MEMORANDUM

ENFORCEMENT

OF

CONGRESSIONAL SUBPOENAS

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I. INTRODUCTION

The Constitution vests in the House of Representatives the sole power of impeachment.[1] Implicit in the power to impeach are the power to inquire and the power to compel the giving of evidence. The full investigative power of the House has been delegated to the Committee on the Judiciary by H. Res. 803, adopted February 6, 1974.

Because the impeachment power of the House is "the most undebatable express power from which to deduce an implied investigatory power," the House's authority to make impeachment inquiries "has been asserted from the first, and . . . has never been judicially questioned."[2] Indeed, the Supreme Court has contrasted the broad scope of the inquiry power of the House in impeachment proceedings with its more confined scope in legislative investigations.[3] From the beginning of the

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1/ U.S. Const., Art. I, § 2, cl. 5.

2/ Dimock, Congressional Investigating Committees 98, 120 (1929).

3/ Kilbourn v. Thompson, 103 U.S. 168, 193 (1883). "If, indeed, any purpose had been avowed to impeach the Secretary" of the Navy, the Court said, "the whole aspect of the case would have been changed." See also Barry v. U.S. ex rel Cunningham, 279 U.S. 587, 616 (existence of broad inquiry power applicable "a fortiori" when House or Senate exercising special functions, as in impeaching, judging qualifications of Members, etc.).

In Senate Select Committee on Presidential Campaign Activities v. Nixon, ___ F.Supp. ___ (D.D.C., 1974), the District Court for the District of Columbia declined to order President Nixon to produce materials in response to a Congressional subpoena in aid of a legislative investigation, but stated that "Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations." (Slip Opinion, February 8, 1974, at 5).

Federal Government, Presidents have stated that in an impeachment inquiry the Executive Branch could be required to produce papers that it might withhold in a legislative investigation.[4/]

4/ To cite a few examples of Presidential statements, in 1796 the House requested President Washington to furnish his secret instructions to John Jay concerning the negotiations of a treaty with England, apparently basing its request on the theory that it would be necessary for the House to appropriate funds to implement the treaty. Although he gave the Senate the papers because of its constitutional duty to ratify or reject treaties, Washington refused the House request on the ground that "the inspection of the papers asked for" could not "be relative to any purpose under the cognizance of the House . . . except that of impeachment, which [purpose] the resolution [of the House] has not expressed." The plain implication was that if the House request had been made pursuant to an impeachment inquiry, Washington would have honored it. 1 J. Richardson, Messages and Papers of the Presidents 187 (1897).

Similarly, President Polk, while resisting disclosure of certain information, said that in an impeachment inquiry "all the archives and papers of the Executive Department, public or private, would be subject to inspection and control of a committee of [the House] and every facility in the Power of the Executive be afforded to enable them to prosecute the investigation." He "cheerfully admitted" that the House, in an impeachment proceeding, could "investigate the conduct of all public officers under the government" and that

> the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to tell all facts within their knowledge. [4 Id., 434-435]

John Quincy Adams, while a member of the House after his term as President, was of the opinion that the House's inquiry power was broader in an impeachment investigation than otherwise. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 155, 180 (1926).

The power to inquire necessarily implies the further power to compel the production of testimonial and other evidence, to enforce compliance with a subpoena, and to punish noncompliance.[5/] This memorandum discusses the alternative methods that are available to the House for this purpose.

Each of these methods presents problems, especially in the case of a subpoena duces tecum directed to the President. If the President refuses to comply, the practical difficulties of enforcing the subpoena may well be insurmountable, and for this reason this memorandum also raises the possibility that factual inferences may be drawn from presidential noncompliance with a subpoena or that noncompliance may itself be a ground for impeachment.

At the outset, it should be noted that the question of whether a subpoena duces tecum should issue to the President is separate from the question of the method of enforcement or the effect of noncompliance. The principle was stated early in our history, and reaffirmed only recently, that the lack of physical power to enforce process against a President is no reason why the process should not issue.[6/]

5/ McGrain v. Daugherty, 273 U.S. 135, 167 (1927); Jurney v. MacCracken, 294 U.S. 125, 151 (1935).

