterial parts of the letter, United States v. Burr, 25 Fed. Cas. 55, 65 (No. 14693) (C.C. Va. 1807), Chief Justice Marshall said: "the *president* has assigned no reason whatever for withholding the paper called for. The propriety of withholding must be decided by *himself*, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on *his* mind, not on the mind of others, which must be respected by the court"; United States v. Burr, 25 Fed. Cas. 187, 192 (No. 14694) (C.C. Va. 1807); emphasis added. In other words, the *initial* judgment of need to withhold must be made by the President, not left to a subordinate.

151. Thus, Hay said: "The application made by the defendant is that testimony which concerns himself should be adduced; that what tends to his own just defense and exculpation may be brought forward. Is it right that he should have more? Is it proper, fair or right that he should have the liberty of going through the whole letter, as well those parts which do not relate to him as those which do, for the purpose of making unfavorable impressions on the public mind . . . making public confidential communications respecting private characters, and thereby producing controversies and violent quarrels? *I wish the court to look at the letter* and see whether it does not contain what ought not to be submitted to public inspection"; 2 Robertson, supra, n. 148 at 509; emphasis added.

152. 25 Fed. Cas. 187, 190 (No. 14694) (C.C. Va. 1807); emphasis added. Marshall said, "I do not think that the accused ought to be prohibited from seeing the letter"; ibid. 192. Rogers himself states that "Judge [sic] Marshall made it clear that if a letter in the possession of the President material to the trial contains matter —'which it would be imprudent to disclose, which it is not the wish of the executive to disclose; such matter, *if it be not immediately* and essentially applicable to the

Far from asserting a claim of absolute privilege, therefore, counsel for Jefferson was perfectly willing to leave it to the court to determine whether portions of the letter were in fact not material. He insisted only that the portions so adjudged should be withheld from the defendant. To this the defendant objected that the court could not judge whether the confidential portions were relevant to the defense until that defense was fully disclosed, and that defendants were not required to make such disclosure until they had put in their case.[153]

It was on this state of facts that Chief Justice Marshall ruled 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 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, be very strong, and to be fully shown to the court before its production *could be insisted on*.[154]

And, referring to private letters sent to the President respecting matters of public concern, Marshall stated that they "ought not *on light ground* to be forced into public view."

Yet it is a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it . . . I cannot precisely lay down any general rule for such a case. *Perhaps* the court ought to consider the reasons, which would induce the president to refuse to exhibit such letter as conclusive on it, *unless* such letter could be shown to be *absolutely necessary* in the defense. 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. At the same time, the *court could not refuse* to pay proper attention to the affidavit of the accused. But on objections being made by the president to the pro-

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point, will, of course, be suppressed' "; Rogers memo 36; emphasis added. In short, Marshall would exclude only irrelevant or immaterial matter, not the entire letter. Whether the adversary should inspect the entire letter is hereinafter discussed.

153. 2 Robertson, supra, n. 148 at 516. Note also Luther Martin's statement on behalf of Burr that "the *personal* attendance of the president was dispensed with only on the condition that the [Wilkinson] letter should be produced"; ibid. at 514.

154. United States v. Burr, 25 Fed. Cas. 187, 191–192 (No. 14694) (C.C. Va. 1807); emphasis added.

duction of a paper, the court would not proceed further in the case without such an affidavit as would *clearly shew the paper to be essential* to the justice of the case . . . [T]o induce the court to take any definite and decisive step with respect to the prosecution, founded on the *refusal of the president* to exhibit a paper, for reasons stated by himself, the *materiality* of that paper *ought to be shown*."[155]

Materiality to the defense, in short, would overcome presidential refusal to disclose. And Marshall concluded that "I do not think that the accused ought to be prohibited from seeing the letter."[156]

Plainly this contradicts Rogers' statement that Marshall "ruled that the President was free to keep from view such portions of the letter which the President deemed confidential in the public interest. The President alone was judge of what was confidential."[157] For Marshall asserted judicial power to decide whether a presidential claim of privilege had merit, and that a claim of secrecy in the "public interest" would have to yield to the necessities of the accused. Rogers' statement that "the President may in his own discretion withhold documents from a court"[158] is further discredited by the all but universal rule in private litigation that whether disclosure must be made by the executive branch cannot be left to the caprice of executive officers.[159]

### 2. *Personal Attendance by the President*

As the Rogers memorandum states, Marshall claimed for the courts "the right to issue a subpoena against the President"; and

155. Ibid. 192; emphasis added.

156. Ibid. Lest it be thought that the rule in civil cases may be narrower, note Marshall's statement that "if this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power which contain evidence pertinent to the issue"; ibid. 191. We need look no further than United States v. Reynolds, 345 U.S. 1, 9–10 (1953), for confirmation that "judicial control over evidence in a case cannot be abdicated to the caprice of executive officers."

157. Rogers memo 35. After Marshall delivered the foregoing opinion, Jefferson sent a copy of the Wilkinson letter, "excepting such parts as he deemed he ought not permit to be made public," United States v. Burr, 25 Fed. Cas. 187, 193 (No. 14694) (C.C. Va. 1807), thereby complying with Marshall's preliminary requirement that the President himself must decide the propriety of withholding. But Burr no longer pressed the matter. Beveridge says, "Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the 'truce' [with Marshall] so earnestly desired by Jefferson was arranged." 3 Albert J. Beveridge, *Life of John Marshall* 522 (Boston, 1919). The Marshall opinion, however, stands and speaks for itself; it announced the paramount power of the court to decide the claim of privilege for itself.

158. William P. Rogers, "Constitutional Law: The Papers of the Executive Branch," 44 A.B.A.J. 941, 1012 (1958).

159. See infra, Ch. 7.

the subpoena that issued required the President "to personally attend."[160] Jefferson objected that personal attendance would disrupt performance of his executive functions, for he could be haled to far-off St. Louis, to one court after another.[161] But he offered to testify by deposition, stating that if Burr should "suppose there are any facts within the knowledge of the heads of the departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition."[162] This was a plea of serious administrative inconvenience, not a claim of absolute immunity from judicial process. No such claim was made by his counsel; to the contrary, as Marshall stated, the "attorney for the United States avowed his opinion that a general subpoena might issue to the president."[163] Not satisfied to rest on concession, Marshall left no doubts on this score: "In the provisions of the constitution, and of the statutes, which give the accused the right to compulsory process of the courts, there is no exception whatever."[164] He rejected the reservation in the law of evidence for the King—which was based on the ground that it was "incompatible with his dignity to appear under the process of the court"—because the "principle of the English constitution that the king can do no wrong" was inapplicable to our government whereunder "the president . . . may be impeached and removed from office." And, Marshall added, "it is not known ever to have been doubted, but that the chief may be served with a subpoena ad testificandum."[165] Fully alive to the

160. Rogers memo 36, 35.

161. United States v. Burr, 25 Fed. Cas. 55, 69 (No. 14693) (C.C. Va. 1807).

162. Ibid.

163. 1 Robertson, supra, n. 148 at 180. Jefferson's counsel, Alexander McRae, conceded that "a subpoena may issue against him [the President] as well as against any other man"; ibid. 181.

164. Ibid. This reflected James Wilson's statement in the Pennsylvania Ratification Convention: "not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment"; 2 Elliot 480. Another Framer, Charles Pinckney, speaking in the Senate on March 5, 1800, of the express congressional privilege from arrest, stated:

> it was never intended to give Congress, or either branch, any but specified, and those very limited, privileges. They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here . . . Let us inquire why the Constitution should have been so attentive to each branch of Congress . . . and have shewn so little to the President . . . in this respect . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. 3 Farrand 385.

165. United States v. Burr, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C. Va. 1807). The Supreme Court stated in 1972 that in Burr, "Chief Justice Marshall, sitting on Circuit,

gravity of the issue, Marshall was at pains to put beyond doubt that a subpoena could reach the President. His subpoena, far from offending the mores of the time, responded to contemporary egalitarianism and met with approval, even from the Republicans.[166] As the foremost apostle of a democratic society, Jefferson could not very well publicly put the President above the law.

In weighing Marshall's judgment it needs to be kept in mind that he knew the problems of government at first hand: he had been a member of the Virginia Assembly and had taken vigorous part in obtaining ratification of the Constitution in Virginia; he had been a member of Congress, defended the Jay Treaty, been a member of the "XYZ mission to France," and had served as Secretary of State under John Adams.[167] As Charles Beard stated, Marshall "had better opportunities than any student of history or law today to discover the intention of the framers of the federal Constitution."[168] Greater light was not given to a present-day President.

