

45TH CONGRESS, 3d Session.	}	HOUSE OF REPRESENTATIVES.	{	Report No. 141.
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George F. Seward

March 3, 1879.—Ordered to be printed.

MR. BUTLER, from the Committee on the Judiciary, submitted the following

REPORT:

*The Committee on the Judiciary, to whom was referred the matter of alleged contempt of George F. Seward, having considered the matter referred to them, beg leave to report:*

The principal question submitted to the Committee on the Judiciary by the House, although of little practical importance to the case in which it arose, owing to the near close of the session, yet is of so much gravity as a precedent involving the constitutional rights of the citizen as to merit a much more extended investigation than it has been possible to give it in the time permitted to us. The committee would therefore state rather the conclusions to which they came than the arguments and authorities by which those conclusions might well be supported.

The facts necessary to raise the question succinctly state themselves in this way: By resolution of the House the Committee on Expenditures in the State Department were in charge of the investigation of the official conduct of George F. Seward, late consul-general of the United States in China, and now minister resident there. Mr. Seward came before the committee, appeared by counsel; charges were filed against him for sundry malfeasances in office, looking to his impeachment, if proven; and evidence was taken to sustain such charges. The committee deemed it important that they should have before them certain books kept by him while such consul-general, and which, it was claimed, showed entries tending to substantiate the accusations. There was evidence before the committee tending to show that those books were the public records of the consulate, and the property of the United States. Mr. Seward claimed that they were books in which he kept his governmental and his private transactions for his personal use, and that he had returned to the State Department or left in the consulate all the books of the United States. The committee procured a subpoena *duces tecum* directed to him, which was served on Mr. Seward, commanding him to produce these books for the purpose of being used in evidence against him. Mr. Seward appeared in obedience to the subpoena, but declined to be sworn as a witness in a case where crime was alleged against him, and where articles of impeachment might be found against him, claiming, through his counsel, his constitutional privilege of not being obliged to produce evidence in a criminal case tending to criminal himself.

Upon this refusal, the Committee on Expenditures in the State Department brought Mr. Seward before the House to show cause at its bar why he should not be

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sworn as a witness, and why he should not obey [\*2] the order of the House, through it subpoena, to produce the documentary evidence called for.

Mr. Seward, when before the House, in answer to the question of the Speaker, set up practically the same claim that he did before the committee. Upon a resolution proposed by the minority of such committee, the question was referred by a vote of the House to its Judiciary Committee as to whether the cause shown by Mr. Seward for not obeying the subpoena of the House and declining to be sworn as a witness was a sufficient answer.

Investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committee of the House, so far as we are instructed; and it is believed that the case cannot be found as a precedent where the party charged has ever been called upon and compelled to give evidence in such case. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation; but even in those cases it was early held that a person called as a witness, and not a party charged before the committee, was not bound to criminate himself; and a statute familiar to the House, for the protection of witnesses under such circumstances, from having the evidence given, used against them, was passed.

In making an investigation of the facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the nation to present that officer for trial before the highest court known to our Constitution, the Senate of the United States, for such punishment as may be constitutionally imposed upon him, which is very severe in its penalties, and even then does not exonerate the party from further prosecution before the proper courts for offenses against the laws.

If these books of Mr. Seward's are his private books, kept for his personal use, or whether they contain records of his action as a public officer intermixed or otherwise with his private transactions, it is believed he cannot be compelled to produce them. A public officer may well keep a duplicate set of records of his transactions as such for his own use and protection, and he may, at his will, mingle therewith his own private transactions; and as a party to a contestation between the United States and himself, looking to his trial and punishment for alleged criminal transactions, he cannot be compelled to produce such books nor answer concerning them, but he is protected by the constitutional provision (which is, after all, only a translation of a clause of Magna Charta), and which is a distinguishing characteristic of criminal procedure at common law in England, as opposed to criminal procedure by the civil law in other European states. Even if he had possessed himself of public records which contained evidence to accuse him of crime in such a contestation (which makes a criminal case), it seems to your committee the question would be more than doubtful whether he could be called upon to produce such books.

A subpoena *duces tecum* is not the remedy of the government. If he has embezzled or stolen the books, he may be proceeded against criminally therefor. If he refuses to produce them to his superior officer who has a right to call for them public books, then they may be got out of his hands by writ of replevin or other proper process.

If the question in whom is the title to these books would be the test as to the question whether the accused himself were obliged to produce them as evidence against

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himself, then a question would at the outset [\*3] arise, how is title to be tried? If the books are private, they are not to be produced. Can a man's title to his private property be tried and decided against him collaterally so as to deprive the accused of his rights? Your committee believe that it cannot.

If, as the Committee on Expenditures in the State Department believe, these are public books, then it seems very clear to your committee that that committee have mistaken the proper procedure in court of justice. Their subpoena *duces tecum* should be issued to the highest executive officer having charge, custody, and control of such public records. Since the case of Burr, where subpoena *duces tecum* was demanded of the court by the defendant against Thomas Jefferson, then President of the United States—and the right to have such writ issued was determined by the Chief Justice—to have certain letter, known as “the Wilkinson letter,” then on the files of the State Department, produced, the usual course has been for committee of Congress to direct letter to the head of the proper department, or the House, by resolution, to call upon the proper executive officer, to produce the same, leaving that officer to get possession of the books from his subordinate by any lawful means. But it may be asked, cannot the House direct subpoena to any executive officer of the departments to produce any books actually in his possession in the course of official duty, and bring them before the House for the purpose of information or to aid an inquiry? Certainly that can be done, and, in proper cases, ought to be done; but, in contemplation of law, under our theory of government, all the records of the executive departments are under the control of the President of the United States; and, although the House sometimes sends resolutions to head of a department to produce such books or papers, yet it is conceived that, in any doubtful case, no head of department would bring before committee of the House any of the records of his office without permission of, or consultation with his superior, the President of the United States; and all resolutions directed to the President of the United States to produce papers within the control of the Executive, if properly drawn, contain a clause, “if in his judgment not inconsistent with the public interest.” And whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The highest exercise of this power of calling for documents, perhaps, would be, in the course of justice, by the courts of the United States, and the House would not for moment permit its journals to be taken from its possession by one of its assistant clerks and carried into a court in obedience to subpoena duly issued by the court.

The mischief of the House calling for documents might easily be a very great one. Suppose the President is engaged in a negotiation with a foreign government, one of a most delicate character, upon which peace or war may depend, and which it is vitally necessary to keep secret; must he, at the call of the House, or of any committee of the House, spread upon its records such state secrets to the detriment of the country! Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive

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department kept secret. [\*4] The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

Your committee regret that it has been impossible for the House to afford them sufficient time in which this grave question might be more satisfactorily and exhaustively examined; but, viewing it with the best light in which we find it, we are constrained to the conclusion at which we have arrived.

Therefore, your committee report to the House that, in their opinion, George F. Seward has shown sufficient cause why he should not be sworn as a witness in the investigation of charges looking to his impeachment by the Committee on Expenditures in the State Department, and why he should not produce the books, whether they are private books solely, or, for the reason above stated, are public books, in which criminatory matter may be contained; and therefore recommend the adoption of the following resolution:

*Resolved*, That, under the facts and circumstances reported from the Committee on Expenditures in the State Department, George F. Seward was not in contempt of the authority of this House in refusing to be sworn as a witness or produce before said committee the books mentioned in the *subpoena duces tecum*.

BENJ. F. BUTLER.

*For the Committee*