6/ See United States v. Burr, 25 Fed. Cas. 30 and 190 (1807) (Chief Justice Marshall sitting on circuit); Nixon v. Sirica, 487 F.2d 700, (D.C.Cir. 1973); NTEU v. Nixon, ___ F.2d ___ (D.C. Cir. Jan. 1974); cf. Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838). In Nixon v. Sirica the Court of Appeals stated that "[i]t is clear that the want of physical power to enforce its judgments does not prevent a court from deciding an otherwise justiciable case."

It should not be presumed that rejection of a request for the production of evidence will be followed by disobedience of a subpoena, should one be issued. The President's legal position would be altered by service of a subpoena. Although the Committee's request letters to the President's counsel specifically identified the materials to be produced and clearly expressed the will of the House acting through the Committee, they do not have the legal effect of a subpoena. There is every reason to assume that the President would comply with a subpoena, lawfully issued by the Committee for the purpose of its inquiry. 7/

7/ The President's ultimate response to the subpoena issued by the District Court for the District of Columbia on behalf of the "Watergate" grand jury would lead to the conclusion that the President will obey a lawful subpoena. Following the decision of the Court of Appeals that the President had a legal duty to comply with the grand jury subpoena, he did so. The President's counsel at the time said in an interview following his appearance in court:

> Now, the President, I am certain, has never at any time had in mind any thought of defying the courts . . . . [A]s the President has always done, he obeys the law; he will abide by a definitive decision. . . . [I]f the thought were abroad in the land that the President was not complying with court orders, if a constitutional crisis persisted, then a wound that has hurt the American country deeply would have continued to drain. We wanted to cure that, and so the President this morning, about noon . . . authorized us to make the announcement that we did [that the subpoenaed materials would be delivered to the court].
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> We will comply in every particular with the order of the District Court as it was modified by the Court of Appeals.

Weekly Compilation of Presidential Documents, October 29, 1973, Vol. 9, No. 43, at 1278.

Only a few days ago the President announced he had complied with another subpoena issued at the request of the Special Prosecutor, without challenging it in court.

From the outset the goal of the Committee and its staff has been to obtain the materials it has requested. If the President complies with a subpoena and produces the materials the Committee seeks, the Committee and the House will be in a better position to evaluate fully and on the merits whether or not grounds for impeachment exist. Such an evaluation is preferable to one based on incomplete evidence or partly on the President's refusal to produce further evidence the Committee considers necessary for its inquiry.

II. DIRECT ENFORCEMENT THROUGH THE PROCESSES OF THE HOUSE

The House has the power to hold in contempt a person who has disobeyed its subpoena.[1] The usual practice is for the Committee that issued the subpoena to report the disobedience to the House, setting forth the circumstances of the refusal and recommending the adoption of a contempt resolution or order.[2] The full House votes to require the arraignment of the contumacious witness before the bar of the House. If he does not satisfy the House that his refusal to testify or to produce papers was justified, or that by compliance he has purged himself of his contempt, he may be adjudged in contempt of the House, and by order or resolution of the House he may be incarcerated for a period not lasting beyond the term of the House of Representatives that imprisoned him.[3] Alternatively, it would appear that the House may merely reprimand or censure him without directing his further imprisonment.[4]

In the exceptional circumstances of a President's failure to comply with a subpoena, the House may prefer to request the President to appear

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1/ The House also presumably has the power, through its Sergeant-at-Arms, to seize the evidence requested by its subpoena for production at the bar of the House. See Barry v. United States ex rel Cunningham, 279 U.S. 597, 610 (1929). The practical difficulties of this procedure are obvious.

2/ See Rules of the House of Representatives, Rule XI(1); 3 Hinds, Precedents of the House of Representatives §§ 1667, 1669, 1670, 1671, 1695, 1696, 1701.

3/ In Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), the Supreme Court intimated that the House might also impose other civil sanctions (such as a fine) to compel obedience to its subpoena.

4/ See 3 Hinds §§ 1606, 1625.

in person or through counsel at the bar of the House to show cause why he should not be found in contempt, rather than pursuing the more usual arrest and arraignment procedure.