What of the defiance threatened by Jefferson in his letters to the district attorney: the court had no "controul over the executive"; force was given by the Constitution to him, not the courts; the executive had the superior means to "protect itself from enterprises of force" attempted by the other departments. This was part and parcel of his total rejection of *Marbury v. Madison* and the doctrine of judicial review, which he denounced as "not law."[169]

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opined that in proper circumstances a subpoena could be issued to the President"; Branzburg v. Hayes, 408 U.S. 665, 689 n. 26.

Rejection of royal immunity had been underlined in the North Carolina Ratification Convention by James Iredell. 4 Elliot 109, quoted supra, Ch. 2, n. 126.

166. "For the first time, most Republicans approved of the opinion of John Marshall. In the fanatical politics of the time there was enough of honest adherence to the American ideal that all men are equal in the eyes of the law, to justify the calling of a President, even Thomas Jefferson, before a court of justice"; 3 Beveridge, supra, n. 157 at 450.

Writing in 1803, before the Burr trial, St. George Tucker, the prominent Republican editor of Blackstone, and later judge of the Virginia Court of Appeals, stated: "In the trial of Mr. Thomas Cooper [before Justice Chase] . . . for a libel against the President . . . under the sedition law, it is said that Mr. Cooper applied to the court for a subpoena to summon the president as a witness on his behalf, and that the court refused to grant one. Upon what principle the application was refused (notwithstanding this article [for compulsory process]) I have never been able to obtain satisfactory information"; Tucker's Blackstone, supra, n. 12 at App. 358. For Chase's high-handed conduct of such trials, see Berger, *Impeachment* 224–251.

167. 12 *Dictionary of American Biography* 315.

168. Charles Beard, *The Supreme Court and the Constitution* 108 (Englewood Cliffs, N.J., 1962).

169. 9 Jefferson, *Writings* 55–62; 3 Henry S. Randall, *Life of Jefferson* 211–212 (New York, 1858). Randall states that "Jefferson in no way publicly challenged [the court's] authority"; ibid. 218.

But, as with Stalin's cynical query, "How many battalions has the Pope?," the respect due to Marshall's opinion cannot be measured by his lack of battalions to enforce a judicial decree. Command of the armed forces was not given the President in order that he might resist judicial decrees but rather to enforce them. The effect of Marshall's opinion as law is not a whit diminished by Jefferson's private threats of resistance. Jefferson's view was not that of the Founders; history confirms Marshall: the final word as to the "law" was given to the courts, the "ultimate interpreter" of the Constitution.

### H. *Executive Shielding of Subordinates*

Not the least of Rogers' misreadings of law and history is his assertion that "heads of departments may not be compelled to attend a trial," and that they "are subject . . . to the direction of the Presidents of the United States. They are not subject to any other directions." Given a subpoena, he maintains, "The President may intervene and direct the Cabinet officer or department not to appear; the person subpoenaed would then advise the court of the President's order and abstain from appearing altogether."[170] As long ago as 1838 *Kendall v. United States* rejected an analogous claim. The Postmaster General, acting on presidential instructions, refused to pay moneys owed by the United States for carriage of mails. Congress then passed a law directing payment, and when this was refused by the Postmaster General, mandamus was brought against him to compel payment. Although the executive power is vested in the President, the Supreme Court declared:

> it by no means follows that every officer in every branch of that department is under the exclusive direction of the President . . . it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution.

The contrary principle, said the Court, would clothe "the President with a power entirely to control the legislation of congress, and paralyze the administration of justice."[171] Whether the rights asserted by a department head are "protected by the Constitution" was not of course left for final decision by the President, but committed to the "ultimate interpreter" of the Constitution, the judiciary.

170. Rogers memo 38, 2.
171. 37 U.S. (12 Pet.) 524, 610, 613 (1838).

KYT 12/5/79

By WARREN WEAVER Jr.
Special to The New York Times

WASHINGTON, Dec. 4 — The legislative logjam holding up President Carter's plan to tax "windfall" oil profits broke today and the Senate promptly began strengthening the measure along lines suggested by the White House.

After a week of stalemate, senators favoring a lower tax on the oil industry gave up their threat of a filibuster in return for assurances that a series of their amendments would receive full consideration on the floor, among them a multibillion-dollar income tax cut, effective in 1981.

*To settle Federal complaints of overcharges, the Getty Oil Company agreed to give $25 million to a new fund to help the poor buy heating oil. Page D1.*

After 15 minutes of debate, the Senate voted by 58 to 35 to increase the tax on one category of oil by $22.5 billion. The amendment would increase from 60 percent to 75 percent the rate on production from wells discovered from 1973 through 1978, so-called "new oil."

**Sponsored by Moynihan**

Later the Senate approved by a 68-to-26 vote an amendment sponsored by Senator Daniel Patrick Moynihan, Democrat of New York, that would delay an automatic phase-out of the tax by several years and thus increase total Government revenue.

Senator Moynihan estimated that his amendment would increase total revenue collectible under the Senate bill from $145 billion to $214 billion by postponing the termination of the tax about six years. The $214 billion figure is for the period 1980-96; all other revenue estimates are for 1980-90.

In another energy development, Carter Administration officials are scheduled to make public this week a program to force the states to conserve energy, as well as a proposal for a standby rationing program for gasoline. The plans are expected to revive regional controversies over supply allotments. [Page D5.]

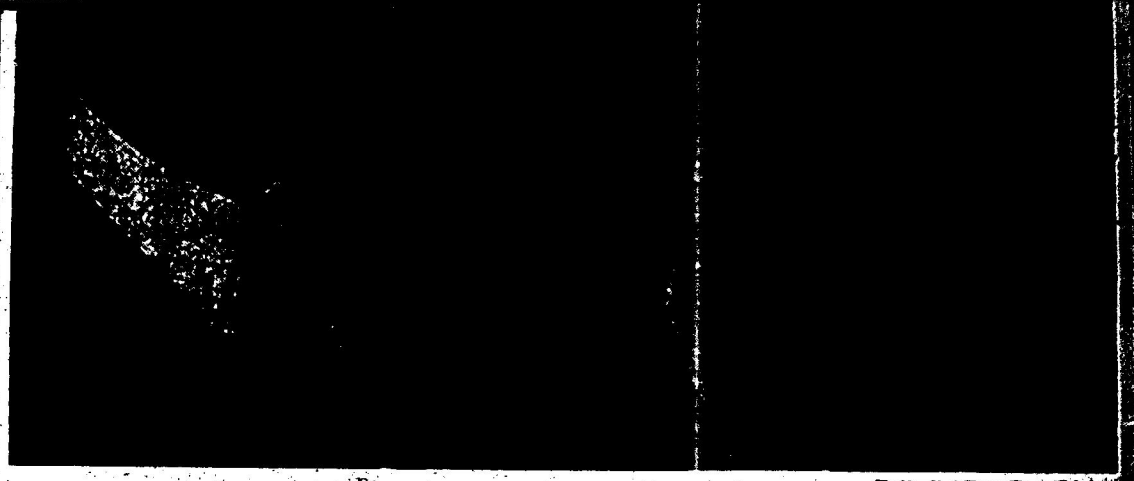
**Far Less Than House Version**

Advocates of a higher oil tax, mostly but not all Democrats, now anticipate that they can increase the 11-year revenue total for the legislation to about $185 billion, far more than the original Senate version, although far less than the $276 billion in the version the House of Representatives approved last summer.

If this Senate strategy succeeds, and the conference committee reconciling the two bills splits the difference, the final legislation going to President Carter could provide about $230 billion over the 1980-90 period.

If the conference committee adopts the

Continued on Page D5, Column 4



The New York Times/Tamara Reynolds

President Carter with Vice President Mondale at the White House after announcing candidacy for a second term

# GASOLINE USE DROPS SHARPLY IN CITY AREA

## Price Rise, Supply Cuts and Public Awareness in 3 States Cited

By PETER KIHSS

Public awareness of the need for conservation, along with high prices and shorter supplies, has resulted in sharp decreases in the use of gasoline in New York, New Jersey and Connecticut, officials of the three states said yesterday.

