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THE POWER OF THE PRESIDENT
TO WITHHOLD INFORMATION
FROM THE CONGRESS

MEMORANDUMS OF THE ATTORNEY GENERAL

COMPILED BY THE
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OF THE
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UNITED STATES SENATE



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PREFACE

The Senate Subcommittee on Constitutional Rights has as one of its continuing functions a study of the extent to which constitutional rights are respected and enforced in the United States. The materials published herein deal with one very important aspect of this part of the subcommittee's work—an examination of the constitutional power of the executive branch of the Government to withhold information from the Congress.

Chief among the materials presented here is a study sent by the Deputy Attorney General to the Subcommittee on Constitutional Rights in response to a request by the chairman of the subcommittee for an expression of views by the Attorney General. This study, together with the memorandum attached to the President's letter of May 17, 1954, to the Secretary of Defense, apparently represent the considered views of the Attorney General on the scope of the power of the President to withhold information from the Congress.

This document has been printed because it is felt that the views of the Attorney General should be readily available in convenient form for the use of the Committee on the Judiciary of the United States Senate.

Publication of these materials should in no way be construed as an approval by the subcommittee of any of the views expressed.

THOMAS C. HENNINGS, Jr.
Chairman, Senate Subcommittee on Constitutional Rights.
FEBRUARY 6, 1958.

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THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS

LETTER FROM SENATOR THOMAS C. HENNINGS, JR., TO ATTORNEY GENERAL HERBERT BROWNELL, JR.

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,

March 13, 1957.

Hon. HERBERT BROWNELL, Jr.,
Attorney General of the United States,
Department of Justice, Washington, D. C.

DEAR MR. ATTORNEY GENERAL: During the past year, the Senate Judiciary Subcommittee on Constitutional Rights has been making a study of complaints it has received from many quarters concerning a growing tendency in this country toward secrecy in Government and the improper withholding of information by various public officials. The subcommittee's interest has centered, of course, on those aspects of the subject dealing with or affecting constitutional rights.

In the course of our study, we have come across a number of instances in which executive departments or agencies have refused to give information requested by a committee or subcommittee of Congress. Some of the departments and agencies involved have cited as their authority for refusing to supply such information the letter written by the President to the Secretary of Defense on May 17, 1954, directing that Secretary to instruct the employees of his Department not to testify or produce documents concerning certain matters in their appearances at the Army-McCarthy hearings.

These refusals by executive departments and agencies to supply information to Congress, together with the citation of the President's letter of May 17, 1954, as the basis for such refusals, raise several serious constitutional questions. So that this subcommittee may have a more complete understanding of the basis and scope of the right claimed by executive departments and agencies to withhold information from Congress, the following questions are submitted to you as the chief legal officer of our Government.

(1) By what authority and under what circumstances may the President withhold requested information from Congress?

(2) What limitations are there, if any, on the President's power to withhold information from Congress?

(3) Under what circumstances may the President delegate to others his power to withhold information from Congress? (In other words, to what extent is any such power "personal" to the President alone?)

(4) In view of the fact that the President's letter of May 17, 1954, is limited by its very terms to Defense Department employees appearing at the Army-McCarthy hearings, may it properly be cited now by executive departments or agencies as authority for withholding information from Congress?

Your answers to these questions should be very helpful to the subcommittee in its present work.

Very truly yours,

THOMAS C. HENNINGS, Jr.,
Chairman.

LETTER FROM DEPUTY ATTORNEY GENERAL WILLIAM P. ROGERS TO SENATOR THOMAS C. HENNINGS, JR.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, April 10, 1957.

Hon. THOMAS C. HENNINGS, Jr.,
Chairman, Subcommittee on Constitutional Rights,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: This is with reference to your letter to the Attorney General of March 13, 1957, requesting answers to a number of questions concerning the furnishing of information to the Congress by executive departments and agencies. The letter states that the questions have been submitted in order that your subcommittee may have "a more complete understanding of the basis and scope of the right claimed by executive departments and agencies to withhold information from Congress."

There is enclosed herewith a copy of a study prepared in this Department on the following question: "Is a congressional committee entitled to demand and receive information and papers from the President and the heads of departments which they deem confidential, in the public interest?" The study discusses the matter in a comprehensive manner, and supplies the answers to the first three questions posed by your letter. The fourth question is answered by the President's letter to the Secretary of Defense of May 17, 1954. This letter is merely a restatement of principles which have been in effect since President Washington's administration; and, of course, these principles continue to be binding on all departments and agencies in the executive branch.

Sincerely,

(Signed) WILLIAM P. ROGERS,
Deputy Attorney General.

IS A CONGRESSIONAL COMMITTEE ENTITLED TO DEMAND AND RECEIVE INFORMATION AND PAPERS FROM THE PRESIDENT AND THE HEADS OF DEPART- MENTS WHICH THEY DEEM CONFIDENTIAL, IN THE PUBLIC INTEREST?

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INTRODUCTORY

For over 150 years—almost from the time that the American form of government was created by the adoption of the Constitution—our Presidents have established, by precedent, that they and members of their Cabinet have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. American history abounds in countless illustrations of the refusal, on occasion, by the President and heads of departments to furnish papers to Congress, or its committees, for reasons of public policy. The messages of our past Presidents reveal that almost every one of them found it necessary to inform Congress of his constitutional duty to execute the office of President, and, in furtherance of that duty, to withhold information and papers for the public good.

Nor are the instances lacking where the aid of a court was sought to obtain information or papers from a President and the heads of departments. Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion. Students of political science and of our constitutional theory of government are not in disagreement as to the fundamental fact that Congress has not the power, as 1 of the 3 great branches of the Government, to subject either of the other 2 branches to its will.

The proposition may be simply stated: We have three divisions of government, the legislative, the executive, and the judicial. Each of them has certain functions to perform, prescribed by the Constitution. It is perfectly clear that under the Constitution neither one of those divisions may impose its unrestrained will upon the others.

What is it then which has in the past caused some of the bitter contests between the Houses of Congress and the Executive concerning the availability of certain information and papers which they thought they had a right to have, while the President and the heads of the departments thought otherwise. The answer seems to lie in the fact that our form of Government permits the Senate or the House of Representatives, or both, to be controlled by one of the major parties, while the Executive is controlled by another political party. In the struggle for political power and supremacy, the Houses of Congress have, on occasion, seen fit to make demands on the executive branch which it felt went beyond established principles of constitutional law and comity. We must remember that one of the principal reasons for the practical success of our form of Government is that there has existed this fundamental feeling in each of its branches; that unless in a spirit of good sense and comity each of the branches stays within its proper jurisdiction, and does not seek to dominate the others, the essential unity of our Government might be disrupted. This is not to say that there are instances lacking where demands for information, deemed unreason-

able by the Executive, have been made where the majority in the legislative branch and the Executive have both been members of one political party. Those cases however are very few. Generally the conflict has arisen where the majority of one or both of the Houses of the Congress have differed politically from that of the President.

It is only in those relatively few instances of our history where a President or the head of a department felt that he could not comply with what appeared to him an unreasonable demand for information and papers, that we have recorded precedents. Such precedents usually take the form of a presidential message addressed to either the Senate or the House of Representatives, refusing the information sought. In the few instances where demands for information or papers have become the subject of court decisions, we have these to help our study. There are also opinions of the Attorneys General rendered to the various Presidents and the heads of departments which deal with this subject. We shall state, in summary form, what the precedents show.

SUMMARY

It may be well to summarize at the outset what our study of Presidential messages shows. In every instance where a President has backed the refusal of a head of a department to divulge confidential information to either of the Houses of Congress, or their committees, the papers and the information requested were not furnished. The public interest was invariably given as the reason for withholding the information. Our study also shows that the head of a department is generally subject to the President's direction, and the President has the last word on the propriety of withholding the papers. Heads of departments are subject to the Constitution, to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the Presidents of the United States. They are not subject to any other directions. While they have frequently obeyed congressional demands, whether made by the use of subpoena or otherwise, and have furnished papers and information to congressional committees, they have done so only in a spirit of comity and good will, and not because there has been an effective legal means to compel them to do so. Under the Constitution, heads of departments cannot be directed by a congressional committee in the exercise of their discretion, concerning the propriety of furnishing papers.

SUMMARY OF COURT DECISIONS

A study of court decisions, opinions of the Attorneys General, and authoritative textwriters reveals that the issuance of a subpoena duces tecum, which calls for testimony and papers, by a court to the head of a department or Cabinet member need not result in the giving of testimony or the production of papers, if they are deemed confidential, in the public interest. The President may intervene and direct the Cabinet officer or department head not to appear; the person subpoenaed would then advise the court of the President's order and abstain from appearing altogether. The better practice appears to be, wherever practicable, for the head of the department to appear in court and claim the privilege of keeping in confidence the information requested.

Similarly, where a congressional committee issues a subpoena to a Cabinet member, the proper practice appears to be to make an appearance and to divulge only such information as would not conflict with the President's direction, in the public interest.

The rule may be stated that the President and heads of departments are not bound to produce papers or to disclose information communicated to them, where, in their own judgment, the disclosure would, on public considerations, be inexpedient. The reason for the rule was succinctly stated by Judge Marshall in *Marbury v. Madison*,¹ and has been reaffirmed in *Cunningham v. Neagle*² and *Meyers v. United States*.³ It is as follows:

By the Constitution, the President is invested with certain political powers. He may use his own discretion in executing those powers. He is accountable only to his country in his political character, and to his own conscience. To aid the President in performing his duties, he is authorized by law to appoint heads of the executive departments. They act by his authority; their acts are his acts. Questions which the Constitution and Laws leave to the Executive, or which are in their nature political, are not for the courts to decide, and there is no power in the courts to control the President's discretion or decision, with respect to such questions. Because of the intimate political relation between the President and the heads of departments, the same rule applies to them.

SUMMARY OF THE CONSTITUTION AND THE STATUTES

Finally, we may thus summarize our study of the Constitution, the statutes creating the executive departments, and those which require witnesses to appear before congressional committees. The Constitution lodges the "executive power" in the President, who "shall take care that the laws be faithfully executed." The President's oath of office requires that he "faithfully execute the Office of President of the United States." All executive functions of our Government belong to the President. The executive departments were created by law, in order to enable the President to better discharge the executive burdens placed upon him by the Constitution. Since the determination of all executive questions belongs in theory and by constitutional right to the President, heads of departments are executors of the will of the President, and subordinate to it.

