When a President Was Summoned to Testify

Two very recent events in American political history have sent the constitutional authorities and students to the old books. The first happened when both senate and house were debating the propriety of permitting members to answer a summons issued by a judge sitting in the District of Columbia; the other when it was suggested that President Taft might be invited to take the witness stand in the Ballinger-Pinchot controversy. Some of the debaters insisted that such a case had never arisen and, particularly in the latter, there were those who insisted that the members of the investigating committee who declared that the committee had a right to summon the president could not show any precedent to warrant such a proceeding. All of which paves the way to the case in point.

Aaron Burr, late Vice President of the United States, was tried in the United States circuit court held at Richmond, Va., at the spring term of 1807. He had been indicted for the crime of high treason, in levying war against the country, and for a misdemeanor in preparing a military expedition against Mexico, then a territory of the king of Spain, with whom the United States was at peace. The event was most remarkable of any that had, up to that time, marked the judicial annals of the nation.

Burr had but recently been a candidate for the presidency and had lacked but one electoral vote of success. Thomas Jefferson had beaten him, but Burr was made vice president and as president of the senate acquitted himself in such a manner as to add to his reputation. While yet vice president he had killed Alexander Hamilton in a duel and thereafter was hated by the federalists, while the followers of Jefferson believed that he had been unfair in his contest for the presidency. At a time when his fortune and influence were waning he conceived the idea of invading Mexico and created the rendezvous at Blennerhassett's Island. Then came his communication to General Wilkinson and the story of how he finally disclosed the plot is history.

Presiding over the court was John Marshall, chief justice of the supreme court of the United States, and before him Colonel Burr moved that a subpoena duces tecum issue, directed to the United States marshal, commanding him to summon Thomas Jefferson, president of the United States, to appear before the court and bring with him, according to the exigency of the precept, the papers desired and designated in the prisoner's affidavit filed, especially the letter of General Wilkinson to the president, dated the 21st of October, 1806, and addressed directly to him.

Counsel for the government vigorously opposed the motion. It was declared by them to be wholly unnecessary, without any precedent, inconsistent with the president's official position and duties, and that it only tended, if it were not deliberately designed, to disparage and affront him. The discussion before the court lasted several days, and after the arguments were completed the chief justice delivered the opinion sustaining the motion. The opinion was long, but some extracts will serve to indicate the reasoning on which the conclusion rested:

"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. * * * In the provisions of the constitution and of the statute which gives to the accused a right to the compulsory process of the court, there is no exception whatever. * * *

"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 can not be named in debate. By the constitution of the United States the president as well as every officer of the government, may be impeached and may be removed from office for 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 people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. * * *

"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 the court is required it would be sworn on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. * * * It can not be denied that to issue a subpoena to a person filling the exalted station of chief magistrate is a duty which would be dispensed with much more cheerfully than it would be performed. But if it be a duty the court can have no choice in the case. * * * The court can perceive no legal objection to issuing a subpoena duces tecum to any person whomsoever, provided the case be such as to justify the process. * * *"

At the time the ruling of the chief justice was bitterly arraigned and since then several modern writers have dissented, the majority of these taking the view of Jefferson, who denounced the opinion as an offensive trespass on the executive department of the government. The president was indignant and promptly and emphatically denied the power of the court to require his attendance as a witness. He did not obey the summons and the court admitted that it had no authority to enforce his presence. This singular assertion of a right to command, not backed by a power to enforce, made the president more angry. He had stated that he was ready to send any papers which might be pertinent, but he repudiated the notion that the court could properly order him to take the stand as a witness.

Concerning the matter Jefferson wrote: "Laying down the position generally that all persons owe obedience to subpoenas, he (Marshall) admits no exception unless it can be produced in his law books. * * * The constitution enjoins his (the president's) constant agency in the concerns of 6,000,000 of people. Is the law paramount to this, which calls on him on behalf of a single one? Let us apply the judge's own doctrine to the case of himself and his brethren. The sheriff of Henrico summons him from the bench to