All warned that gasoline supplies would continue to be tight. According to forecasts, 8 percent less gas will be delivered in New York State this month than in December 1978.

According to the officials, New York motorists used 14.6 percent less gasoline in September — the latest month with available data — than in September of last year. It was the sixth consecutive month of decline, with an overall decrease of 6.1 percent for the year's first nine months.

**16.1% Drop in New Jersey**

New Jersey data for September, still subject to revision, showed a decline of 16.1 percent in gasoline use from a year ago. The decrease over nine months in the state was 3.9 percent.

Connecticut reported 10.3 percent less gasoline used in September than last year and a 3.6 percent decline for the year.

James L. Larocca, New York Commissioner of Energy, said the state's drop in

Continued on Page D22, Column 1

# *Carter, Without Fanfare, Declares He Is Candidate for a Second Term*

By TERENCE SMITH
Special to The New York Times

WASHINGTON, Dec. 4 — President Carter, still grappling with the Iranian crisis, today officially declared his candidacy for a second term in a subdued, nine-minute ceremony shorn of the usual political fanfare.

Surrounded by his family and with his running mate, Vice President Mondale, at his side, Mr. Carter told an audience of Administration officials and White House staff members gathered in the East Room that he would "continue to talk sense to the American people in the campaign."

"As President and as a candidate, I will continue to ask you to join me in looking squarely at the truth," he said. "Only by facing up to the world as it is can we lift ourselves towards a better future."

Mr. Carter also called for the renomination of Mr. Mondale, whom he referred to as "the most effective Vice President in American history."

**Strauss Voices Confidence**

After the ceremony, Robert S. Strauss, the President's campaign manager, predicted that Mr. Carter would become the front-runner in the race for the Democratic nomination within 60 to 90 days. He conceded that Senator Edward M. Kennedy was still ahead in the polls but said the Massachusetts Democrat was "declining steadily, while the President is climbing, slowly but steadily."

Mr. Carter canceled a scheduled appearance at a $1,000-per-couple fund-raising party at the Washington Hilton tonight. His press secretary, Jody Powell, said that the President "simply feels his presence there would not be appropriate"

Continued on Page A36, Column 1

# *President Negotiating To Give Vesco Inquiry Answers by Videotape*

By ROBERT PEAR
Special to The New York Times

WASHINGTON, Dec. 4 — President Carter is negotiating an agreement to answer questions by videotape for a Federal grand jury investigating allegations that Robert L. Vesco attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the grand jury inquiry said today that several members of the panel considered the videotape arrangement unsatisfactory because the jurors would not be able to ask the President follow-up questions. However, a majority of the jurors voted to accept the arrangement rather than insist on his personal appearance, the sources said.

**No Jurors at Questioning**

Under the proposed arrangement, said to have been approved by Chief Judge William B. Bryant of the Federal District Court here, questions would be put to the President by Government lawyers, and no grand jurors would be present. Lawyers for the White House and for the United States Attorney here have been negotiating details of the interview.

If Mr. Carter gives his answers in this manner, it would be the first time that a President answered questions for a grand jury by videotape. No incumbent President has testified in person before a

Continued on Page A17, Column 6

# *Cincinnati Officials Order Inquiry Into Concert Crush That Killed 11*

By REGINALD STUART
Special to The New York Times

CINCINNATI, Dec. 4 — City officials today ordered an investigation into the sequence of events that led to the deaths of 11 youths crushed by other rock fans rushing to get unreserved seats at a concert last night.

This river city was shocked and saddened by the deaths of the young rock fans and the injuries to at least eight others caught in the frenzied stampede to get first-come, first-served general admission seats at the concert by the Who.

The accident at Riverfront Coliseum also raised concern that the conditions that led to the deaths — thousands of excited youths rushing through doors in a race for good seats — existed at hundreds of other concert halls around the nation.

**'Hard to Believe'**

"It is hard to believe that people would run over other people," said 31-year-old Mayor John Kenneth Blackwell, sworn into office only four days ago.

Mr. Blackwell, who ordered the city's investigation, was among those who decided last night that the concert should proceed despite the incident. The 18,000 fans who watched the performance were unaware of what had happened at the gates of the coliseum, and officials were worried that the abrupt cancellation of the concert would produce an unruly reaction from the young audience.

"My reaction, when I was first advised of the incident, was one of total disbelief," said Mr. Blackwell, pausing in an interview in his office this afternoon to look toward the ceiling, his eyes showing fatigue.

Mr. Blackwell's views were echoed by others, including members of the Who, a British group. An older sister of Jacqueline Eckerle, a 15-year-old girl who was

Continued on Page D21, Column 4

Associated Press

TRIAL SUSPENDED IN KOREA: Kim Jae Kyu, charged in murder of President Park. Court's jurisdiction was challenged. Page A5.

## INSIDE

**Koch Plans Hospital Shifts**
Mayor Koch plans to shift the leadership structure of the Health and Hospitals Corporation in an apparent effort to weaken its president. Page B1.

**Few Leads in Navy Ambush**
There were few leads in the attack in Puerto Rico in which two sailors died. The ambush renewed turmoil over independence for the island. Page A24.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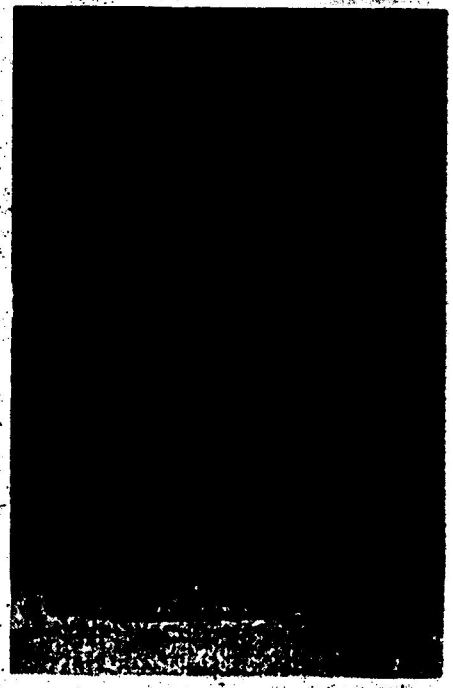

Members of the United Nations Security Co on resolution yesterday demanding release captured during the takeover of the United

# Iranians Say Record

By JEFF GERTH
Special to The New York Times

TEHERAN, Iran, Dec. 4 — Iranian officials charge that documents uncovered in an investigation into the finances of the deposed Shah of Iran show that over $1 billion in identifiable funds was diverted or misappropriated by the Shah and his family from Iranian banks and other institutions.

Officials at the central bank here presented documents for examination by The New York Times that they said supported their charges that the Shah had

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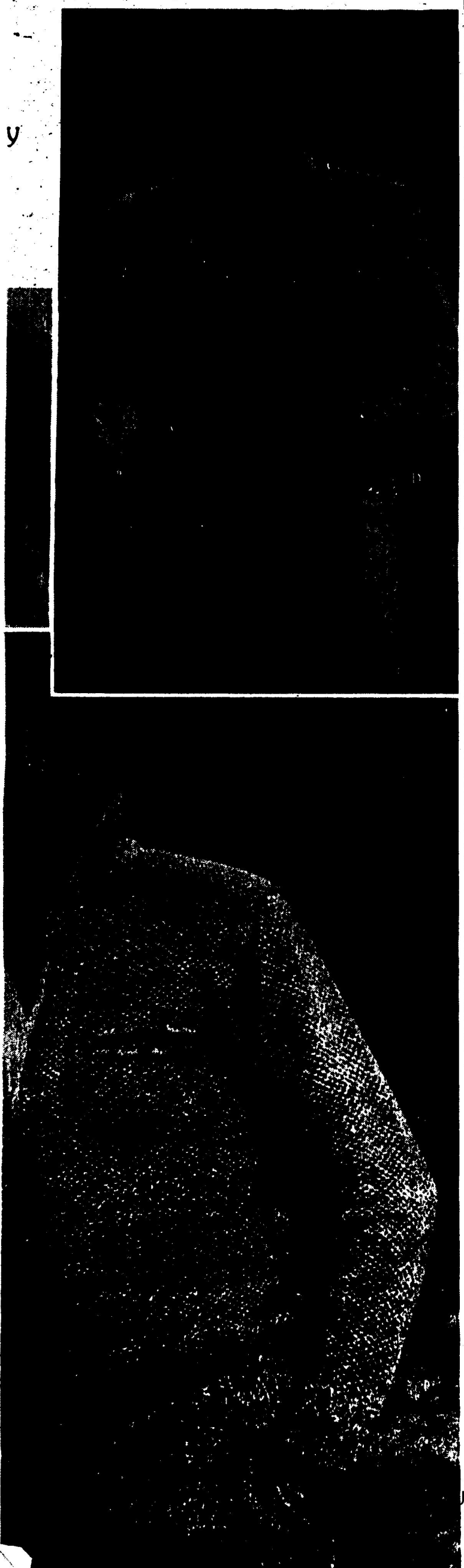

# CARTER NEGOTIATING IN INQUIRY ON VESCO

Continued From Page A1

grand jury, Justice Department officials said.