The House has a considerable degree of discretion in the procedures by which it chooses to conduct a contempt proceeding. Not all the procedures used in a court trial are required,[5] although fundamental fairness is, and the courts will presume the regularity of Congressional proceedings unless there is a manifest abuse of discretion.[6]

The courts have been reluctant to intervene to quash a Congressional investigative subpoena at the insistence of the subpoenaed party.[7] A fortiori, that should be true respecting a subpoena issued in an impeachment inquiry.[8] However, an arrested witness may file a petition for a writ of habeas corpus in the appropriate federal court. The function of a court in such a case is limited to determining whether the action of the House of Congress was within its jurisdiction, and does not extend to adjudicating the guilt or innocence of the contemnor.[9]

5/ Groppi v. Leslie, 404 U.S. 496, 500-502 (1972).

6/ Barry v. United States ex rel Cunningham, 279 U.S. 597, 611, 619-620 (1929); Marshall v. Gordon, 243 U.S. 521, 545 (1917).

7/ See Mins v. McCarthy, 209 F.2d 307 (D.C. Cir., 1953); Fischler v. McCarthy, 117 F. Supp. 643 (S.D. N.Y.). But see United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973).

8/ See Part I, note 3 supra.

9/ Jurney v. McCracken, 294 U.S. 125, 152 (1935); Stewart v. Blaine, 1 MacArthur 457 (D.C. Sup. Ct., 1873), 3 Hinds § 1713.

III. ENFORCEMENT THROUGH THE JUDICIAL PROCESS

Because the powers of impeaching and removing federal officers are vested by the Constitution exclusively in the Congress, it may be thought inappropriate to seek the aid of the judicial branch in exercising these powers.[1/] Moreover, as a practical matter, the courts have no means to enforce compliance with process in a presidential impeachment inquiry that are not also available to the House itself through its own procedures.

The usual mode of enforcement of congressional subpoenas is for Congress to refer contempts to the appropriate U.S. Attorney for criminal prosecution under 2 U.S.C. §§ 192 and 194. Those statutes provide for a fine of from $100 to $1000 and imprisonment of from one to twelve months upon conviction.

The advantages of this statutory procedure are that it does not require a contempt hearing on the floor of the House and that the penalty of imprisonment may extend beyond confinement during the term of the present House. Criminal proceedings, however, would pose a number of problems for this inquiry, including delay, the uncertainty of relying upon the Executive Branch to prosecute the Chief Executive,

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1/ Cf. Kilbourn v. Thompson, 103 U.S. 168, 190 (1880). The framers of the Constitution explicitly denied the judiciary a role in impeachment, vesting the totality of the impeachment power in the legislative branch alone. 2 The Records of the Federal Convention, 551-553 (M. Farrand ed. 1911). See also Ritter v. United States, 84 Ct. Cl. 293 (1936), cert. denied 300 U.S. 668 (1937) (conviction by the Senate after impeachment not subject to judicial review).

and doubt whether an incumbent President may be prosecuted for a criminal offense before his impeachment and removal from office.

A civil proceeding to compel compliance by the President might lie under 28 U.S.C. Sec. 1361, conferring jurisdiction on the Federal district courts to hear "any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[2/] Under the mandamus statute, however, the concept of "duty" is quite limited and technical. It might be argued that the obligation to obey a subpoena does not fall within the statutory definition,[3/] leading to delay while that threshold jurisdictional issue was litigated.

While civil proceedings might be brought under other existing

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2/ In NTEU v. Nixon, ___ F.2d ___ (1974), the Court of Appeals held that it had jurisdiction under the mandamus statute to order the President to put into effect a statutory civil service pay increase. It withheld issuance of the writ of mandamus, however, and directed the district court to issue a declaratory judgment instead, in the expectation the President would comply. The White House thereafter announced it would comply and would not seek further review.