While Congress passed the laws creating the executive departments, that does not mean that the heads of those departments are subject to the orders of the House of Representatives or of the Senate. Congress can, by a law, duly passed and signed by the President, add to or change the duties of a particular department, or even abolish it altogether. It also has the power to deny appropriations to a department. But that is all it may do. It may not use its legislative power to compel a head of a department to do an act which the President must disapprove in the proper discharge of his executive power, and in the public interest. And any law passed by Congress, designed to compel the production of papers by heads of departments would necessarily have to comply with the constitutional requirement that the President is as supreme in the duties assigned to him by the Constitution, as Congress is supreme in the legislative functions assigned to it. In other words, Congress cannot, under the Constitution, compel heads of departments by law to give up

¹ 1 Cranch, 137, 143-144.

² 135 U. S. 1, 63.

³ 272 U. S. 132-135.

THE POWER OF THE PRESIDENT

papers and information, regardless of the public interest involved; and the President is the judge of that interest. Such a law would render the President powerless in a field of action entrusted to his complete care by the Constitution.

Up to now, Congress has not passed such a law. Some of the statutes recognize the executive discretion to withhold such papers and information as the public good requires. The remaining statutes affect only private individuals.

Heads of departments are entirely unaffected by existing laws which prescribe penalties for failure to testify and produce papers before the House of Representatives or the Senate, or their committees.

I. ILLUSTRATIONS OF REFUSALS BY OUR PRESIDENTS, AND THEIR HEADS OF DEPARTMENTS, TO FURNISH INFORMATION AND PAPERS

William Howard Taft, in his book entitled "Our Chief Magistrate and His Powers," states:

The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest (p. 129).

PRESIDENT WASHINGTON'S ADMINISTRATION

In March 1792, the House of Representatives passed the following resolution:

Resolved, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair: and that the said committee be empowered to call for such persons, papers and records, as may be necessary to assist their inquiries (3 Annals of Congress, p. 493).

This was the first time that a committee of Congress was appointed to look into a matter which involved the executive branch of the Government. The expedition of General St. Clair was under the direction of the Secretary of War. The expenditures connected therewith came under the Secretary of the Treasury. The House based its right to investigate on its control of the expenditure of public moneys. It appears that the Secretaries of War and the Treasury appeared before the committee. However, when the committee was bold enough to ask the President for the papers pertaining to the General St. Clair campaign, President Washington called a meeting of his Cabinet (Binkley, President and Congress, pp. 40-41).

Thomas Jefferson, as Secretary of State, reports what took place at that meeting. Besides Jefferson, Alexander Hamilton, Henry Knox, Secretary of War, and Edmond Randolph, the Attorney General, were present. The committee had first written to Knox for the original letters, instructions, etc., to General St. Clair. President Washington stated that he had called his Cabinet members together, because it was the first example of a demand on the Executive for papers, and he wished that so far it should become a precedent, it should be rightly conducted. The President readily admitted that he did not doubt the propriety of what the House was doing, but he could conceive that there might be papers of so secret a nature that

they ought not to be given up. Washington and his Cabinet came to the unanimous conclusion:

First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. * * * Note: Hamilton agreed with us in all these points, except as to the power of the House to call on Heads of Departments (Writings of Thomas Jefferson, 1905, vol. 1, pp. 303-304).

The precedent thus set by our first President and his Cabinet was followed in 1796, when President Washington was presented with a resolution of the House of Representatives which requested him to lay before the House a copy of the instructions to the Minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and documents relative to that treaty. Apparently it was necessary to implement the treaty with an appropriation which the House was called upon to vote. The House insisted on its right to the papers requested, as a condition to appropriating the required funds (President and Congress, Wilfred E. Binkley (1947), p. 44).

President Washington's classic reply was, in part, as follows:

I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give, or which could be required of him by either House of Congress as a right; and with truth I affirm that it has been, as it will continue to be while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof so far as the trust delegated to me by the people of the United States and my sense of the obligation it imposes to "preserve, protect, and defend the Constitution" will permit (Richardson's Messages and Papers of the Presidents, vol. 1, p. 194).

Washington then went on to discuss the secrecy required in negotiations with foreign governments, and cited that as a reason for vesting the power of making treaties in the President, with the advice and consent of the Senate. He felt that to admit the House of Representatives into the treatymaking power, by reason of its constitutional duty to appropriate moneys to carry out a treaty, would be to establish a dangerous precedent. He closed his message to the House as follows:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; * * * and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request (Richardson's Messages and Papers of the Presidents, vol. 1, p. 196).

A fact which writers on this subject generally omit to point out is that in his Farewell Address, Washington felt called upon to caution against the dangers resulting from the encroachment of one department of the Government upon the others. He wrote:

It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroach-

ment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. * * * The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them (Richardson's Messages and Papers of the Presidents, vol. 1, p. 219).

THOMAS JEFFERSON'S ADMINISTRATION

In January 1807, Representative Randolph introduced a resolution, as follows:

Resolved, That the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same (16 Annals of Congress (1806-7), p. 336).

The resolution was overwhelmingly passed. The Burr conspiracy was then stirring the country. Jefferson had made it the object of a special message to Congress wherein he referred to a military expedition headed by Burr. Jefferson's reply to the resolution was by a message to the Senate and House of Representatives. Jefferson brought the Congress up to date on the news which he had been receiving concerning the illegal combination of private individuals against the peace and safety of the Union. He pointed out that he had recently received a mass of data, most of which had been obtained without the sanction of an oath so as to constitute formal and legal evidence.

It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question (Richardson's Messages and Papers of the Presidents, vol. 1, p. 412, dated January 22, 1807).

Since Jefferson had taken the lead in bringing the Burr conspiracy to the attention of the country, he necessarily felt called upon, from time to time, to bring Congress and the country up to date on various phases of the conspiracy and the measures which the Government took to combat it. However, he did not consider it safe, for the public good, nor just to the persons who had given information to the Government in confidence, to reveal their names and the evidence which they had furnished concerning the conspiracy. It is believed that this is the first authoritative instance of a President of the United States refusing to divulge confidential information, and the results of investigations conducted by the Government, in a criminal cause of large dimensions.

ANDREW JACKSON'S ADMINISTRATION

On December 12, 1833, President Jackson vigorously declined to furnish to the Senate of the United States a copy of a paper which

had been published, and which was said to have been read by him to the heads of the executive departments.⁴

On February 10, 1835, President Jackson sent a message to the Senate wherein he declined to comply with the Senate's resolution requesting him to communicate copies of charges which had been made to the President against the official conduct of Gideon Fitz, late Surveyor-General, which caused his removal from office. The resolution stated that the information requested was necessary both in the action which it proposed to take on the nomination of a successor to Fitz, and in connection with the investigation which was then in progress by the Senate respecting the frauds in the sales of public lands.

The President declined to furnish the information. He stated that in his judgment the information related to subjects exclusively belonging to the executive department. The request therefore encroached on the constitutional powers of the Executive.

The President's message referred to many previous similar requests, which he deemed unconstitutional demands by the Senate:

Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive (*ibid.*, p. 133).

The President next took up the fact that the Senate resolution had been passed in executive session, from which he was bound to presume that if the information requested by the resolution were communicated, it would be applied in secret session to the investigation of frauds in the sales of public lands. The President said that, if he were to furnish the information, the citizen whose conduct the Senate sought to impeach would lose one of his basic rights, namely, that of a public investigation in the presence of his accusers and of the witnesses against him. In addition, compliance with the resolution would subject the motives of the President, in the case of Mr. Fitz, to the review of the Senate when not sitting as judges on an impeachment; and even if such a consequence did not follow in the present case, the President feared that compliance by the Executive might thereafter be quoted as a precedent for similar and repeated applications.

Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate; * * *

I therefore decline a compliance with so much of the resolution of the Senate as requests 'copies of the charges, if any,' in relation to Mr. Fitz, and in doing so must be distinctly understood as neither affirming nor denying that any such charges were made; * * * (*ibid.*, p. 134).

Thus we see that President Jackson refused to allow any insinuations or accusations to be made by the Senate, in secret session, or its committee, against a removed executive official. The fact that the Senate coupled the request with a proposed investigation by it of frauds in the sales of public lands did not alter the President's view that furnishing the papers would violate an individual's basic rights and interfere with the executive function.

A resolution of the House was adopted on January 17, 1837, to investigate the condition of the executive departments concerning their integrity and efficiency. A committee of the House requested

⁴ Richardson's Messages and Papers of the Presidents, vol. 3, p. 36.

the President and heads of departments to advise it concerning all appointments which were made since 1829 without the advice and consent of the Senate and to report all those who had received salaries without being in office. President Jackson replied:

I shall on the one hand cause every possible facility consistent with law and justice to be given to the investigation of specific charges; and on the other shall repudiate all attempts to invade the just rights of the Executive Departments and of the individuals composing the same.

The President added that department heads might answer requests made upon them as they pleased provided they did not injure the public service by consuming their own time and that of their subordinates, but for himself he added:

I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition (Presidential Declaration of Independence, Charles Warren, 10 Boston University Law Rev. pp. 11, 12, Cong. Deb., vol. 13, pt. 2 (1837), App. p. 202).

JOHN TYLER'S ADMINISTRATION

In the administration of John Tyler a resolution was adopted by the House of Representatives on March 16, 1842, to the effect that the President of the United States and the heads of the several departments be requested to communicate to the House of Representatives the names of such Members of the 26th and 27th Congresses who had applied for office, and for what offices, whether in person or by writing or through friends. President Tyler declined to furnish the information or to permit the heads of departments to furnish it. In a message to the House of Representatives dated March 23, 1842, President Tyler stated, in part:

* * * Applications for office are in their very nature confidential, and if the reasons assigned for such applications or the names of the applicants were communicated, not only would such implied confidence be wantonly violated, but, in addition, it is quite obvious that a mass of vague, incoherent, and personal matter would be made public at a vast consumption of time, money and trouble without accomplishing or tending in any manner to accomplish, as it appears to me, any useful object connected with a sound and constitutional administration of the Government in any of its branches.