It was not known whether a date for the interview with Mr. Carter had been selected.

Lloyd N. Cutler, the White House counsel, declined to comment on the grand jury proceedings. But he did say, "This President will give evidence in an appropriate forum to any proper investigative body."

President Carter has given court testimony at least twice before. Paul J. Curran, the special counsel who investigated the Carter family's peanut business in Georgia, took a four-hour, sworn deposition in the White House on Sept. 5. Mr. Curran concluded his inquiry with the finding that there was "no evidence whatsoever" that money from the business was used in the 1976 Presidential campaign.

In April 1978, a 51-minute videotape of the President's testimony was presented in Federal District Court in Macon, Ga., at the trial of a Georgia State Senator, Culver Kidd, on gambling and conspiracy charges. Mr. Kidd was acquitted.

The grand jury here has for more than a year been investigating allegations that representatives of Mr. Vesco, the financier who is accused of swindling investors, made improper contacts with high-ranking officials of the Carter Administration in 1977 in hopes of halting extradition proceedings against him.

The grand jury foreman, Ralph E. Ulmer, tried to resign last August, charging that the Justice Department had directed a "cover-up" to protect the Administration, but Judge Bryant rejected the resignation.

Philip B. Heymann, Assistant Attorney General in charge of the criminal division of the Justice Department, and Jody Powell, the White House press secretary, have denied Mr. Ulmer's charges, saying there was no political interference with the investigation.

### Likely Focus of Questions

The jury's questions for Mr. Carter are likely to focus on a Feb. 15, 1977, meeting at the White House between the President and Richard M. Harden, an aide who had met a week earlier with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests.

After conferring with Mr. Harden, the President sent a note to Griffin B. Bell, then Attorney General, urging him to see Mr. Lee. Justice Department officials have said that Mr. Bell never received the note and never met with Mr. Lee.

Sources in the department said last summer that Mr. Harden was under investigation for possible perjury in his account to the grand jury of conversations with Mr. Carter and Mr. Lee. Thus, the grand jury might seek Mr. Carter's account of the February 1977 meeting with Mr. Harden in an effort to determine whether the President's account corroborates or contradicts Mr. Harden's testimony.

The grand jury might also ask the President why he sent Mr. Bell a handwritten note saying, "Please see Spencer Lee from Albany when he requests an appointment."

### Apparent Efforts by Vesco

Mr. Vesco evidently hoped to use Mr. Lee's contacts at the White House to arrange a settlement of charges pending against him. Mr. Vesco, wanted on felony charges of looting millions of dollars from investors in mutual funds, fled the United States for Costa Rica in the early 1970's. He is believed to be living in the Bahamas.

President Ford was the first incumbent President to submit to interrogation by lawyers concerning a criminal case. A film of his testimony was shown in 1975 at the trial of Lynnette Alice Fromme, who was later convicted of attempting to assassinate Mr. Ford in Sacramento, Calif.

The procedure for taking President Carter's testimony is being negotiated in an exchange of letters between Mr. Cutler and Carl S. Rauh, the United States Attorney for the District of Columbia.

Two well-placed sources said that several of the 23 grand jurors would have preferred for Mr. Carter to deliver his testimony in person. However, Justice Department lawyers said there was no precedent for demanding a personal appearance by Mr. Carter. The grand jury could have attempted to subpoena the President had it thought such action necessary.

Neither Mr. Rauh nor the White House nor Mr. Heymann would confirm or discuss plans for taking the President's testimony.

## *Baby Found in Manger At a Scene of Nativity*

URTS 16326) Docid: 70105306 Pag

LONGVIEW, Tex., Dec. 4 (AP) — The Rev. Charles Holland walked by

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NYT 12/8/79

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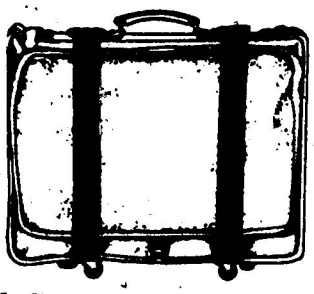

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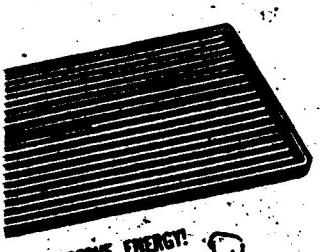

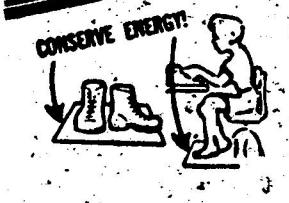


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### Calls Himself 'a Possibility'

Mr. Dole, who was President Ford's running mate in 1976, is, he admits, a long shot in the crowded Republican field, but he continues to regard himself as "a possibility" in the year ahead.

"Maybe I'm dreaming," he said in an interview off the Senate floor, "but I can see Connally and Reagan knocking each other off and Bush and Baker doing the same thing, and there I'd be all alone."

The Senator was referring to his chief competitors, Ronald Reagan of California, John B. Connally of Texas, George Bush, and Howard H. Baker Jr. of Tennessee, the Senate minority leader.

Mr. Dole said that his campaign was not in debt, except for a disputed claim of $100,000 by a political consulting concern. His organization has spent virtually all the $800,000 it has raised but expects to receive $400,000 or more in Federal matching funds early next year.

"We're all right financially," the Senator said.

Any Presidential candidate who drops out of the competition before 1980 will not be eligible for the Federal subsidy payments.

### Connally Hires New Aide

WASHINGTON, Dec. 7 (AP) — John B. Connally has hired a new senior campaign aide and is making sharp cuts in the size of his staff as part of an effort to inject new life into his drive for the 1980 Republican Presidential nomination.

The new aide is Charles Keating, a former Arizona businessman, who will take over as chief administrative official of the campaign.

A campaign spokesman, Hugh O'Neill, said today that 20 of Mr. Connally's 160 staff members in campaign headquarters had been dropped. He added that there would soon be more dismissals, mainly among middle-level campaign workers.

Meanwhile, he said, the new appointment will give Eddie Mahe, the campaign manager, time to plan political strategy as the primary election season draws near. He said that the change was not a demotion for Mr. Mahe.

# Civiletti Says He Is Withdrawing From Role in Vesco Investigation

WASHINGTON, Dec. 7 (AP) — Attorney General Benjamin R. Civiletti said today that he had removed himself from any role in the Government's investigation into allegations of White House influence-buying in behalf of Robert L. Vesco, the fugitive financier.

At the same time, the Attorney General said at an impromptu news conference that he believed it was proper that President Carter be allowed to give videotaped testimony to a grand jury. The President plans to give the testimony to a Federal grand jury that has been investigating the Vesco case for more than a year.

Mr. Civiletti said he was taking no part in the investigation because of his role in the Administration's 1977 decision to abandon efforts to extradite Mr. Vesco in favor of using diplomatic channels to have him deported.

There has been no evidence that the decision was made to benefit Mr. Vesco. Nonetheless, Mr. Civiletti said it would be "inappropriate" for him to take part in the investigation because he was "involved in contemporaneous actions" relating to extradition proceedings against Mr. Vesco.

### Living in the Bahamas

Mr. Vesco, who fled the country in 1970, is wanted in the United States on charges of misappropriating $224 million from the Investors Overseas Service, a Swiss-based mutual fund, and with making an illegal $200,000 contribution to President Nixon's re-election campaign. He is now believed living in the Bahamas.

Mr. Civiletti said today that he was not consulted about the plans disclosed this week for the President to testify by videotape rather than in person before the grand jury.

