

PRESIDENTS AND EX-PRESIDENTS AS WITNESSES: A BRIEF HISTORICAL FOOTNOTE

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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.

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

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).

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-

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.

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. Burr*, 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 subpoena *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).

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 abundantia 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 deposition underscores the poor transportation

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.

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 appearance³²

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 from 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 unsupported³⁴ 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.*

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 E. 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).