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How Jefferson Handled It

Presidential Subpoenas

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Thomas Jefferson, the only President other than Richard M. Nixon to be served with a subpoena, refused to make the court appearance that the legal paper ordered, but his refusal was never challenged in court.

The apparent reason was that Jefferson tried to cooperate with the court in every other way. He said he was too busy to travel from Washington to Richmond to testify but he produced the documents the court was seeking and volunteered to be examined in Washington.

Since no one tried to compel Jefferson to appear in the Richmond court, in the way the Senate Watergate Committee and the special prosecutor, Archibald Cox, are trying to compel President Nixon to produce the White House tapes, the incident in 1807 established no legal precedent for the events of 1973.

What the incident did produce was an opinion by Chief Justice John Marshall, sitting as a trial judge rather than on the Supreme Court, holding that the President was subject to subpoena, just like any other citizen.

The occasion was the treason trial of Aaron Burr, who had attempted to organize an armed invasion of Mexico. The prosecution needed a letter that James Wilkinson, one of the conspirators, had written to President Jefferson, informing him of the plot.

Government attorneys asked Marshall, who was presiding over the trial, as Supreme Court justices often did in those days, to issue a subpoena compelling the President to appear and bring with him the Wilkinson letter. After some deliberation, the chief justice complied.

"The first magistrate of the union," Marshall wrote in granting the motion for a subpoena, "may more properly be likened to the first magistrate of a state (than to a king) . . . and it is not known ever to have been doubted but that the chief magistrate of state might be served with a subpoena . . .

"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it would be because his duties as chief magistrate demand his whole time for national objects intended "be withdrawn

"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 rather constitute a reason for not obeying the process of the court than a reason against its being issued.

In declining to honor the subpoena personally, Jefferson wrote the Burr prosecutor that compliance with such court orders "would leave the nation without an executive branch," which the Constitution had never intended 'be withdrawn from its station by any coordinate authority."

Following the Marshall rationale, John Henry Wigmore, in his classic legal text on evidence, declares there is "no reason at all" why a President should enjoy a special privilege not to be a witness in civil or criminal trials.

"The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force," the 1961 edition of Wigmore states. "It does not suffer an exemption which would apply irrespective of the nature of the person's knowledge and would rest wholly on the nature of the person's occupation."

Another President who refused to honor a request for information, but not a subpoena, was Andrew Jackson. In 1835 he declined to give the Senate information on his surveyor general, Gideon Fitz, who had already been dismissed, in connection with hearings on his successor.

Jackson contended that congressional investigators had no right to information about employees of the executive branch even when they had been charged with wrongdoing.

The term "executive privilege" for this general theory was not used until the Eisenhower Administration.

Although the Supreme Court has never ruled on the right of a President to reject a subpoena, the majority in a 1972 decision had some relevant statements about the general responsibility of witnesses to testify.

"Citizens generally," the court observed, "are not constitutionally immune from grand jury subpoenas: and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he had received in confidence."

Subscribing to this view, in a case that denied reporters' any right to refuse to identify sources of information, were all four of President Nixon's appointees to the court: Chief Justice Warren E. Burger and Associate Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist, plus Associate Justice Byron R. White, appointee of John F. Kennedy.