Mr. Carter's videotaped answers in the Vesco case would mark the first time a President has answered grand jury questions in this manner, but Mr. Carter has provided testimony in different forms at least twice before criminal investigations since January 1977, when he became President.

Sources close to the investigation said that some grand jurors had complained that the videotaping procedure would prevent them from asking follow-up questions. Asked if a President should be given special treatment when called to testify, the Attorney General replied: "Certainly. Only in the most compelling circumstances should a President have to provide information directly to a court or investigation."

### Georgia Businessman Involved

A District of Columbia grand jury is investigating allegations that, shortly after Mr. Carter took office, an attempt was made to pay off high officials in the Administration to quash extradition proceedings against Mr. Vesco.

R.L. Herring, a Georgia businessman who has been convicted on unrelated fraud and racketeering charges, has said he paid $10,000 to a lawyer, W. Spencer Lee 4th of Albany, Ga., to act in Mr. Vesco's behalf.

Mr. Lee has said he met with Richard M. Harden, a White House aide, in February 1977 and was persuaded by Mr. Harden not to pursue the matter further. Mr. Harden subsequently met with the President, who sent a note to Griffin B. Bell, then Attorney General, that said, "Please see Spencer Lee from Albany when he requests an appointment."

The Justice Department said the note was placed in a file folder for potential job-seekers but that Mr. Lee never appeared for an appointment.

## *Carter Defeats Kennedy 84 to 14% in Tennessee*

NASHVILLE, Dec. 8 (UPI) — President Carter, hailed for his handling of the Iranian crisis, won an overwhelming victory last night in a Presidential straw poll of Tennessee Democrats attending fund-raising dinners in 10 cities.

Mr. Carter, who made an obvious reference to Senator Edward M. Kennedy's criticism of the Shah in a telephone speech to the meetings, rolled up 84.5 percent of the total, or 1,425 votes, to 14.1 percent, or 236 votes, for Mr. Kennedy and 1.4 percent, or 24 votes, for Gov. Edmund G. Brown Jr. of California.

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NYT 3/2/80

# JURY IN VESCO CASE SEES CARTER ON TAPE

## His Testimony to the Panel Is Said to Focus on Alleged Attempt to 'Fix' Legal Problems

By EDWARD POUND
Special to The New York Times

WASHINGTON, March 1 — President Carter spent more than an hour answering questions on videotape last month for a Federal grand jury investigating allegations that Robert L. Vesco, the fugitive financier, attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the interview said that Mr. Carter offered no major new information about the case when he was questioned at the White House by three Federal prosecutors. His videotaped interview was shown to the grand jury on Feb. 21, the sources said.

They declined to comment on Mr. Carter's testimony other than to say that it was not damaging to anyone in his Administration, including an aide who is under investigation for possible perjury. The President, the sources said, often responded by saying that he could not recall matters about which the Government lawyers were inquiring.

Mr. Carter's videotaped answers marked the first time that a President had answered grand jury questions in that manner, though he has provided testimony in different forms at least twice before in criminal investigations.

### Carter Aide Is Reticent

Lloyd N. Cutler, the White House counsel, declined to confirm that the President had been questioned. But he said, "The President always cooperates with the proper law enforcement investigation. He has and he will cooperate with this investigation."

Government lawyers who questioned Mr. Carter refused to discuss the session. However, they were known to have focused their questioning on a meeting Mr. Carter held in the White House on Feb. 15, 1977, with Richard M. Harden, a special assistant.

The lawyers wanted the President's account of the meeting to determine whether it corroborated or contradicted Mr. Harden's testimony before the grand jury in December 1978. Sources in the Justice Department said last summer that Mr. Harden was under investigation for possible perjury in his account of his conversation with Mr. Carter and an earlier one with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests and who is a close friend of Mr. Harden.

Mr. Harden reportedly told the grand jury that he talked Mr. Lee out of continuing to represent Mr. Vesco's interests when they met on Feb. 8, 1977. He was also reported to have testified that he briefed Mr. Carter on the Vesco situation a week later and informed him that Mr. Lee was withdrawing from the deal.

### Some Jurors Dissatisfied

Sources close to the grand jury investigation said that jurors submitted some of the questions that were put to the President by Government lawyers. No jurors were present for the interview and, the sources said, several jurors were dissatisfied with the procedure because it prevented them from asking followup questions. They were also reportedly displeased because they believed the President should have testified in person.

Evidence in the case is being presented to the grand jury by the office of the United States Attorney here. Government lawyers have not indicated whether the investigation will continue after the grand jury's 18-month term expires in early April.

At one point, Ralph E. Ulmer, the grand jury's foreman, tried to resign, charging the Justice Department with directing a "cover-up" to protect the Carter Administration. His charges were denied by Mr. Carter's spokesmen and the Justice Department.

John T. Kotelly, deputy chief of the fraud division in the United States Attorney's office, declined to comment on the investigation.

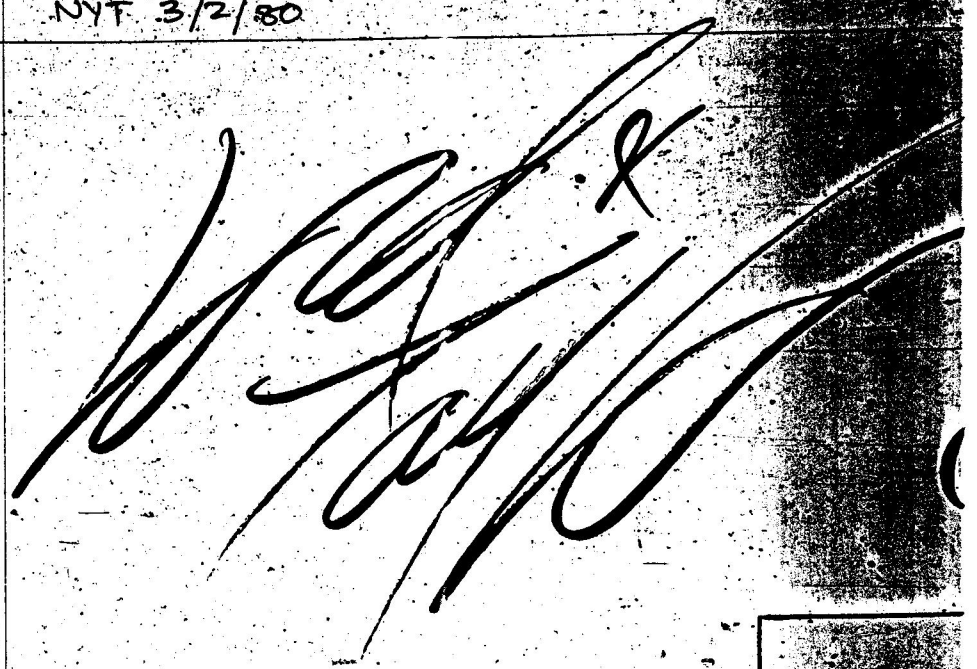
### Origin of Inquiry

The investigation began after R. L. Herring, a businessman in Albany, Ga., charged that Mr. Vesco wanted to bribe Carter Administration officials to resolve his legal problems. Mr. Vesco fled the United states nearly a decade ago after he was charged with defrauding stockholders of millions of dollars in an international swindle.

Mr. Herring, who was convicted on unrelated fraud and racketeering charges and is in a Federal prison in Miami, has said that he retained Mr. Lee, the Albany lawyer, to act in Mr. Vesco's behalf.

In a telephone interview yesterday, Mr. Herring said that he was scheduled to take a polygraph (or lie detector) test on March 6 and that he planned to release the test results to the press.

## Goldwater Tells G.O.P.

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FOIA (b)(6) DocId: 70105306 Page 368

WSJ 10/17/79

17 OCT

# Independent Prosecutor Clears Carters In Peanut Warehouse Loan Investigation

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—An independent prosecutor's investigation into the finances of the Carter family peanut warehouse cleared President Carter and his brother, Billy, of any criminal wrongdoing.

Paul Curran, special counsel appointed in March to investigate loan transactions between the warehouse and a Georgia bank headed by Bert Lance, former federal Budget Director, yesterday closed out his inquiry with reports to Congress and the Attorney General.

Mr. Curran told reporters his six-month investigation hadn't turned up any evidence President Carter "committed any crimes." He added that "based on all the evidence and the applicable law," he wouldn't seek any indictments in the case.

