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MEMORANDUM FOR HONORABLE JOHN W. DEAN III
Counsel to the President

Re: Power of Congressional Committee to Compel Appearance or Testimony of Presidential Assistant.

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

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

Thus, if a Presidential assistant is exempt from appearing and testifying before a congressional committee, it is because he has some special immunity or privilege derived from the constitutional doctrine of separation of powers that is not available to others. To the extent there is such an immunity of privilege it must be based upon the assistant's intimate relationship to the President. Although we are not aware of any judicial pronouncement on the question, the general but not uniform practice has been for Presidential assistants in an intimate relationship to the President to decline to appear and testify before congressional committees. On two occasions during the administration of President Truman, a subcommittee of the House Committee on Education and Labor issued subpoenas

to John R. Steelman, who held the title "Assistant to the President". In both instances he returned the subpoena with a letter stating that "In each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee."

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

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

During the Eisenhower Administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential relationship to the President. However, at a later date in the administration he volunteered to testify concerning his dealings with Bernard Goldfine who was charged with violations of federal criminal statutes.

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

Pierson declined to appear, writing the Committee as follows:

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

To the extent that generalizations can be drawn from the precedents it can be said that as a matter of principle a high level Presidential Assistant should be regarded as absolutely immune from testimonial compulsion. He may not only not be interrogated by a Congressional committee but not even be compelled to appear, anymore than the President could. As Chief Justice Marshall stated in the prosecution of Aaron Burr, although maintaining that President Jefferson was legally compellable by the courts to produce documents pursuant to a subpoena:

> "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." Robertson, Report of the Trials of Aaron Burr, Vol. 2, pp. 233, 236.

It would appear that if a Presidential Assistant is invited to testify, an appropriate response can be to advise the committee that the President has directed him not to appear.

Subsequent Proceedings for Failure to Appear or Testify

Should a congressional committee persist in its efforts to obtain the testimony of a Presidential assistant, it can, of course, direct him to appear by serving him with a subpoena.*/ Should the assistant ignore the subpoena the committee may vote to recommend that its parent house cite him for contempt of that house. In that event, 2 U.S.C. § 192 provides that any person who refuses to appear or refuses to testify before any congressional committee shall be guilty of a misdemeanor subject to a fine of not more than $1,000 nor less than $100 and to imprisonment of not less than one month nor more than twelve months. Whenever a witness fails to appear or testify, 2 U.S.C § 194 provides that the failure shall be reported to either House, and it shall be the duty of the President of the Senate or the Speaker of the House, as the case may be, to certify such fact to the appropriate United States Attorney, whose duty it shall be to bring the matter before the grand jury for its action. Although the statute by its terms imposes a mandatory duty on the United States Attorney, we doubt that there is any method whereby he can be compelled to take action; presumably if he did not act he could be subject to impeachment.

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

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*/ The matter is discussed generally and at length in 1 Haynes, The Senate of the United States, 514-535.

The committee then made a report to the Senate, which adopted a resolution directing the President of the Senate pro tempore to issue his warrant commanding the Sergeant at Arms or his deputy to take Mally into custody and bring him before the bar of the Senate to answer such questions as the Senate might propound. The Sergeant at Arms issued the warrant and directed his deputy to execute it, which was done. Mally then petitioned a federal district court for a writ of habeas corpus, which was granted. Upon direct appeal to the Supreme Court, that court reversed. McGrain v. Daugherty, 273 U.S. 135 (1927), supra. The Court brushed aside several technical objections to the procedure followed (pp. 154-9), and stated as the principal question "whether the Senate-or the House of Representatives, both being on the same plane in this regard-has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution" (p. 160). It held that either House had such power. The authority of McGrain has never been questioned, so far as we are aware.

In 1935, in Jurney v. MacCracken, 294 U.S. 125, the Court expressly held that R.S. § 102 (the predecessor of 2 U.S.C. § 192) did not impair the power of either House of Congress to punish for contempt. As the Court said (p. 151):

> "The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment was not considered sufficiently drastic a punishment for contumacious witnesses."

Concluding Comment

It should be noted that the judicial pronouncements have involved alleged contempts of Congress by private persons not by Executive branch officials failing to respond either at the express or implied direction of the President exercising his authority under the doctrine of the separation of powers.

In the case of a Presidential assistant acting either under the express or implied direction of the President exercising his authority under the doctrine of the separation of powers, it appears that two alternative coursesof action are available:

(1) The Presidential assistant could ignore either an indictment founded on 2 U.S.C. §192, or a warrant of arrest by the House of Congress involved, upon the basis that the separation of powers makes him absolutely immune from any such process when acting at the direction of the President. This appears to be a logical extension of the application of the separation of powers doctrine upon which any initial refusal to appear is based.

(2) A second and perhaps more conciliatory and orderly approach would be to seek a judicial resolution of the constitutional issue of whether a committee of Congress has the authority to summon a Presidential assistant to give testimony concerning his official duties. This might be accomplished by a motion to dismiss the indictment, if that method of enforcement is followed, or by a civil action in the nature of a declaratory judgment and injunction against the congressional officer directed by the House involved to execute the warrant.

As is apparent, the first approach is founded upon a complete and absolute reliance on the separation of powers doctrine to the point of not even submitting the matter for a judicial determination. The second approach would necessarily involve an acknowledgment that the doctrine of separation of powers is not completely absolute inasmuch as it contemplates the submission of the matter to a court for determination. Either of these approaches appears to be open, the principal question being the policy determination as to which avenue to follow if the ultimate confrontation occurs.

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