3/ Compare Senate Select Committee v. Nixon, ___ F. Supp. ___ (D.D.C. 1973), remanded for reconsideration, ___ F.2d ___ (D.C. Cir. 1973), with NTEU v. Nixon, ___ F.2d ___ (D.C. Cir. 1974). It should be noted, however, that the Senate Select Committee decision respecting whether the President had a "duty" (as that term is used in the mandamus statute) to honor a Senate subpoena might well be inapplicable to a subpoena issued by this Committee in an impeachment proceeding.

statutes, they may also raise jurisdictional issues.[4/] Legislation was recently enacted expressly vesting jurisdiction in the district court to hear an action brought by the Senate Select Committee on Presidential Campaign Activities to compel compliance with its subpoenas.[5/] Similarly, new legislation probably could resolve other litigation difficulties. Consideration should be given, however, to the time required for the passage of legislation, the possibility of a Presidential veto and consequent necessity for a vote to override,[6/] as well as to potential delays encountered routinely in litigation and enforcement problems once a court order is obtained.

4/ A suit to compel production of evidence might also be brought under the "federal question" jurisdictional statute, 28 U.S.C. Sec. 1331. However, a serious problem might be encountered in satisfying the $10,000 minimum "amount in controversy" required under that section.

Other potential civil remedies include a petition for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and a proceeding under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. However, it is doubtful whether the Declaratory Judgment Act creates anything more than an additional remedy for a claim for relief derived from some other source, and it is clear that it does not expand the subject matter jurisdiction of the district courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937); compare Senate Select Committee v. Sirica, supra.

The same jurisdictional problem may be presented in an action based on the Administrative Procedure Act, and there may be other questions as well concerning the substantive applicability of that Act to this situation. Compare Senate Select Committee v. Nixon, supra.

5/ P.L. 93-190.

6/ It should be noted, however, that the President permitted the Senate Select Committee bill to become law.

IV. NONCOMPLIANCE AND THE IMPEACHMENT INQUIRY

Realistically, the President probably cannot be compelled to comply with a subpoena duces tecum by use of the processes of either the House or the courts. Rather than being considered solely in terms of the availability of coercive means of enforcement, however, noncompliance may also be addressed in terms of its effect in the impeachment proceeding itself. This question is one of first impression. There is no direct precedent, and what little material exists from past impeachment inquiries is of limited usefulness.[1/]

1/ Article X of the articles of impeachment voted by the House against Andrew Johnson alleged that, by making speeches highly critical of Congress, Johnson "did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof," charging this to be a high misdemeanor. Cong. Globe, 40th Cong., 2d Sess. 1638-39 (1868). It may be doubted, however, whether this charge (which was never voted upon by the Senate) involved a true contempt. See Marshall v. Gordon, 243 U.S. 521 (1917).

In 1879, the Committee on Expenditures in the State Department reported articles of impeachment against George Seward, former consul-general at Shanghai, including a charge that Seward had concealed and refused to deliver up certain records. H.R. Rep. No. 134, 45th Cong., 3d Sess., at 6 (1879). The House adjourned without voting on the Seward impeachment; the Judiciary Committee, to which was referred the question of whether Seward should be held in contempt for his refusal to produce books and papers, recommended against contempt primarily on the ground that Seward had validly claimed his Fifth Amendment privilege against self-incrimination. H.R. Rep. No. 141, 45th Cong., 3d Sess. (1879).

One policy issue suggested by these two cases -- though not directly addressed by them -- is whether the officer should be formally adjudged in contempt of the House before consideration of his conduct in the impeachment proceeding.

In determining what effect should be given to noncompliance, the Committee would have to consider the degree of noncompliance and any stated reasons for it, including any claims of privilege. Noncompliance by the President with a subpoena issued by the Committee could be taken into account in the impeachment inquiry in two ways:

First, under some circumstances an inference negative to the President might be drawn from his refusal to produce materials sought by the Committee. In litigation generally, an unjustified refusal to produce evidence within the control of a party "permits the inference that its tenor is unfavorable to the party's cause,"[2/] and the same principle might be deemed applicable in an impeachment proceeding.

Second, unjustified noncompliance might be considered independently in determining whether sufficient grounds exist for impeachment of the President. For example, contempt of the House arising from such noncompliance is prosecutable as a federal crime. And unjustified disobedience of a subpoena issued by a Committee exercising the sole power of impeachment would be an action in derogation of the authority explicitly vested by the Constitution in the House of Representatives.

2/ 2 Wigmore, Evidence § 285 at 162. See also, e.g., McCormick, Evidence 416 n. 3; Hoffman v. Commissioner of Internal Revenue, 298 F.2d 784 (3d Cir. 1962).