* * * In my judgment a compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance can not be made by me nor by the heads of Departments by my direction. The appointing power, so far as it is bestowed on the President by the Constitution, is conferred without reserve or qualification. The reason for the appointment and the responsibility of the appointment rest with him alone. I can not perceive anywhere in the Constitution of the United States any right conferred on the House of Representatives to hear the reasons which an applicant may urge for an appointment to office under the executive department, or any duty resting upon the House of Representatives by which it may become responsible for any such appointment. (Richardson, Messages and Papers of the Presidents, vol. 4, pp. 105-106.)

The foregoing illustrates the principle that all papers and documents relating to applications for office are of confidential nature, and an appeal to a President to make such records public should be refused. Civil Service Commission records, containing confidential information furnished by applicants for Government employment, would come within the reasoning of President Tyler's refusal to make such records public.

One of the best reasoned precedents of a President's refusal to permit the head of a department to disclose confidential information to the House of Representatives is President Tyler's refusal to communicate to the House of Representatives the reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practiced upon them. A resolution of the House of Representatives had called upon the Secretary of War to communicate to the House the reports made to the Department of War by Lieutenant Colonel Hitchcock relative to the affairs of the Cherokee Indians together with all information communicated by him concerning the frauds he was charged to investigate; also all facts in the possession of the Executive relating to the subject. The Secretary of War consulted with the President and under the latter's directions informed the House that negotiations were then pending with the Indians for settlement of their claims; in the opinion of the President and the Department, therefore, publication of the report at that time would be inconsistent with the public interest. The Secretary of War further stated in his answer to the resolution that the report sought by the House, dealing with alleged frauds which Lieutenant Colonel Hitchcock was charged to investigate, contained information which was obtained by Colonel Hitchcock by ex parte inquiries of persons whose statements were without the sanction of an oath, and which the persons implicated had had no opportunity to contradict or explain. The Secretary of War expressed the opinion that to promulgate those statements at that time would be grossly unjust to those persons, and would defeat the object of the inquiry. He also remarked that the Department had not been given at that time sufficient opportunity to pursue the investigation, to call the parties affected for explanations, or to determine on the measures proper to be taken.

The answer of the Secretary of War was not satisfactory to the Committee on Indian Affairs of the House, which claimed the right to demand from the Executive and heads of departments such information as may be in their possession relating to subjects of the deliberations of the House.

President Tyler in a message dated January 31, 1843, which is frequently cited by writers on the subject under discussion, stated that the negotiations with the Cherokee Indians, to which the Secretary of War referred, had terminated since the Secretary of War had written as aforesaid and he was, therefore, sending to the House all the information communicated by Lieutenant Colonel Hitchcock respecting the Cherokees—their condition as a nation and their relations to other tribes. However, the President felt that it would be inconsistent with the public interest to transmit to the House Colonel Hitchcock's suggestions and projects that dealt with the anticipated propositions of the delegates of the Cherokee Nation; Colonel Hitchcock's views of the personal characters of the delegates were likewise not sent to the House because President Tyler felt that their publication would be unfair and unjust to Colonel Hitchcock.

President Tyler vigorously asserted that the House of Representatives could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the

House if, by so doing, it attempted to interfere with the discretion of the Executive. He stated:

* * * The injunction of the Constitution that the President "shall take care that the laws be faithfully executed," necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion after the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at once of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive (Hinds' Precedents of the House of Representatives, vol. 3 (1907), p. 181).

President Tyler pointed out that although papers and documents related to the sphere of the legitimate powers of the House, nevertheless there were occasions when such papers and documents had to be kept secret by the executive departments.

* * * It cannot be that the only test is whether the information relates to a legitimate subject of deliberation. The executive departments and the citizens of this country have their rights and duties, as well as the House of Representatives; and the maxim that the rights of one person or body are to be so exercised as not to impair those of others is applicable in its fullest extent to this question. Impertinence or malignity may seek to make the executive department the means of incalculable and irremediable injury to innocent parties by throwing into them libels most foul and atrocious. Shall there be no discretionary authority permitted to refuse to become the instruments of such malevolence?

And although information comes through a proper channel to an executive officer, it may often be of a character to forbid its being made public. The officer charged with a confidential inquiry, and who reports its result under the pledge of confidence which his appointment implies, ought not to be exposed individually to the resentment of those whose conduct may be impugned by the information he collects. The knowledge that such is to be the consequence will inevitably prevent the performance of duties of that character, and thus the Government will be deprived of an important means of investigating the conduct of its agents (*ibid.* p. 181-182).

President Tyler then stated the principle of law justifying a failure to produce papers, whether to a court or to a legislature, which the President or the head of a department deemed privileged.

* * * In the courts of that country from which we derive our great principle of individual liberty and the rules of evidence, it is well settled, and the doctrine has been fully recognized in this country, that a minister of the Crown or the head of a department cannot be compelled to produce any papers, or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged; and the persons who have been the channels of communication to officers of the State are in like manner protected from the disclosure of their names. Other instances of privileged communications might be enumerated, if it were deemed necessary. These principles are as applicable to evidence sought by a legislature as to that required by a court (*ibid.* p. 182).

President Tyler's message was referred to the Committee on Indian Affairs. It responded with great vigor in favor of the unrestricted production of papers and documents to the Congress. However, it recommended no action by the House in regard to the President's refusal to show all the papers which the House had requested.

The refusal by the Secretary of War, and later by President Tyler, to make public the results of investigation and inquiries conducted by the Government into the manner in which public agents perform their duties is a reiteration of the principle first established by President Thomas Jefferson, when he had refused to divulge to the House of Representatives the results of investigations conducted by the Government in a criminal conspiracy. President Tyler cited the confidential nature of the inquiry, the fact that both truth and falsehood was revealed thereby, and that an inquiry may be incomplete and require further prosecution.

Worthy of significance, also, is the fact that President Tyler refused to communicate to the House of Representatives the suggestions and projects of Lieutenant Colonel Hitchcock concerning the anticipated propositions of the delegates of the Cherokee Nation. The views of Colonel Hitchcock concerning the personal characters of the delegates of the Cherokee Nation were likewise not communicated by President Tyler to the House. The reasons given by the President for the failure to send the papers and documents referred to were that suggestions, anticipated projects, views dealing with the personal character of persons, would not be of aid to Congress in legislation, and their publication would be unfair and unjust to a Federal official and inconsistent with the public interest.

JAMES K. POLK'S ADMINISTRATION

In 1846, a resolution of the House of Representatives requested President Polk to furnish the House an account of all payments made on the President's certificates, with copies of all memoranda regarding evidence of such payments, through the agency of the State Department, for the contingent expenses of foreign intercourse from March 4, 1841, until the retirement of Daniel Webster from the Department of State. In 1841, John Tyler was President. Daniel Webster was his Secretary of State. The request of President Polk, therefore, was for the details of certain payments made by the State Department during the preceding administration.

Polk's message to the House pointed out that contingent expenses covering intercourse between the United States and foreign nations were covered by law which provided that against all sums drawn from the Treasury, the President was authorized to settle annually with accounting officials; the President had the right to make public, or not, the character of the expenditure by the type of voucher which he chose to file. President Polk stated that where a past President had placed the seal of confidence on an expenditure, and the whole matter was terminated before he entered office;

An important question arises, whether a subsequent President, either voluntarily or at the request of one branch of Congress, can without a violation of the spirit of the law revise the acts of his predecessor and expose to public view that which he had determined should not be "made public." If not a matter of strict duty, it would certainly be a safe general rule that this should not be done. Indeed, it may well happen, and probably would happen, that the President for the time being would not be in possession of the information upon which his predecessor acted, and could not, therefore, have the means of judging whether he had exercised his discretion wisely or not (Richardson, *Messages and Papers of the Presidents*, vol. IV, p. 433).

Polk concluded that the President making an expenditure, deemed by him confidential, may, if he chooses, keep all the information and

evidence upon which he acts in his own possession. If, for the information of his successors, he leaves the evidence on which he acts on the confidential files of one of the executive departments, they do not in any proper sense become thereby public records.

Finally, Polk stated that if the President was obliged to answer the present call—

He must answer similar calls for every such expenditure of a confidential character, made under every administration, in war and in peace, from the organization of the Government to the present period.

Since expenditures of this confidential character had never before been made public, Polk feared the consequences of establishing a precedent which would render such disclosures thereafter inevitable (*ibid.*, pp. 433-434).

The foregoing illustrates the principle that what a past President has done dies with him.⁵ Whether or not he leaves behind a record of something which by law he was permitted to keep confidential, a subsequent President will not break that confidence. In the second place, despite a keen awareness of a strong public feeling which existed throughout the country against secrecy of any kind in the administration of the Government, especially in matters of public expenditures, President Polk, nevertheless, felt obliged to observe a secrecy, when he visualized the consequences of establishing a precedent for similar disclosures. In the third place, President Polk pointed to the law which had enabled his predecessors in office, in the interests of the public safety, to keep expenditures of a certain kind secret in nature. If Congress wished to repeal the law it could do so; while the law existed a sense of public policy and duty obliged him to observe its provisions and the uniform practices of his predecessors under it. Finally, an executed transaction furnishes no greater justification for revealing information concerning it, than one which is executory in nature; the determining factor appears to be: Was the information of a character which the executive department had the right under the Constitution and the laws to keep secret? If the answer is "Yes," a President in office is justified in keeping the information from a congressional committee.

THE ADMINISTRATION OF JAMES BUCHANAN

On March 28, 1860, President Buchanan addressed a message of protest to the House of Representatives against a resolution of the House which provided for a committee of five to investigate whether the President of the United States or any other officer of the Government had, by money, patronage or other improper means sought to influence the action of Congress for or against the passage of any law relating to the rights of any State or Territory. The resolution further sought an investigation into the attempts of any officer or officers of the Government to prevent or defeat the execution of any laws.

⁵ It appears that the President has authority over matters in the executive branch during his administration. When he leaves office, that is an end to the things he did. His successor cannot be called upon to explain his acts. There is no continuity. "It was said by Mr. Wirt to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive so far as the Executive is concerned; 'Otherwise decisions might be opened back to the presidency of Washington, and the acts of the Executive kept perpetually unsettled and afloat'" (*The American Executive*, Finley and Sanderson, p. 193).