**No Room for Doubt**

The investigation was triggered, in part, by speculative press reports suggesting the warehouse loans had been diverted to the Carter presidential campaign during 1976. Mr. Curran said his "audits and examinations of the books and records" don't leave any "room for doubt" this allegation was false.

"Every nickel and every peanut have been traced into and out of the warehouse," and there wasn't any unlawful diversion of funds "in either direction," Mr. Curran said.

Jody Powell, presidential press secretary, said Mr. Curran's findings ended a "witch hunt" in which investigators "didn't find any witches." The White House later issued a more formal statement expressing pleasure at Mr. Curran's decision.

The President, asked about the report at a Democratic Party reception in Harvey, Ill., said, "I'm glad they have completed their investigation and turned their attention to crime control." Later, at the White House, he added, "The truth finally came out."

**Carter Made Deposition**

President Carter testified under oath to Mr. Curran in a four-hour deposition taken at the White House early last month. Mr. Curran said yesterday he thought this was the first time a sitting U.S. President had been examined under oath in a criminal investigation. He added that President Carter had "cooperated totally."

Billy Carter, the President's brother and manager of the warehouse until mid-1977, said in a telephone interview yesterday the Curran investigation had been "a complete waste of the taxpayers' money." He blamed the long inquiry on "idiot reporters" and the fact that "Jimmy is President."

Despite Mr. Curran's finding that indictments shouldn't be sought, his 179-page public report outlines some irregularities in the loan relationship between the Carter warehouse and the National Bank of Georgia. The bank, which Mr. Lance headed at the time of the loans, lent the warehouse nearly $10 million from 1975 through 1977.

**Loan Violated Collateral Terms**

In one instance, a 1975 loan to finance inventories of peanuts was "out of bond," or in violation of the collateral provisions of the loan agreement, "almost from its inception to its termination on Aug. 31, 1976," Mr. Curran found. He said that during the spring of 1976, when the warehouse owed the bank more than $1 million, there weren't any bonded peanuts in the warehouse to meet the loan's collateral terms.

Mr. Curran also found that because of repeated overdrafts in the warehouse account, the National Bank of Georgia simply held checks from Billy Carter until there were sufficient funds in the account.

The toughest task Mr. Curran faced was deciding whether that loose bookkeeping constituted technical violations of federal banking laws that warranted indictment of Billy Carter, and perhaps others.

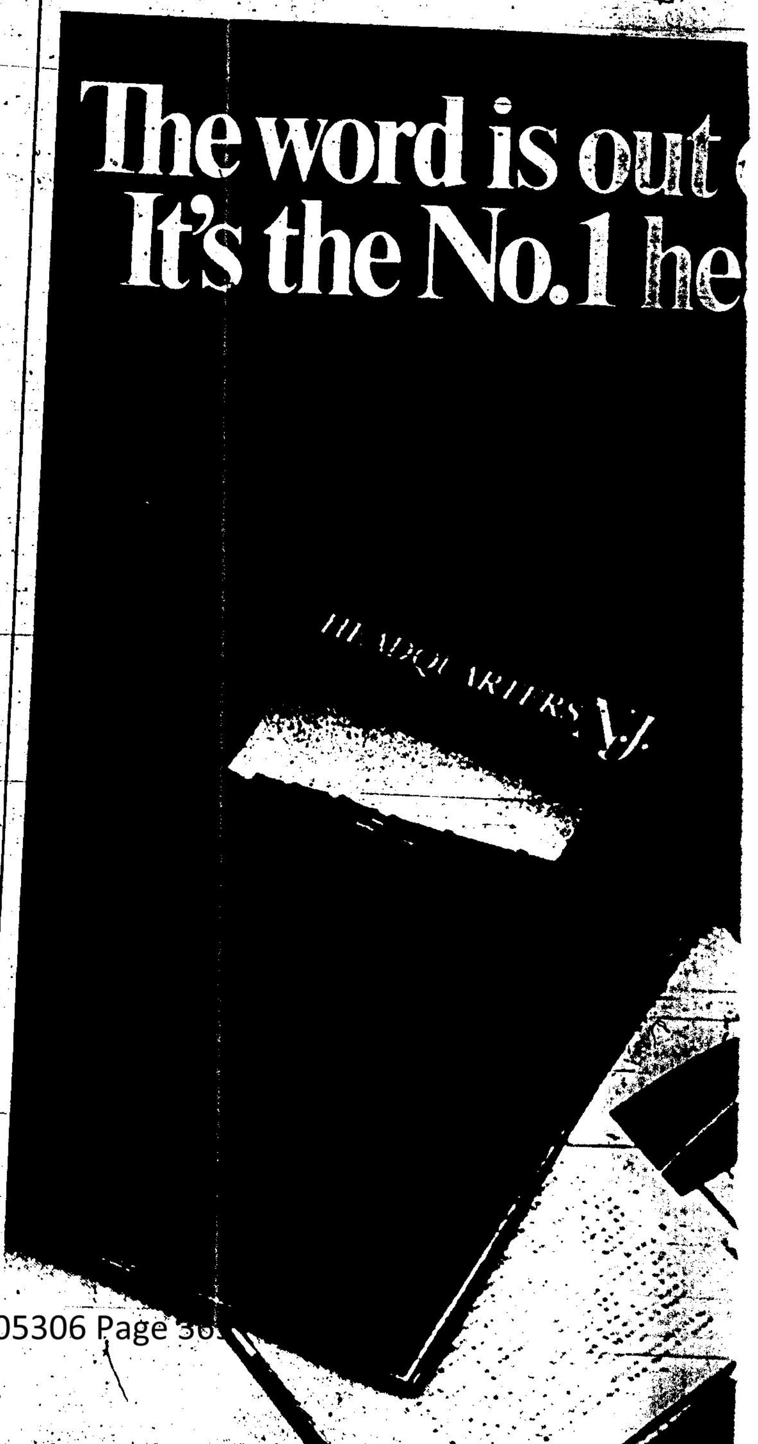
Mr. Curran decided any technical violations that might exist didn't amount to willful criminal acts. He did so after analyzing numerous bank-law cases that raise similar issues. But this detailed analysis of the evidence, and its relation to past cases, was made only in Mr. Curran's 239-page report to the Attorney General and wasn't made available to Congress or reporters.

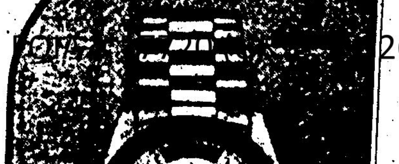
Mr. Curran's report draws a devastating picture of Billy Carter as a manager. The report describes the warehouse books as "disorganized" and notes that by August 1977 the warehouse was in such "financial difficulty" its current liabilities exceeded its current assets by about $400,000.

To bail out his foundering family business, President Carter provided the warehouse, through his trustee, Charles Kirbo, $440,000 during 1977 and 1978, Mr. Curran found. To finance these loans to the warehouse, Carter Farms Inc., a business owned entirely by President Carter and his children, borrowed $480,000 from Trust Co. Bank in Atlanta. The balance of these loans was $275,000 as of July 1978, Mr. Curran notes.

The Carter warehouse may also owe the government some income tax. Mr. Curran's audit discovered what he said were "a number of errors related to the recording of sales and purchases" that "may have material income-tax consequences."

For example, $260,000 of peanuts bought in 1975 weren't recorded until 1976. Mr. Curran said such errors affect the net profit reported by the warehouse for 1975 through 1977. The special counsel added that these audit findings will be reported to the Internal Revenue Service.



NYT 10/17/79


# Times

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rk Times

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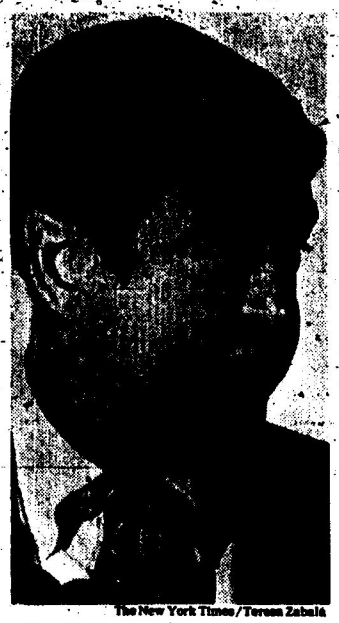
A12, Column 3



The New York Times/Teresa Zabala

Paul J. Curran at news conference

# CARTER'S BUSINESS CLEARED IN INQUIRY ON CAMPAIGN FUNDS

## INDICTMENTS ARE RULED OUT

### Investigator Finds No Evidence of Diversion of Warehouse Profit to '76 Presidential Race

By EDWARD T. POUND
Special to The New York Times

WASHINGTON, Oct. 16 — Paul J. Curran, a special Federal investigator, said today that an exhaustive inquiry into loans to President Carter's family peanut business by the National Bank of Georgia had turned up "no evidence whatsoever" that proceeds had been diverted to Mr. Carter's 1976 Presidential campaign.

