

Article XIII of the treaty contemplates only such materials and supplies as are intended for the construction and operation of the canal.

The effect of the order above quoted, therefore, is to prevent direct shipments into the Zone; and any goods consigned to Panama or Colon, although ultimately to go to the Zone, are shipped to a foreign country, at the ports of which they must be entered and where they would pay duty.

This being so, I am of opinion that distilled spirits withdrawn for shipment to Panama or Colon would be withdrawn for shipment to a place without the jurisdiction of the United States, within the letter and spirit of the statutes.

Respectfully,

W. H. MOODY.

The SECRETARY OF THE TREASURY.

EXECUTIVE DEPARTMENT—OFFICIAL RECORDS—TESTIMONY.

The head of an Executive Department is not legally bound, in obedience to a subpoena of a court, to appear in a suit between private parties and testify to facts which have come to his knowledge officially; but he may appear and give such testimony as he shall deem proper.

The head of an Executive Department may properly decline to furnish official records of his Department, or copies thereof, or to give testimony in a cause pending in court between private parties, respecting facts which have come to his knowledge officially, whenever in his judgment the production of such papers or the giving of such testimony might prove prejudicial, for any reason, to the Government or to the public interest.

The head of an Executive Department may legally prohibit the chief of a bureau from producing in court any official records of the Department, or certified copies thereof, in obedience to a subpoena *duces tecum*, and from making or certifying copies of such official records.

The records of Executive Departments are quasi-confidential in their nature, and must be classed as privileged communications whose production can not be compelled by a court without express authority of law.

DEPARTMENT OF JUSTICE,

January 9, 1905.

SIR: Your letter of January 5 advises me that in a certain action pending in the courts of the State of New York a commission has been issued for the purpose of taking your

testimony and that of Commissioner-General of Immigration, and that the Commissioner-General has been summoned to produce in court certified copies of certain papers on file in the appointment division of your Department, for use in said case. Whereupon you request my opinion upon the following questions:

1. Is the Secretary of Commerce and Labor legally bound to obey a subpoena of a court to appear and testify?

2. To what extent and upon what grounds may the Secretary decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court?

3. May the Secretary legally prohibit the chief of a bureau of the Department from producing in court official records, or certified copies thereof, in obedience to a subpoena *duces tecum*, and from making or certifying copies of such official records?

Although I find nothing in the law or decisions of the courts regarding the duty of the head of an Executive Department to obey the subpoena of a court requiring him to appear as a witness, an examination of the authorities makes it clear that in the event of his so appearing he may properly refuse to testify or furnish official records, if, in his judgment, to do otherwise would be prejudicial to the interests of the Government or of the public.

The case of *Marbury v. Madison* (1 Cr., 137) furnishes a precedent for the appearance in court as a witness of the head of an Executive Department. There Attorney-General Lincoln, having been summoned, objected to giving testimony as to certain facts which came officially to his knowledge while acting as Secretary of State, stating, among other reasons for such objections, that while he respected the jurisdiction of the court, he felt bound to maintain the rights of the Executive; that "it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially." The court said in reply that they had no doubt the Attorney-General should answer the question whether certain documents had been in his office as Secretary of State, that fact

not being of a confidential nature, but that he was not bound to disclose what had become of the papers.

In an opinion of Attorney-General Devens (15 Opin., 378) it was held, where a United States district attorney had been subpœnaed to appear as a witness in a suit between private parties and to bring with him certain correspondence between himself and the Commissioner of Internal Revenue, that such official correspondence must be deemed to belong to that class of communications which, on considerations of public policy, are regarded as privileged. Citing various English cases upon the rule exempting official papers from being used in evidence, the opinion concludes:

“While I entertain no doubt that the letters and telegrams which passed between the Commissioner of Internal Revenue and the United States attorney, regard being had to their subject-matter, fairly come under the protection of the principle above adverted to, it seems to me that it would be proper for the latter officer to appear before the court in obedience to the subpœna, and to there object to produce the papers called for on the ground that their production would be prejudicial to the public interests, if, in his judgment or in that of the Commissioner, such would be the case. It may reasonably be presumed that the court, on the objection being made, will be governed by the prevailing rule of law, according to which the production of the papers would seem not to be compellable.”

I may refer also to another opinion of Attorney-General Devens (16 Opin., 24), in which he held that in a suit instituted for the recovery of certain internal-revenue taxes the court had no authority to compel the production of the reports and documents on file in the Treasury Department upon which the Commissioner had acted in making the assessments, for the reason, among others, that the papers were of a private and confidential character between officers of the Government.