President Buchanan said:

I * * * solemnly protest against these proceedings of the House of Representatives, because they are in violation of the rights of the coordinate executive branch of the Government and subversive of its constitutional independence; because they are calculated to foster a band of interested parasites and informers, ever ready, for their own advantage, to swear before ex parte committees to pretended private conversations between the President and themselves, incapable from their nature of being disproved, thus furnishing material for harassing him, degrading him in the eyes of the country, and eventually, should he be a weak or timid man, rendering him subservient to improper influences in order to avoid such persecutions and annoyances; because they tend to destroy that harmonious action for the common good which ought to be maintained, and which I sincerely desire to cherish, between coordinate branches of the Government; and, finally, because, if unresisted, they would establish a precedent dangerous and embarrassing to all my successors, to whatever political party they might be attached (Richardson, Messages and Papers of the Presidents, vol. 5, pp. 618-619).

ULYSSES S. GRANT'S ADMINISTRATION

In the last days of Grant's administration, in April 1876, when the House was Democratic, the House of Representatives, by resolution, requested the President to inform the House whether any executive offices, acts, or duties, and, if any, what, have been performed at a distance from the seat of government established by law. The inquiry aroused General Grant, and his declination to furnish the information is quite spirited. He stated that he failed to find in the Constitution the authority given to the House of Representatives to require of the Executive, an independent branch of the Government, an account of his discharge of his purely executive offices, acts, and duties. The President went on to say that as of right, the House of Representatives may demand from the Executive information necessary for the proper discharge of its powers of legislation or of impeachment. The inquiry in the resolution was apparently aimed to find out where executive acts had been performed within the last 7 years. That had nothing to do with legislation. If, however, the information sought of the President was in aid of the power of impeachment,

It is asked in derogation of an inherent natural right, recognized in this country by a constitutional guaranty which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself.⁶

The President concluded his message by asserting that the performance of executive acts by the President exists, and is devolved upon him, wherever he may be within the United States, by the Constitution. The President's civil powers are neither limited nor capable of limitation as to the place where they shall be exercised;

No act of Congress can limit, suspend, or confine this constitutional duty. I am not aware of the existence of any act of Congress which assumes thus to limit or restrict the exercise of the functions of the Executive. Were there such acts, I should nevertheless recognize the superior authority of the Constitution, and should exercise the powers required thereby of the President.⁷

It appears that the House request on President Grant was a political move to embarrass him by reason of his having spent some of the hot months at Long Branch.⁸

⁶ Richardson, Messages and Papers of the President, vol. VII, p. 362.

⁷ Ibid., p. 363.

⁸ Our Chief Magistrate and His Powers, William Howard Taft, 1916, p. 130.

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Grant's reply illustrates that not only may Congress exceed its constitutional powers in calling for information, but that its source of power, just like the President's, is the Constitution, and even an act of Congress calling for information which, in the judgment of the President, limits or restricts the Executive in the exercise of his functions would run counter to the superior authority of the Constitution.

GROVER CLEVELAND'S ADMINISTRATION

One of the greatest debates that ever took place in the annals of Congress occurred during the first administration of Grover Cleveland. The "Relations Between the Senate and Executive Departments" was the controversy which exclusively took up the sessions of the Senate for almost 2 weeks. More than 25 Senators participated in the debate, amongst whom were some of our most noted names and authorities in the field of constitutional law.⁹

For approximately 25 years prior to Cleveland's election, the legislative branch of the Government was controlled by the Republican Party. The Senate continued Republican after Cleveland's election. The new President removed from office approximately 650 persons in the executive branch. The Senate made demands upon the various heads of departments to furnish the documentary evidence on file with the departments which showed the reasons for the removals. The complaints against the removed officeholders were based on personal transgressions or partisan misconduct which were usually made to the executive and to the heads of departments by means of letters, ordinarily personal and confidential. Whatever papers or documents were thus received on the subject were, for convenience of reference, placed together on department files. The complaints were carefully examined; many were cast aside as frivolous or lacking support, while others resulted in the suspension of the accused officials.¹⁰

Early in the Senate session of 1886, frequent requests were made in writing by the different committees of the Senate to which nominations were referred, directed to the heads of departments having supervision of the offices to which the nominations related, asking the reasons for the suspensions of officers whose places the nominations were intended to fill, and for all papers on file which showed the reasons for the suspensions. Replies were made to the committees by the heads of departments stating that, by direction of the President, they declined to furnish the papers and the reasons, on the ground that the public interest would not be promoted thereby, or on the ground that the papers related to a purely executive act. The foregoing numerous requests finally led up to an incident which has become famous in American history and in constitutional law. The Senate, by resolution, denounced the Attorney General for failing to furnish information and papers relating to the suspension of George N. Duskin, district attorney in Alabama. President Cleveland had appointed one Burnett in Duskin's place and had sent to the Senate Burnett's nomination. The Judiciary Committee of the Senate asked the Department of Justice for the papers touching the suspension and appointment. The papers relating to the suspension were not

⁹ Congressional Record, vol. 17, pp. 2211-2814, March 9 through March 26, 1886.
¹⁰ Grover Cleveland, Presidential Problems, The Independence of the Executive, pp. 43 ff.

sent. The Attorney General was directed by resolution of the Senate to transmit those papers. The Attorney General replied that the President directed him to say that "the public interest would not be prompted by compliance with the resolution." The great debate to which we have referred then took place in the Senate.¹¹

The majority report thus stated the question—whether it was within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves? The report freely admitted that, except in respect of the Department of the Treasury, there was no statute which commanded the head of any department to transmit to either House of Congress on its demand any information whatever concerning the administration of his department. The committee believed, however, that from the nature of the powers entrusted by the Constitution to the two Houses of Congress, it was a necessary incident that either House had the right to know all that officially existed or took place in any of the departments of the Government.

The minority report referred to the admission in the majority report that no statute conferred the right on either House to direct the Attorney General to send to either House any official papers and documents. The minority wondered whether any grant of power in the Constitution to either House required that they should have the right to know anything, wherever or in whatever form it may exist, about removals or suspensions of Federal officers.

President Cleveland in his famous message to the Senate of March 1, 1886, stated that, although public officials of the United States might owe their offices to laws enacted by the two Houses of Congress, that fact did not encumber the offices with a lien in favor of either branch of Congress. While Congress created the executive departments for the benefit of the people, to answer the general purposes of government under the Constitution and the laws, the departments were nevertheless unembarrassed by any obligation to the Senate as the price of their creation.¹² Cleveland disclaimed any intent to withhold official papers, but he denied that papers and documents inherently private or confidential, addressed to the President or a head of a department, having reference to an act entirely executive such as the suspension of an official, were changed in their nature and became official when placed for convenience in the custody of a public department. Concerning such papers, the President felt that he could with entire propriety destroy them or take them into his own personal custody.

Referring to the Senate's wholesale demands for papers from the heads of departments, the President stated :

The requests and demands which by the score have for nearly three months been presented to the different departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the

¹¹For the text of the Senate's resolution expressing condemnation of the Attorney General's refusal, and for the majority and minority reports of the Judiciary Committee, see Senate Miscellaneous Documents, vol. 7, 52d Cong., 2d sess., pp. 232-272. The majority report is at pp. 235-243; the condemnatory resolution at p. 243; the minority report at pp. 243-262.

¹²Ibid., p. 62, Grover Cleveland, *Presidential Problems*.

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Constitution, my duty to the people who have chosen me to execute the powers of their great office and not relinquish them, and my duty to the chief magistracy which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands (*ibid.*, pp. 63-64).

The President analyzed the contents and the character of the information which had been addressed to him and to the heads of the departments by private citizens concerning the removed officials. He refused to attach official character to papers and documents solely because they were in the executive departments.

There is no mysterious power of transmutation in departmental custody, nor is there magic in the undefined and sacred solemnity of Department files.

Papers and documents do not derive official character when they are unrelated to a constitutional, statutory, or other requirement making them necessary to the performance of the official duty of the executive.¹³

The long and bitter controversy ended with a victory for President Cleveland. The Senate voted to confirm Burnett for the place vacated by Duskin's suspension.

President Cleveland thus established a precedent which for the first time set apart private papers in the executive departments from public documents. While it is hard to define each, we may state, if we follow President Cleveland's reasoning, that those papers in the executive departments which relate purely to executive acts and duties lodged in the President alone by the Constitution, remain private and unofficial despite their filing in the executive departments. On the other hand, papers and documents which relate to matters in which Congress does have a right to participate, in connection with its legislative or other duties prescribed for it by the Constitution, may properly be called for. The real question, of course, is who determines the character of the papers? Cleveland established that the President does. The Executive is not to be subjected to inquiry arising from the motives and purposes of the Senate, as they are day by day developed, and that the President need not wait for the Senate to be satisfied with the President's choice or selection (*ibid.*, p. 378).

For complete text of President Cleveland's message, see Richardson, *Messages and Papers of Presidents* (vol. 8, pp. 375-383).

THEODORE ROOSEVELT'S ADMINISTRATION

President Roosevelt established the principle that heads of the executive departments are subject to the Constitution, to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President, but to no other directions whatever. His vigorous assertion produced one of the historic debates on the relationship between Congress and the Executive, and an effort by the Judiciary Committee of the Senate to compel, by law, the production of all papers and documents filed in the public offices, when called for by the Senate or its committees.

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether legal proceedings had been instituted by him against the United States Steel Corp. on account of the absorption by it of the Tennessee Valley Coal & Iron

¹³ Richardson, *Messages and Papers of the Presidents*, vol. 8, pp. 378-379, 381.

Co.; if no proceedings had been instituted the Attorney General was required to state the reasons for such nonaction. The resolution also asked the Attorney General to state whether an opinion was rendered by him concerning the legality of the absorption, and to attach a copy of the opinion.

President Roosevelt, in a special message to the Senate dated January 6, 1909, stated that he had been orally advised by the Attorney General that, in his opinion, there was insufficient grounds for legal proceedings against the Steel Corporation. President Roosevelt also sent to the Senate a copy of a letter which he had sent to the Attorney General which gave the details of an interview between the President and Judge Gary and Mr. Frick of the United States Steel Corp. He closed his message with the statement:

I have thus given to the Senate all the information in the possession of the executive department which appears to me to be material or relevant, on the subject of the resolution. I feel bound, however, to add that I have instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever (Congressional Record, vol. 43, pt. 1, 60th Cong., 2d sess., pp. 527-528).