Mr. Curran, who spent nearly seven months investigating $9.8 million in loans to Carter's Warehouse, the President's family business in Plains, Ga., said: "Our audits and examinations of the books and records leave no room for doubt on this score. Every nickel and every peanut have been tracked into and out of the warehouse, and no funds were unlawfully diverted."

"There is no evidence to establish that President Jimmy Carter committed any crimes," Mr. Curran said. "Further, my

*Excerpts from statement, page A21.*

overall conclusion . . . is that based on all the evidence and the applicable law, no indictment can or should be brought against anyone. None will be filed."

**Insufficient Loan Collateral**

But Mr. Curran's report said the investigation found that the Carter warehouse loans had insufficient collateral for long periods in 1975 and 1976; that the warehouse had major overdrafts of its bank account in late 1975 and that the bank often held checks because the account had insufficient funds.

Mr. Curran said that there had been some "record-keeping violations by a fairly low-level bank person." He did not identify the bank employee but said that the employee had been granted immunity to testify before the grand jury and would not have been prosecuted in any event "on the facts in this case."

Mr. Curran, a Republican who is a New York lawyer, was appointed as the Justice Department's special counsel in the warehouse inquiry on March 20 by Griffin B. Bell, then the Attorney General. He was given Watergate-style prosecution powers, meaning that he had the authority to seek indictments without clearance from anyone in the Justice Department.

**Loan Diversion Alleged**

He was appointed after repeated allegations had been made that proceeds from the National Bank of Georgia loans to the Carter business may have been diverted to Mr. Carter's Presidential campaign.

In 1975 and 1976, when Mr. Carter ran for the Presidency and when the bulk of the National Bank of Georgia loans were made, the warehouse business was managed by his brother, Billy Carter. The National Bank of Georgia, which is based in Atlanta, was controlled by Bert Lance, a close friend of the President.

Mr. Lance, who was Mr. Carter's first director of the Office of Management and

Continued on Page A20, Column 1

# *Sindona Enters A Hospital Here With a Wound*

By JOSEPH B. TREASTER

Michele Sindona, the Italian financier who disappeared two and a half months ago while awaiting trial on fraud charges in connection with the collapse of the Franklin National Bank, was admitted to Doctors Hospital yesterday with a possible bullet wound in the leg, Federal authorities said.

The United States Attorney's office said that Mr. Sindona had been immediately arrested, but the Federal Bureau of Investigation and the financier's lawyers said that Federal marshals were on hand only for his protection.

Mr. Sindona's family said in a statement that the 59-year-old businessman had been released by his kidnappers. However, the F.B.I. said it had no information on that point.

Since late on the evening of Aug. 2 when Mr. Sindona was reportedly last seen walking alone on Fifth Avenue near his apartment at the Pierre Hotel, law-enforcement officials had been divided on whether the millionaire had been kidnapped or had fled to avoid the upcoming trial.

In late September, Mr. Sindona's law-

Continued on Page B3, Column 1

## adoran Junta Promises s and a General Amnesty

By ALAN RIDING
Special to The New York Times

ct. 16 — El Salva- junta today an- economic and so- easing this coun- isis.

ho led yesterday's t Carlos Humberto ly fled the country, iselves to calling a reasonable peri- political prisoners ity, and to respect-

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further leftist un- leclared a state of constitutional guar- d imposed a 10 P.M. l meetings of more re prohibited.

ing a "wait-and-see" attitude toward the new junta, which is expected to be expanded to include three civilians and today began describing itself as the "revolutionary Government." Antonio Morales Erlich, leader of the Christian Democratic Party, noted that the junta was echoing the sentiments of most Salvadorans but stressed that "it is absolutely necessary to implement the promise as soon as possible."

The new rulers received cautious sup-

Continued on Page A10, Column 3

OCT 17 1979


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# Carter Business Cleared in Inquiry on Bank Loans and Campaign Funds

Continued From Page A1

Budget, resigned in September 1977 after a Senate inquiry into his banking practices. He was indicted last May 22 on criminal counts of illegal banking manipulations and conspiracy matters unrelated to the Carter warehouse inquiry.

Mr. Curran declined today to say whether he had questioned Mr. Lance, but he emphasized, "We found no violations of law committed by President Jimmy Carter, by Billy Carter, by Mr. Lance."

Mr. Curran, perhaps reflecting a prosecutor's caution, said in response to a question: "I'm not exonerating anyone. Our investigation covered all the transactions involving Carter's Warehouse and the National Bank of Georgia . . . and my statement stands that there is no evidence to warrant the bringing of criminal charges against anyone."

President Carter, who was in the Chicago area today holding a "town meeting," was clearly pleased by Mr. Curran's findings. He told reporters, "I'm glad they have completed their investigation and turned their attention to crime control." He said he knew "all the time" that he had not engaged in wrongdoing.

Billy Carter's lawyer, Pierre Howard of Decatur, Ga., said today, "This is the result we have anticipated from the beginning. We're glad that it's over."

Mr. Curran completed his assignment today by delivering a 239-page report to Benjamin R. Civiletti, who succeeded Mr. Bell as Attorney General. Mr. Curran also delivered an abridged report to Congress and provided copies of that document to reporters during a late morning news conference at the Justice Department. He said that his report to Congress was "incomplete" because he was prohibited by law from releasing testimony given before a Federal grand jury in Atlanta.

Mr. Curran emphasized today at his news conference that his investigation had been "thorough." He said that he and his team of lawyers and accountants, with assistance from the Federal Bureau of Investigation, had reviewed more than 80,000 documents and interviewed numerous witnesses, among them President Carter.

He said that he had taken Mr. Carter's deposition during a four-hour meeting at the White House on Sept. 5. He said the deposition had been submitted to the grand jury and that the President, in response to a subpoena last May, had "promised all documents sought and more. He has cooperated totally in this investigation," Mr. Curran said.

### Errors in the Records

The White House said late this afternoon that Mr. Carter's deposition would not be made public because the President had been advised by his lawyers that "it would be inappropriate in this case" to release the document.

Mr. Curran said that he and his investigators had found numerous errors in the warehouse records relating to the sales and purchases of peanuts; failure by the National Bank of Georgia to obtain, at all times, sufficient collateral, and numerous overdrafts on a warehouse checking account by Billy Carter.

Mr. Curran said he also conducted "a limited examination" of the records of Gerald Rafshoon Advertising Inc. to determine whether the Atlanta-based agency had obtained money from any outside sources that enabled it to extend credit to Mr. Carter's primary campaign. The agency was owned at the time by Gerald Rafshoon, who is Mr. Carter's media adviser, but it was sold this year.

Mr. Curran said that his inquiry showed that the Rafshoon agency had had no access to unexplained cash while handling Mr. Carter's primary campaign and that the agency had at no point spent more than it had received from Mr. Carter's campaign committee.

Mr. Curran said that he and his staff had audited all peanut sales and purchases by the warehouse and had turned up "a number of errors related to the recording of sales and purchases" from 1975 through 1977. He said the errors his staff had discovered had had "a material impact on each year's reported net profits, although in the aggregate, the three-year 1975-1977 profits and losses remain unchanged."

He said, however, that the errors related to net income and loss for each year and "they may have material income tax consequences" for the partners — the President, Billy Carter and Lillian Carter, their mother.

The bank loans examined by Mr. Curran were made from 1975 through 1977. They were made in the following categories: $1,101,813 to purchase a peanut sheller and construct a new warehouse for peanut storage and $8,775,181 in two commodity loans.

Mr. Curran said he believed that none of the proceeds of those loans had been diverted to the Presidential campaign. "We traced every advance and every repayment into and out of the warehouse accounts and found them all properly accounted for," he said.