By section 161, Revised Statutes, each head of an Executive Department is authorized “to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, * * * and the custody, use, and preservation of the records, papers,

and property appertaining to it." It thus appears that the head of a Department has full charge and control of all the records and papers belonging to the Department. His authority to prescribe whatever rules and regulations he may deem proper regarding their use and custody is unlimited, so long as "not inconsistent with law." Such broad discretion would necessarily include the right to determine whether certain documents should or should not be taken from the files of the Department for any purpose except for use in connection with departmental business, and in accordance with his determination so to instruct the chiefs of bureaus or other officers concerned.

This power is recognized by section 1076, Revised Statutes, which authorizes the Court of Claims to call upon the Departments for any information or papers it may deem necessary, but provides that "the head of any Department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest."

That the head of a Department may legally prohibit an officer from producing in court or elsewhere official records was authoritatively decided in *Boske v. Comingore* (177 U. S., 459). In that case a United States collector of internal revenue had been adjudged in contempt because he refused to obey an order of the court requiring him to file with his deposition copies of certain official reports in his custody, basing his refusal upon a Treasury regulation which forbade the use of such records except for purposes relating to the collection of revenue. The Supreme Court held that the regulations were such as the Secretary of the Treasury could legally prescribe and that the court was without jurisdiction to compel the collector to violate them, saying (p. 469):

"Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. * * * At any rate, the Secretary deemed the regulation in question a wise and proper one, and we can not perceive that his action was beyond the

authority conferred upon him by Congress * * * In our opinion, the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate * * * all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve, for his own determination all matters of that character."

Recurring to your first question, it should be noted that on the trial of *Aaron Burr*, Chief Justice Marshall sustained an application for a *subpoena duces tecum* directed against the President, drawing a distinction between the President and the King of England, and holding that all officers of the United States, including the Chief Executive, are subordinate to the law.

"If in any court of the United States it has ever been decided that a subpoena can not issue to the President, that decision is unknown to this court." (Trial of Aaron Burr, by Robertson, p. 181.)

It seems that the subpoena was to produce a certain letter written to the President. When the process was received, the President wrote to the district attorney, stating that he could not conceive how the court should order him to attend the trial by subpoena. The letter in question was, however, transmitted to the district attorney, who was authorized by the President to withhold such portions as he should in his discretion deem immaterial. Upon a copy of part of the letter being produced in court, Burr moved for compulsory process to compel the production of the original letter, but at that point the court hesitated, and no further steps were taken toward enforcing the doctrine laid down by Chief Justice Marshall.

The *Burr* case was cited by counsel on both sides in *Mississippi v. Johnson* (4 Wall., 475), which was a suit for injunction to restrain the President from carrying into effect certain acts of Congress. The court limited its inquiry to the single point involved and expressed no opinion on the broader questions.

From the above it seems clear that while a subpoena may be directed against the President to produce a paper, or

for some other purpose, in case of his refusal to obey the subpoena, the courts would be without power to enforce process. (cf. *Kendall v. United States*, 12 Pet., 524.)

In view of the foregoing, I have the honor to advise you, regarding your first question, that in the absence of specific authority on the subject, I am inclined to think that you are not legally bound to appear and testify in obedience to a subpoena of a court. This question, however, does not actually arise upon the facts which you submit, and is therefore at present hypothetical. Yet it is to be remembered that Attorney-General Lincoln saw fit to respond to a subpoena to testify as a witness by appearance in court for that purpose. I would suggest that in this instance, inasmuch as it is purposed to take the testimony by commission, and you are thus not required to appear in court, but before a referee or commissioner, an arrangement might readily be made which would better comport with the dignity of your office, as the head of an Executive Department of the Government, whereby such testimony as you should deem proper and advisable to give could be taken at the Department of Commerce and Labor.

As to your second question, I am of opinion that under the authorities cited above you may properly decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court, whenever in your judgment the production of such papers or the giving of such testimony might prove prejudicial for any reason to the Government or to the public interest. The records of your Department are executive documents acquired by the Government for the purpose of administering its own affairs; they are to a certain extent *quasi* confidential in their nature, and must therefore be classed as privileged communications whose production can not be compelled by a court without the express authority of a law of the United States.

For the same reason and upon the same authorities I have the honor to answer your third question in the affirmative.

Very respectfully,

W. H. MOODY.

THE SECRETARY OF COMMERCE AND LABOR.