The Senate, having been unable to get the documents from the Attorney General, thereafter summoned Herbert Knox Smith, head of the Bureau of Corporations, to appear before its Committee on the Judiciary. When Mr. Smith appeared, the committee informed him that if he did not at once transmit the papers and documents requested, the Senate would order his imprisonment. Mr. Smith reported this to the President; the latter ordered him in writing to turn over to the President all the papers in the case, "so that I could assist the Senate in the prosecution of its investigation." What happened afterward can best be stated in President Roosevelt's own words:

I have those papers in my possession, and last night I informed Senator Clark of the Judiciary Committee what I had done. I told him also that the Senate should not have those papers and that Herbert Knox Smith had turned them over to me. The only way the Senate or the committee can get those papers now is through my impeachment, and I so informed Senator Clark last night.

The Senator informed me that the Senate was only anxious to exercise its prerogatives and that if the papers were of such a nature that they should not be made public the committee was ready to indorse my views. But, as I say, it is just as well to take no chances with a man like Culberson [Senator from Texas], who is behind this thing, so I will retain those papers until the 3d of March at least. Some of these facts which they want, for what purpose I hardly know, were given to the Government under the seal of secrecy and cannot be divulged, and I will see to it that the word of this Government to the individual is kept sacred. [Italic supplied.] (The Letters of Archie Butt, Personal Aide to President Roosevelt, by Abbott, pp. 305-306.) (See also The President—Office and Powers, by Corwin, pp. 281 and 428.)

The effort made by the Senate to get the papers took place in January 1909. Theodore Roosevelt's term of office expired at midnight, March 3, 1909. His challenge to the Senate to impeach him, if it wished to get the papers which he felt should not be made public, was fortified by powerful legal argument. Roosevelt had ordered the head of the Bureau of Corporations to get a decision from the Attorney

General that the papers should not be made public. The Attorney General followed the provisions of the act of 1903, when he reasoned that the President was to judge what information should be made public. Faced with the Senate committee's insistence that the Commissioner of Corporations violate both the law and the practices of his predecessors or face imprisonment, the Attorney General suggested that the papers be turned over to the President in order that the latter might thereafter instruct the Commissioner concerning their disposition. (27 Op. A. G. 150.)

Thwarted in its efforts to obtain the records from two heads of departments, there was introduced the following Senate resolution:

Resolved by the Senate. That any and every public document, paper, or record, or copy thereof, on the files of any department of the Government relating to any subject whatever over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the officers of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction (43 Congressional Record 839 (1909)).

An exciting and prolonged debate followed.¹⁴ In brief, the arguments of the Senators who favored adoption of the resolution were: Congress was responsible, in the very beginning of our Government, for creating by statute the executive departments. What Congress created, it can at any time modify by statute or entirely abolish. Since Congress created the departments, the heads of those departments owe their principal obligation to it. Either House of Congress may, therefore, demand compliance by heads of departments with calls for information and papers.¹⁵ It is significant that the Senate debate was entirely based upon the great debate which took place in the Senate during Cleveland's first administration, in 1886. Proponents of the resolution urged that since the Senators who were members of the Judiciary Committee, in 1886, were amongst the truly great names in the field of constitutional law in the history of our Government, and since both the majority and minority reports in the controversy with President Cleveland united on a fundamental proposition, they thought it best to base the resolution on that proposition, to wit: That every public document or paper relating to any subject whatever, concerning which Congress had jurisdiction, was subject to a call for inspection by either the House or the Senate.¹⁶

Opponents of the resolution argued that it was impossible to settle a controversy with the executive branch by means of a resolution. Final settlement lay "in the observance by both Houses of Congress of the constitutional relations that exist between the coordinate departments of the Government."¹⁷ Senator Dolliver asked some pointed questions which struck at the vitals of the controversy. He wished to know to what department of the Government the executive departments belonged. They certainly did not belong to the legislative or the judicial branches. He thought it would be a very interesting matter to determine what jurisdiction the legislative department of the Government had over the Executive. He noted that it had been customary, from the foundation of our Government, to ask for information from the executive department, oftentimes, when nobody felt particularly

¹⁴ Ibid., pp. 839, 1762 (1909).

¹⁵ 43 Congressional Record 849.

¹⁶ 43 Congressional Record 842.

¹⁷ 43 Congressional Record 3732 (1909).

the need of it. It had been a favorite method of introducing subjects for debate in the Senate.

* * * *What I want to know is, where Congress gets authority either out of the Constitution or the laws of the United States to order an executive Department about like a servant.* (Italics supplied.) (43 Congressional Record 3732 (1909).)

Senator Rayner answered the foregoing queries by asserting that each House of Congress had the power to order anyone that had information or documents coming within its jurisdiction and control. He cited that Kilbourn and the Chapman cases¹⁸ in support. Senator Dolliver replied that those cases involved *private* citizens who had refused to appear and give testimony before committees of the Senate,¹⁹ and not officials of the executive departments.

The debate developed two striking points of agreement between proponents and opponents of the resolution: (1) That there was no law which compelled heads of departments to give information and papers to Congress; (2) that if the head of a department refused to obey a subpoena of either of the Houses of Congress, there was no effective punishment which Congress could mete out. Senator Bacon, who had introduced the resolution, was asked the pointed question: Whether Congress could by law compel the production of papers by heads of departments? He replied that the matter of enforcement presented difficulty, and that the same question had been raised in the famous 1886 debate, in Cleveland's administration, and it was conceded "that there was no present or immediate remedy in case the head of a department or the President should refuse" (43 Congressional Record 819 (1909)). Of what use, therefore, was the resolution, urged its opponents, when there was no way to enforce it? The President and heads of departments might, in a proper case, decide to pay no attention to a request for documents; passing the resolution, therefore, would be a futile gesture.²⁰

The resolution did not come to a final vote.

Professor Willoughby, in his well-known treatise, discusses the resolution and refers to the debates in Cleveland's and Roosevelt's administrations. He concludes that the constitutionality of the positions taken by Presidents Cleveland and Roosevelt would seem to be clear. Referring to the contests between Congress and the Presidents as to the right of the former to compel the furnishing to it of information, Willoughby states that it has been established that the President may exercise full discretion as to what information he will furnish, and what he will withhold.²¹

PRESIDENT COOLIDGE'S ADMINISTRATION

On March 12, 1924, the Senate passed a resolution which provided for the appointment of a committee to investigate the Bureau of Internal Revenue, with authority to hold hearings and subpoena witnesses. In a letter dated April 10, 1924, to President Coolidge, Andrew Mellon, Secretary of the Treasury, pointed out that although the purpose of the committee was to obtain information upon which

¹⁸ See footnote 17 on p. 18.

¹⁹ *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661.

²⁰ 43 Congressional Record 3730 (1909).

²¹ W. W. Willoughby, *The Constitutional Law of the United States*, 2d edition (1929), pp. 1488-1491.

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to recommend to the Senate reforms in law and in administration of the Bureau, it now appeared that the committee intended to vent a personal grievance of Senator Couzens, the author of the resolution in the Senate, against Mr. Mellon. The committee sought out all companies in which Mr. Mellon was interested, and directed its investigation activities solely against those companies.

President Coolidge in a special message to the Senate dated April 11, 1924, stated that it was recognized, both by law and custom, that there was certain confidential information which it would be detrimental to the public service to reveal. He recognized that it was legitimate for the Senate to indulge in political discussion and partisan criticism.

But the attack which is being made on the Treasury Department goes beyond any of these legitimate requirements. Seemingly the request for a list of the companies in which the Secretary of the Treasury was alleged to be interested, for the purpose of investigating their tax returns, must have been dictated by some other motive than a desire to secure information for the purpose of legislation. * * *

The constitutional and legal rights of the Senate ought to be maintained at all times. Also the same must be said of the executive departments. But these rights ought not to be used as a subterfuge to cover unwarranted intrusion. It is the duty of the Executive to resist such intrusion and to bring to the attention of the Senate its serious consequences. That I shall do in this instance (65 Congressional Record 68th Cong., 1st sess., p. 6087).

In reply, Senators Robinson and Walsh stated on the floor of the Senate that the committee had never attempted to compel the production of confidential records. Everything which the committee received came from voluntary witnesses and by departmental courtesy (Ibid., p. 6108).

PRESIDENT HOOVER'S ADMINISTRATION

On June 6, 1930, Secretary of State Stimson wrote the chairman of the Senate Foreign Relations Committee in reply to a request for confidential telegrams and letters leading up to the London Conference and the London Treaty. Secretary Stimson's confidential memorandum answered "as far as possible" the questions contained in the request. He refused, however, to divulge the contents of the other papers called for, on the ground that he had been directed by the President to say that their production would not, in his opinion, be compatible with the public interest.²¹

On June 12, 1930, the Foreign Relations Committee adopted a resolution to the effect that the committee regarded all facts which entered into the antecedent or attendant negotiations of any treaty as relevant and pertinent, when the Senate was considering a treaty for the purpose of ratification. The committee went on to assert its right to have full and free access to all records touching the negotiations of the treaty, basing its right on the constitutional prerogative of the Senate in the treatymaking process.

The bitterness of the debate in the Senate culminated in a message from President Hoover to the Senate dated July 11, 1930, wherein he pointed out that there were a great many informal statements and reports which were given to our Government in confidence. The Executive was under a duty, in order to maintain amicable relations

²¹ 72 Congressional Record, 12029 (1930).

with other nations, not to publicize all the negotiations and statements which went into the making of the treaty. The Executive must not be guilty of a breach of trust, nor violate the invariable practice of nations. He concluded as follows:

* * * No Senator has been refused an opportunity to see the confidential material referred to, provided only he will agree to receive and hold the same in the confidence in which it has been received and held by the Executive. A number of Senators have availed themselves of this opportunity. I believe that no Senator can read these documents without agreeing with me that no other course than to insist upon the maintenance of such confidence is possible. * * *

In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest (S. Doc. No. 216, 71st Cong., special sess., p. 2).

It appears that the Senate was not satisfied by President Hoover's reply. It avoided, however, further wrangling. Senatorial face was saved by adopting a resolution of Senator Norris, which stated that in ratifying the treaty the Senate did so with the distinct and explicit understanding that there were no secret files or documents which in any way, directly or indirectly, modified or changed the stipulations and agreements in the treaty (73 Congressional Record 378 (1930); *The Developments of Congressional Investigative Power*, McGahey, p. 103, footnote 20).