There is no evidence that Billy Carter ever pledged the same collateral more than once or that there was a major delay in payments between March and May 1976.

### History of Loans Traced

In a summary statement released with the report he gave to reporters, Mr. Curran traced the history of the loans. The commodity loans were to be secured by peanuts at the warehouse, Mr. Curran explained, and at one point — from March 23 through May 13, 1976 — there was "no security" on the initial commodity loan. At the time, the warehouse owed the National Bank of Georgia $1,150,000 on the loan, Mr. Curran said.

Moreover, Mr. Curran said, "The repayment checks issued by the warehouse to N.B.G. to accompany the warehouse releases were not processed by N.B.G., except for the first five checks totaling $250,000 written in October 1975. Every other repayment check issued with releases during the life of the loan was held by the bank and not processed. Instead, the bank adopted the procedure of reducing the loan by debit memos debiting the warehouse account as monies were deposited in the account by the warehouse. The checks were not processed by N.B.G. due to insufficient funds in the warehouse account." The releases referred to were the collateral — peanuts.

Mr. Curran said that overdrafts "appeared very frequently in the warehouse account in 1975," reaching a peak of $369,415 in October. But they were eliminated in large part after that time, Mr. Curran said, when the bank adopted the procedure of not processing the loan repayment checks.

The first commodity loan, he said, was to be repaid on Aug. 31, 1976. However, the balance of $520,936 was not repaid; rather, he said, it was "rolled over" into the 1976 commodity loan, meaning that the warehouse commenced its 1976 peanut buying season with a heavy debt on its hands.

Mr. Curran said that his inquiry showed that some repayment checks from the warehouse continued to be held by the bank during the life of the second commodity loan. This was a result, he said, of "insufficient funds" and the fact that the checks were processed when the warehouse account had sufficient funds to cover them.

By Aug. 31, 1977, the warehouse was still in financial difficulty and was unable to pay its current debts. Consequently, Mr. Carter said, Carter Farms, a corporation in which President Carter has a 91 per cent interest, and Mr. Carter personally lent $440,000 to the warehouse to "bail out" the business.

Associated Press

A forklift operator storing bags of peanuts at Carter Warehouse in Plains, Ga.

## Brown Off for Talks in Seoul

WASHINGTON, Oct. 16 (Reuters) — Defense Secretary Harold Brown left today for consultations on security in South Korea and Japan. He will attend the annual military meetings of the United States and South Korea in Seoul tomorrow through Friday. He then goes to Japan where he will confer with military officials and visit Japanese air and ground military installations before returning home next Monday.

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A4 Thursday, December 6, 1979 THE WASHINGTON POST

# Vesco Jury Agrees to Take Taped Testimony From Carter

Associated Press

A federal grand jury investigating a case of alleged White House influence-buying involving fugitive financier Robert L. Vesco has agreed to accept videotape testimony from President Carter, government sources said yesterday.

The sources, who asked not to be identified, said several members of the grand jury objected to the proposed arrangement for questioning Carter on the grounds that they would be unable to submit follow-up questions to the president.

The minority of the grand jurors contended that the president should not be afforded special treatment and that if security was a problem special precautions could be taken, the sources said.

The grand jury is investigating allegations that there was an attempt shortly after Carter took office in January 1977 to quash extradition proceedings against Vesco, who fled the country after his indictment on stock fraud charges. He is believed to be living in the Bahamas.

Under the arrangement for questioning Carter, the president would be interviewed by government lawyers without grand jurors present, sources said. They said negotiations between the White House and the U.S. attorney's office are incomplete and that no date has been set for the videotape interview.

The questions for the president are likely to center on a Feb. 15, 1977, meeting between Carter and an aide, Richard M. Harden.

F. Spencer Lee IV, a Georgia lawyer who allegedly acted as an intermediary in Vesco's behalf, met with Harden in February 1977.

Lee and Harden have said that Harden talked the lawyer out of pursuing the matter.

# Activities Today in Senate, House

## House

Meets at 10 a.m.

Committees:

Agriculture—10:30 a.m. Open. Cont. mark-up Forestry Loan Act, Food Stamp Act amends. 1301 Longworth House Office Bldg.

Armed Services—10 a.m. Open. Res. & Develop. Subcomte. on reprogramming requests. 2212 Rayburn House Office Bldg.

District of Columbia—9:30 a.m. Open. Pending business. H-128 Capitol.

Education & Labor—9:30 a.m. Open. Elem., secondary & Voc. Edu. Subcomte. Oversight hrngs. on innovative school lunch programs. 2175 RHOB.

Education & Labor—10 a.m. Open. Labor-Manage. Relations Subcomte. Oversight hrngs. on pressure in today's workplace. 2261 RHOB.

Education & Labor — 9:30 a.m. Open. Labor Standards Subcmte. Oversight hrngs. on Longshoremen's & Harbor Workers' Comp. Act. 2257 RHOB.

Interior & Insular Affairs—9:45 a.m. Open. Mines & Mining Subcomte. Mark-up geothermal legis. 310 Cannon House Office Bldg.

Interior & Insular Affairs—9:45 a.m. Open. Public Lands Subcomte. Cont. on pending wilderness legis. 1324 LHOB.

Interstate & Foreign Commerce—10 a.m. Open. Cont. mark-up Natl. Energy Conserv. Initiatives Act, 2123 RHOB.

Judiciary—9:30 a.m. Open. Civil & Constit. Rights Subcomte. Cont. hrngs. on FBI charter. 2226 RHOB.

Judiciary—2 p.m. Open. Criminal Justice Subcomte. Cont. mark-up Criminal Code revision. B-352 RHOB.

Merchant Marine & Fisheries—9:30 a.m. Open. Maritime Edu. & Training Subcomte. On Maritime Edu. & Training Act. 1334 LHOB.

Merchant Marine & Fisheries—9:30 a.m. Open. Coast Guard & Navigation Subcomte. Hrng. on compensation for losses resulting from Mexican oil spill. 1302 RHOB.

Public Works & Transportation—10 a.m. Open. Aviation Subcomte. Hrng. on air traffic control system. 2167 RHOB.

Ways & Means—10 a.m. Open Trade Subcomte. Mark-up oil import legis. 1100 LHOB.

Select Comte. on Committees—9:30 a.m. Open. Cont. hrngs. on energy jurisdiction. 2337 RHOB.

## Senate

Meets at 9:30 a.m.

Committees:

Appropriations Subcomte on the District of Columbia—8 a.m. Open. Hearing on D.C. 1979 summer youth program. 1114 Dirksen Office Bldg.

Banking, Housing and Urban Affairs—11 a.m. Open. Hearing on procedures for allocation of mass transportation funds. Followed by hearing on nomination of Theodore Lutz to be administrator of the Urban Mass Transportation Admin. 5302 DOB.

Commerce, Science and Transportation—9:30 a.m. Open. Business meeting. 235 Russell Office Bldg.

Energy and Natural Resources—10 a.m. Open. Business meeting to consider nuclear waste policy and other pending calendar business. 3110 DOB.

Finance—10 a.m. Open. Business meeting to consider U.S. trade status with People's Republic of China; nom. of Michael Smith to be dep. special rep for trade negotiations, and other pending business. 2221 DOB.

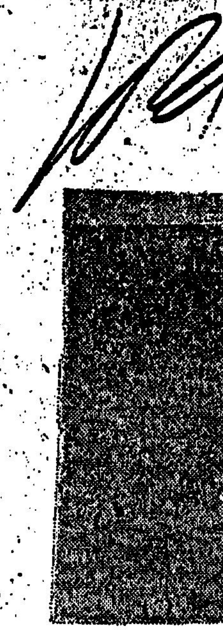
Foreign Relations—10 a.m. Open. Hearing on Special Central American and Caribbean Security Assistance Act, 1979. 4221 DOB.

Foreign Relations—2 p.m. Closed. Subcomte on Near Eastern & South Asian Affairs to hold hearing on current situation in Yemen including military buildup. S-116 Capitol.

Governmental Affairs Subcomte—9 a.m. Open. Energy, Non-proliferation ...

## President's Appointments

The president's appointment's today:

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for Chris...

A Credit Suiss gol...
17-jewel watch on ...
leather wallet, 335 ...
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Falls Church—call ...
Open late, open S...