On May 14, 1932, a resolution was presented in the House of Representatives requesting the Secretary of the Treasury to submit to the House the testimony, documents, and records which had been presented in the investigation conducted by the Secretary of the Treasury concerning the importation of ammonium sulfate. The resolution was vigorously attacked on the ground that the Government, in obtaining the information, had not disclosed a purpose of intended publicity, and that no business interest would disclose its costs of production and other confidential data, even for the use of the Federal Government, if that information was to be disclosed to the world.²² The resolution appears to have been amended so as to contain the phrase "if not incompatible with the public interest." The Secretary of the Treasury wrote the Speaker of the House on May 29, 1932, that the information had been furnished to the Treasury with the understanding that it would be treated confidentially. He added:

As consent has not been given to the disclosure of the information contained in the record before the Treasury Department, I am of the opinion that it would be incompatible with the public interest to comply with the request contained in the resolution (*ibid.* 11669).

The reply of the Treasury Department was received by the House without comment.

FRANKLIN D. ROOSEVELT'S ADMINISTRATION

House Resolution 212 called upon President Roosevelt, "if agreeable to him and available," to transmit to the Speaker of the House of Representatives the full transcript of his press conference of May 3, 1933, on the resolutions of the United States Chamber of Commerce concerning the President's legislative program. The object of the resolution was to afford the President an opportunity to send up for the record his comments on the resolutions adopted by the chamber of

²² 75 Congressional Record, 72d Cong., 1st sess., p. 10207 (1932).

commerce at Washington, "which constituted the first major offensive by the representatives of big business on his program as a whole."²³

President Roosevelt wrote the Speaker of the House on May 8, 1935:

I do not believe, however, that it would be advisable for me to create the precedent of sending to the Congress for documentary use the text of remarks I make at the biweekly conferences with the newspaper representatives here in Washington.²⁴

The President went on to say that he did not wish to create a precedent of permitting questions and answers which came up at his press conferences to be transcribed and printed in the Congressional Record, for in such event he could no longer speak informally, as was his habit, and would bring about a consciousness of restraint as well as the necessity for constant preparation of his remarks.

In 1941, the chairman of the House Committee on Naval Affairs, by letter, requested the Federal Bureau of Investigation to furnish the committee with reports since June 1939, together with all correspondence of the Bureau or the Department of Justice in connection with investigations made by the Department arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts. Attorney General Jackson replied in an opinion in which he pointed out that the request for Federal Bureau of Investigation reports was one of many which had been received from congressional committees. The number of requests alone would have made compliance impracticable, particularly since many of the requests were very comprehensive in character. He felt obliged, therefore, in view of the increasing frequency of those requests, to restate the policy of the Department together with the reasons therefor:

It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.²⁵

The Attorney General pointed to the following injurious results which would follow disclosure of the reports: (1) Disclosure would seriously prejudice law enforcement; (2) disclosure at that particular time would have prejudiced the national defense; (3) disclosure would seriously prejudice the future usefulness of the Federal Bureau of Investigation, for keeping of faith with confidential informants was an indispensable condition of future efficiency; (4) disclosure might also result in the grossest kind of injustice to innocent individuals, because the reports included leads and suspicions, and sometimes even the statements of malicious or misinformed people.

The opinion of the Attorney General accorded with the conclusions which had been reached by a long line of predecessors, and with the position taken by the President from time to time since Washington's administration. He concluded by stating that exercise of this discretion in the executive branch had been upheld and respected by the judiciary.

²³ 79 Congressional Record 7002 (1935).

²⁴ Ibid., p. 7186.

²⁵ 40 Opinions, A. G., No. 8, April 30, 1941.

On January 20, 1944, a Select Committee To Investigate the Federal Communications Commission met in order to listen to the testimony of J. Edgar Hoover, Director, Federal Bureau of Investigation, who had been served with a subpoena to appear before the committee. The committee had been conducting hearings pursuant to a resolution of the House of Representatives of January 19, 1943, which empowered the committee to conduct an investigation of the Federal Communications Commission. The purpose of the investigation was to determine whether the Commission had been acting in accordance with law and the public interest. The committee was authorized to require the attendance of witnesses and production of books and papers by subpnea. Mr. Hoover was not required by the subpnea with which he had been served to produce any documentary evidence. However, he was shown certain letters, which he refused to admit he received in the performance of his duties as Director of the Bureau. We will quote from the record of the hearing before the committee:

Mr. GAREY (committee counsel). You were asked at the last hearing to produce before this committee the written directive which you had received from the President of the United States respecting the scope of the testimony which you were not to give, putting it in one way, or which you would be permitted to give, before this committee. Are you now ready to produce that written directive?

Mr. HOOVER. I am not (hearings, vol. 2, House, 78th Cong., Select Committee To Investigate the Federal Communications Commission (1944), p. 2337).

The record shows that the chairman of the committee, in order to lay the foundation for consideration of the matter by the committee in executive session, directed Mr. Hoover, on behalf of the committee, to answer the question and to produce the written directive of the President of the United States directing him not to testify, in certain respects, before the committee.

Mr. Hoover declined to comply with the direction of the chairman. Mr. Hoover told the committee that he had discussed with the Executive Assistant to the Attorney General the matters which he felt he would be asked. Those matters related to fingerprint records, certain matters relating to activities at Pearl Harbor, and certain operations of the Bureau. Mr. Hoover disclaimed any desire to interfere with the work of the committee. However, the President had directed him not to testify to any matter, or to any correspondence relating to internal security, and the Attorney General had construed questions relating to fingerprint records, and the matters relating to activities at Pearl Harbor, as fully within that category. Mr. Hoover had with him a copy of the President's direction in writing. He would not, however, produce the copy for the benefit of the committee for reasons given in a letter of the Attorney General addressed to the chairman of the committee.²⁶ The letter read in part as follows:

I have carefully considered the request of Mr. Garey, counsel for the committee, that I produce before your committee a copy of the document that I received from the President directing Mr. Hoover not to testify before your committee about certain transactions between this Department and the Federal Communications Commission.

It is my view that as a matter of law and of long-established constitutional practice, communications between the President and the Attorney General are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress. In this instance, it seems to me that the privilege should not be waived; to do so would be to establish an unfortunate precedent, inconsistent with the position taken by my predecessors.

²⁶ Letter dated January 22, 1944, signed Francis Biddle, Attorney General.

Furthermore, I should like to point out that a number of Mr. Garey's questions related to the methods and results of investigations carried on by the Federal Bureau of Investigation. The Department of Justice has consistently taken the position, long acquiesced in by the Congress, that it is not in the public interest to have these matters publicly disclosed. Even in the absence of instructions from the President, therefore, I should have directed Mr. Hoover to refuse to answer these questions (*ibid.*, 2338-2339).

The chairman of the committee recognized the privilege, which had been granted to the executive departments from the beginnings of our Government, in these words:

* * * Under this general question of the right of the witness to refuse to testify, we have a situation where the law seems to be rather indefinite, but for over 140 years a certain exemption has been granted to the executive departments, particularly where it involves military secrets or relations with foreign nations. Yet we, of course, realize that the President, by a blanket order, could not exempt a witness who is an official in an executive department, I take it, from the duty of testifying when properly called before a committee like this one, with its authority (*ibid.*, 2305).

The chairman recognized the committee's desire, in wartime, not to interfere with the executive departments in maintaining proper secrecy. He therefore suggested that counsel ask Mr. Hoover other questions which he deemed pertinent. Counsel to the committee stated that none of the questions which he had put to Mr. Hoover dealt with internal security or national security.

Mr. Hoover was asked a number of other questions, to which he replied that they fell within the restrictions of the Presidential directive to him.

Counsel for the committee stated that the House might want a record of the proceedings in the event that it elected to exercise its constitutional powers to compel answers to questions put to Mr. Hoover. Accordingly, the chairman of the committee directed Mr. Hoover to answer each and every question put to him by counsel which Mr. Hoover had refused to answer. Mr. Hoover reiterated his declination to answer the questions for the reasons previously given.

Thus, we see the issue squarely raised between the head of the Bureau of Investigation and the Attorney General, who determined, in their own judgment, whether questions put to Mr. Hoover by the House committee came within the directive of the President. Necessarily, matters of discretion were left, by the President's order to Mr. Hoover, to both the Attorney General and to Mr. Hoover. The record of the hearings appears to be silent as to any action taken by the committee, following Mr. Hoover's refusal to testify or produce the President's directive, pursuant to the subpoena.

The same committee had also issued a subpoena to Harold D. Smith, Director of the Bureau of the Budget, to appear before the committee and to produce the files and correspondence in the Bureau of the Budget. Those files dealt with requests of the War and Navy Departments to the President for an Executive order transferring the functions of the Radio Intelligence Division of the Federal Communications Commission to the military establishments. The subpoena also sought to obtain the recommendations of the Bureau of the Budget.

On July 9, 1943, Mr. Smith appeared before the committee. He had previously, by letter, advised the chairman of the committee that the matters which the committee sought to obtain from him affected the national defense, and that the President had issued instructions that the files and correspondence of the Bureau of the

Budget should not be made public because of their confidential nature and because disclosure would not comport with the public interest (committee hearings, vol. 1, p. 34).

The opinion of Attorney General Jackson, previously referred to,²⁷ was also cited by Mr. Smith as a reason for not complying with the subpoena.

The record of Mr. Smith's testimony also shows that the files and documents which had been subpoenaed were turned over to the White House, at the request of someone there, in Mr. Smith's absence.

Congressman Hart asked Mr. Smith:

You feel compelled to carry out the orders of the Chief Executive?

Mr. SMITH. That is right.²⁸

The chairman of the committee then stated that the issue presented was going to be fought out. In order to make the record stand on the responses which had been given to the subpoena, the chairman directed the witnesses to produce the documents called for. Mr. Smith replied that in view of the position which he had taken, on the advice of counsel, he could not make the documents available.²⁹

Finally Mr. Smith was asked whether he would produce the documents at an executive session of the committee. The Director of the Bureau of the Budget subsequently advised the chairman of the committee that he had no choice but to decline to testify or otherwise furnish the committee with any information in the possession of the Bureau concerning the matters mentioned, whether in executive session or otherwise, by reason of the instructions which he had received from the President, and for the additional reasons given in the opinion of the Attorney General.³⁰

James L. Fly, Chairman of the Federal Communications Commission and Chairman of the Board of War Communications, was also subpoenaed to appear before the aforesaid committee.

He appeared on July 9, 1943, and did not produce the records described in the subpoena. He told the committee that he was bound by the decision of the Board of War Communications, of which he was one member, and that even if he had the documents in his custody, he would have no choice but to decline to hand them over to the committee.

The records in question were in the possession of Mr. Denny, general counsel of the Federal Communications Commission, who was present at the time Mr. Fly was testifying before the committee. Mr. Denny had also been subpoenaed. He advised the committee that he had in his possession the papers called for. Neither Mr. Denny, nor Mr. Fly, exhibited the records to the committee. Both felt bound by the decision of the Board of War Communications.³¹

Acting Secretary of War Robert P. Patterson received an invitation by letter to appear before the committee and to produce certain docu-

²⁷ Vol. 40, Opinions, A. G., No. 8.

²⁸ Hearings, Select Committee To Investigate the Federal Communications Commission, vol. 1, p. 36.

²⁹ Ibid., 39.

³⁰ Vol. 40, Opinions, A. G., No. 8, April 30, 1941.

³¹ Hearings, Select Committee To Investigate the Federal Communications Commission, vol. 1, pp. 46, 48 through 67.

ments. Several Army officers were also requested to appear. The reply of Mr. Patterson in part was as follows:

The President directs that the committee be informed that he, the President, refuses to allow the documents to be delivered to the committee as contrary to the public interests. For the same reason, I am unable to permit the witnesses to appear (*ibid.*, 67).

Counsel for the committee noted in the record that the Secretary of War's refusal to allow the documents to be delivered was based upon the President's direction. However, the Secretary's decision not to permit the Army officers to appear was based upon the Secretary's own judgment.

Similarly, James Forrestal, Acting Secretary of the Navy, replied to a committee request for the testimony of naval officers and for certain documents from the files of the Navy Department. Mr. Forrestal declined permission for the naval officers, active or inactive, to appear. He closed his letter to the committee by stating:

The President of the United States authorizes me to inform the committee that he, the President, refuses to allow the documents described in your letter to be delivered to the committee, as such delivery would be incompatible with the public interest (*ibid.*, 68).

Again, we see that the President and members of his Cabinet, as well as heads of departments, exercised their own discretion concerning the propriety of furnishing testimony and papers to a committee of the House.

It may be added that the testimony of 10 Army officers, 20 naval officers, and the production of documents in 20 categories of the Army and 25 categories of the Navy were requested by the committee. By direction of the President, the production of the testimony and documents requested were refused.³²

Although Congressman Cox, chairman of the committee, inserted two statements in the Record which were critical of the Chief Executive by reason of the latter's refusal to permit heads of departments and members of the Cabinet to furnish information and papers, the committee thought it wise not to press the issue.³³

Apparently no further action was taken by the committee, following refusals of the heads of departments to comply with the subpoenas which had been served upon them.

To summarize

The precedents furnished by Franklin D. Roosevelt's administration show:

1. Federal Bureau of Investigation records and reports were refused to congressional committees, in the public interest.
2. The Director of the Federal Bureau of Investigation refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interests of national security, to refrain from testifying or from disclosing the contents of the Bureau's reports and activities.
3. Communications between the President and the heads of departments are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress.
4. The Director of the Bureau of the Budget refused to testify and to produce the Bureau's files, pursuant to subpoena which had been

³² 90 Congressional Record 2111.

³³ 90 Congressional Record, Appendix, 1034, 1066 (1944).

served upon him, because the President had instructed him not to make public the records of the bureau due to their confidential nature. Public interest was again invoked to prevent disclosure.

5. A precedent which Theodore Roosevelt had established, to order the records of a department brought to the White House, when the President was convinced of their confidential nature, was apparently followed in the transfer of the records from the Director of the Bureau of the Budget to the White House.

6. The Chairman of the Federal Communications Commission and its chief counsel, both of whom had been subpoenaed, refused to testify and to produce files and records, despite the fact that the select committee was created to investigate the Federal Communications Commission. The reasons given for such refusal were that the records in question were those of the Board of War Communications, of which the Chairman of the Federal Communications Commission was only 1 member out of 5. Both the chairman and the chief counsel of the Commission who had possession of the records stated that they felt bound by the decision of the Board of War Communications not to produce the records or to testify concerning them.

7. Although the Chairman of the Federal Communications Commission was also Chairman of the Board of War Communications, he did not produce the records because of their confidential nature and because disclosure would have adversely affected the national security.

8. The Secretaries of War and Navy were directed not to deliver documents which the committee had requested, on grounds of public interest. The Secretaries, in their own judgment, refused permission to Army and Navy officers to appear and testify because they felt that it would be contrary to the public interests.

9. The chairman of the committee, while severely critical of the Chief Executive's directions to the Cabinet members and to the heads of departments, conceded a "certain exemption" which had been granted to the executive departments for over 140 years.

PRESIDENT TRUMAN'S ADMINISTRATION

By concurrent resolution a joint congressional committee on the investigation of the Pearl Harbor attack was established on September 11, 1945. The committee was authorized to require by subpena, or otherwise, the attendance of witnesses and the production of books and papers. There had been seven prior investigations concerning the Pearl Harbor attack.³⁴ The committee's investigation extended to the files of all pertinent branches of the Government, and President Truman issued instructions to various departments of the Government. We will examine those instructions.³⁵

On October 13, 1945, the President advised Senator Barkley, chairman of the committee, that he had appointed Judge Latta to supply the committee with any information which it deemed necessary from the White House files. The President's letter also stated that if the committee experienced difficulty in obtaining access to the files the President would issue the necessary orders for "complete access."

³⁴ Doc. No. 244, 79th Cong., 2d sess., Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, pp. xli and xiv.

³⁵ Appendix C, Communications From the President of the United States Relating to the Pearl Harbor Investigation, pp. 283-287 of the report, *Ibid.*, footnote 1, supra.

On August 28, 1945, the President had addressed a memorandum to the Secretaries of State, War, Navy, the Attorney General, the Joint Chiefs of Staff, and the Directors of the Bureau of the Budget and the Office of War Information to this effect: That they should take the requisite steps to prevent release to the public, except with the President's approval, of information regarding the Cryptanalytic Unit. Since the joint committee was created subsequent to the August 28, 1945, memorandum, the President sent a memorandum on October 23, 1945, to four of the departments above named, expressing a desire to assist the joint congressional committee. He specifically excepted from the August 28 memorandum and authorized the release of information, "material to the investigation." The President also authorized any employee or member of the armed services, whose testimony the committee desired, to testify publicly before the committee concerning any matter "pertinent to the investigation" (joint committee report, p. 286).

On November 7, 1945, the President addressed a memorandum to the chief executives of all departments, agencies, commissions, and bureaus. The memorandum stated that in order to assist the committee to make a complete investigation, heads of departments were requested by the President to authorize every person in their respective departments or agencies, if interrogated by the committee, to give any information of which they may have knowledge bearing on the subject of the investigation. The President also requested the heads of the departments to authorize their respective employees to come forward voluntarily and to disclose to the committee—

any information they may have on the subject of the inquiry which they may have any reason to think may not already have been disclosed to the committee.²⁸

The President's directive was made applicable to all persons of all executive departments, whether or not those persons were called to testify before the joint committee.

There was one additional memorandum issued by the President for the chief executives of all executive departments, agencies, commissions, and bureaus. It referred to the President's memorandum of November 7, 1945, and requested the heads of the departments to further authorize every person in those departments or agencies, whether or not they were interrogated by the committee, "to come forward and disclose orally to any of the members" of the committee—

any information which they may have on the subject of the inquiry which they may have any reason to think has not already been disclosed to the committee.²⁹

The memorandum closed with the words: "This does not include any files or written material."

The joint committee's investigation was obviously intended to make full and complete disclosure to the American people, in order that the lessons of the Pearl Harbor disaster might "avoid pitfalls in the future," and "to evolve constructive suggestions for the protection of our national security."³⁰

The executive branch was obviously in full agreement with the intent of Congress. The committee's report makes it clear, as already indicated, that the files of the pertinent Government branches

²⁸ Ibid., joint committee report, p. 286.

²⁹ Ibid., joint committee report, p. 287.

³⁰ P. xi, foreword, joint committee report, supra.

were made available to the committee, following instructions from the President.³⁹

The report also states that one member of the committee requested the production by the State Department of all papers relating to the "so-called Tyler Kent case," which was disapproved by the majority of the committee. The State Department had advised the committee that those papers were in no way pertinent to the subject of the committee's inquiry.⁴⁰

The report contains the names of the witnesses which appeared before the joint committee. Among them were the highest officers in both the War and Navy Departments and the highest officials of the State Department. The President's directives heretofore cited made the appearance of those witnesses possible.⁴¹

It should be noted, however, that the Chief Executive did not strip the executive branch, by his directives, of a discretion, in a doubtful case, to withhold written files. While the report of the joint committee indicates that the committee received the fullest measure of cooperation from the executive branch, in its desire to bring all pertinent facts to light, Senators Ferguson and Brewster filed a minority report wherein they were critical of the Presidential restraints on the committee.⁴²

The minority complained that the President's memorandum of October 23, 1945, which lifted the prior secrecy of the Cryptanalytic Unit, was limited to the State, War, and Navy Departments. The minority also complained that the President's order relaxed the secrecy of the records only so far as "the joint committee" was concerned, while it continued to prevent individual members of the committee from searching records. In this discussion, of course, we are not concerned with the differences within the committee.

The minority report was also critical of the phrase in the October 23, 1945, memorandum of the President, "any information in their possession *material to the investigation*."⁴³ The minority stated that those words provided a cloak for those reluctant to yield information requested by the members of the committee. Finally, the minority pointed out that the subsequent memoranda of the President never wholly removed the restrictions on the Government departments, and that in the order of November 7, 1945, the President relaxed restraints on executives of the Government in order that they might speak freely to "individual members of the committee," but the order did not include the release to such individual members of files or written material.⁴⁴

The foregoing criticism of the minority, that "the joint committee was hedged about with troublesome qualifications and restraints"⁴⁵ by the Chief Executive does not find support in the report which was signed by the other eight members of the joint committee. However, there is a tacit understanding by the majority of the propriety of the President's instructions to the heads of departments as outlined above, and the minority did not anywhere in its report question the right of President Truman to issue the instructions which he did to

³⁹ Ibid., xiv, introductory statement of the joint committee report.

⁴⁰ Ibid., p. xv, introductory statement of the joint committee report.

⁴¹ See pp. 278 and 279 for a list of the witnesses who appeared before the joint committee.

⁴² Ibid., p. 498, joint committee report.

the heads of departments. Apparently, their chief complaint was that the Truman committee, during the 4 years of its operations, did allow individual members of the committee to search for any information deemed relevant by them, whereas, in the joint committee investigation the majority of the committee refused to extend permission for individual members to search files and other records.

The conclusion we derive from the activities of the joint committee, which investigated the Pearl Harbor attack, is that the President, in an investigation involving the national security as well as the future safety of the country from attacks similar to the Pearl Harbor attack, assumed the responsibility of guiding and directing the heads of the executive departments concerning the oral testimony and the written material which they were to furnish to the committee.⁴³ In so doing, President Truman merely exercised the executive prerogative which prior administrations had handed down to him.

RÉSUMÉ AND CONCLUSIONS

A bird's-eye view of the refusals by 17 of our Presidents, and their heads of departments, to comply with congressional requests for information and papers from the Executive, beginning with 1796 to the present time, follows:⁴⁴

⁴³ For the Senate debate which accompanied the President's directions to the Cabinet officers and heads of departments, see 91 Congressional Record 10583-10594 (1945).

⁴⁴ In the bird's-eye picture, reference is made to the refusals of Presidents Monroe, Fillmore, Lincoln, and Hayes. Monroe's refusal may be found in a message dated January 10, 1825, 2 Richardson, *Messages and Papers of Presidents*, p. 278; Fillmore's in 5 Richardson p. 159; Lincoln's in 6 Richardson, p. 12; and the refusal in Hayes' administration is dealt with in 17 Congressional Record 2332 and 2618.

President	Date	Type of information refused
George Washington.....	1796	Instructions to U. S. Minister concerning Jay Treaty.
Thomas Jefferson.....	1807	Confidential information and letters relating to Burr's conspiracy.
James Monroe.....	1825	Documents relating to conduct of naval officers.
Andrew Jackson.....	1833	Copy of paper read by President to heads of departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
		List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler.....	1842	Names of Members of 26th and 27th Congresses who applied for office.
	1843	Report to War Department dealing with alleged frauds practiced on Indians, and Colonel Hethcock's views of personal characters of Indian delegates.
James K. Polk.....	1846	Evidence of payments made through State Department, on President's certificate, by prior administration.
Millard Fillmore.....	1852	Official information concerning proposition made by King of Sandwich Islands to transfer islands to United States.
James Buchanan.....	1860	Message of protest to House against resolution to investigate attempts by Executive to influence legislation.
Abraham Lincoln.....	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Ulysses S. Grant.....	1876	Information concerning executive acts performed away from Capitol.
Rutherford B. Hayes.....	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as collector of port of New York.
Grover Cleveland.....	1886	Documents relating to suspension and removal of Federal officials.
Theodore Roosevelt.....	1909	Attorney General's reasons for failure to prosecute U. S. Steel Corp.
Calvin Coolidge.....	1924	Documents of Bureau of Corporations, Department of Commerce.
Herbert Hoover.....	1930	List of companies in which Secretary of Treasury Mellon was interested.
	1932	Telegrams and letters leading up to London Naval Treaty.
		Testimony and documents concerning investigation made by Treasury Department.
Franklin D. Roosevelt..	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Commission, and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
President Truman.....	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.
		President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

The framers of the Constitution had taken pains to insure the independence of the executive branch.⁴⁵ Historical precedents detailed by

⁴⁵ Binkley, President and Congress, p. 25. The Federalist No. 51: "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

us, covering more than 150 years of presidential action, demonstrate that our Presidents have vigorously asserted that independence.

This is not to say that the instances we have cited are the only ones in which a President or the heads of departments asserted their judgment and discretion, in the public interest, to keep papers in the executive departments confidential. There are many other illustrations, in both the administrations of the Presidents we have listed and in those not included in our discussion, where papers have been withheld from Congress or its committees. Compared with the great number of situations where the Executive has freely furnished Congress with information, those presented by us are relatively few.⁴⁶ Fewer still are the conflicts between the Executive and Congress which have given rise to congressional debate or to resolutions of protest by either of the Houses.

In the great conflicts which have arisen, in the administrations of Washington, Jackson, Tyler, Cleveland, and Theodore Roosevelt, the Executive always prevailed.⁴⁷

II. COURT DECISIONS ESTABLISH THAT INFORMATION AND PAPERS WHICH HEADS OF DEPARTMENTS CONSIDER CONFIDENTIAL, IN THE PUBLIC INTEREST, MAY NOT BE EXPOSED TO PUBLIC VIEW, EITHER IN COURT OR TO CONGRESSIONAL COMMITTEES

The fundamental theory which justifies an uncontrolled discretion in the heads of executive departments concerning the propriety of keeping certain records and information confidential, in the public interest, has been succinctly stated by Woodrow Wilson in his work on Constitutional Government in the United States (1908) :

But in the federal government the executive is at least in itself a unit. Every one subordinate to the President is appointed by him and responsible to him, both legally and politically. He can control the *personnel* and the action of the whole of the great "department" of government of which he is the head (p. 205).

Chief Justice Taft speaking for the majority of the Court in *Myers v. United States*,⁴⁸ stated that the highest and most important duties which the President's subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion.

This field is a very large one. It is sometimes described as political. * * * Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority (pp. 132-133).

The foregoing principles find illustration in the following cases:

Marbury v. Madison,⁴⁹ defines the limits at which a court must stop when the head of a department invokes the privilege that the informa-

⁴⁶ Henry W. Ehrmann, *The Duty of Disclosure in Parliamentary Investigation*: 11 University of Chicago Law Review, 1, 137, 1943-44.

⁴⁷ "The history of conflicts between the Senate and the Executive is not favorable to this body nor encouraging to its pretensions. It matters not how great the alleged grievance or how powerful the talent and the influences brought to bear, the Senate has never scored a victory in a collision with the Executive" (Senator Voorhees in the famous 1886 debate (17 Congressional Record 2741)).

"The Senate had at last come to realize that in every one of these 4 great conflicts with the Executive the people promptly aligned themselves with the Executive" (W. E. Binkley, President and Congress, p. 167).

⁴⁸ 272 U. S. 52, 132-135.

⁴⁹ 1 Cranch 137, 143, 144 (1803).

tion sought from him is confidential and cannot be disclosed. William Marbury was one of the "midnight judges" appointed by President Adams, just prior to the assumption of the Presidency by Thomas Jefferson. However, the commission evidencing the appointment had not been issued to Marbury by John Marshall, who was Secretary of State under Adams. James Madison, who succeeded Marshall as Secretary of State, refused to issue the commission to Marbury. The latter brought suit by mandamus to compel the issuance of the commission. Marshall, having in the meantime been appointed Chief Justice of the Supreme Court by President Adams, was now called upon to decide the issue. The Court wished to ascertain certain facts relating to the commission, and to that end summoned Levi Lincoln, the Attorney General, before it for questioning.

Mr. Lincoln objected to answering. While he respected the Court's jurisdiction—

He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; * * * (pp. 143-144).

He was acting as Secretary of State at the time when the transaction in question had happened. He was, therefore, of the opinion that he was not bound to answer "as to any facts which came officially to his knowledge while acting as Secretary of State" (p. 143) :

The Court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it; * * * (p. 144).

After taking time to consider, Mr. Lincoln said that he had no objection to answering the questions proposed except one, to wit: What had been done with the commissions? He did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. The Court was of the opinion that he was not bound to say what had become of the commissions.

The rule of the law was stated by the Court as follows:

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his order. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the Nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive * * * (p. 164).

Judge Marshall spoke of the intimate political relation between the President and the heads of departments:

1. * * * The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. * * *

* * * * *
The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the

constitution and laws, submitted to the executive, can never be made in this court (pp. 168-170).

The Court decided, therefore, that with respect to a paper which under the law was already of record, which a person entitled thereto had a right to receive a copy of, such a question was not an intrusion into the secrets of the Cabinet.

Where the head of a department acts in a case requiring the exercise of executive discretion, where he is the mere organ of the executive will, any application to a court to control the conduct of such head of a department would be rejected without hesitation.

In the trial of Aaron Burr for treason before Judges Marshall and Griffin, the Chief Justice had this to say on whether a Cabinet officer could be compelled to reveal information which he deemed confidential. Referring to the case of *Marbury v. Madison*, Marshall said:

The principle decided there was that communications from the President to the Secretary of State could not be extorted from him (David Robertson, *2 Burr Trials* (1808), p. 527).

**TRIAL OF THOMAS COOPER, FOR SEDITIOUS LIBEL (1800) CIRCUIT COURT OF
THE UNITED STATES FOR PENNSYLVANIA**

Thomas Cooper was charged with having published a false, scandalous, and malicious attack on the character of the President of the United States, with an intent to excite the contempt of the people of this country against the President. Cooper applied to the Court for process to be issued on President Adams in order that the defendant might obtain a certain letter to aid in his defense. Judge Peters and Judge Chase, a member of the United States Supreme Court, presided at the trial. The Court refused to issue a subpoena on President Adams. In addressing the Court, Cooper stated that if documents from the public offices in proof of notorious facts were required as evidence at the trial, and if persons charged with crime could not obtain these documents, "then are the mouths of the people completely shut up on every question of public conduct or public character?"⁵⁰

The Court informed the defendant that he was mistaken if he thought the public documents were at his service. Since the defendant was defeated in his efforts to procure certain documents by subpoenas, the Court gave him wide latitude in offering secondary evidence. Cooper was found guilty by jury and was sentenced to a fine and imprisonment.

This appears to be the first recorded instance of an effort to compel a President of the United States to produce a document at a Court trial.

**THE ISSUANCE OF A SUBPOENA DUCES TECUM TO PRESIDENT JEFFERSON
(BURR'S TRIALS, ROBERTSON (1808))**

Aaron Burr's trial took place in the Circuit Court of the United States, held at Richmond, Va., in 1807. In the course thereof, Burr applied to the Court for the issuance of a subpoena duces tecum upon President Jefferson. Judge Marshall rendered an opinion and allowed the subpoena to issue. It directed President Jefferson to produce a letter which one General Wilkinson had sent the President. The

⁵⁰ Wharton's State Trials, Trial of Thomas Cooper, p. 667 (1800).

letter was alleged, in an affidavit filed by Burr, to contain information helpful to the defense. While Judge Marshall's opinion stated that under the Constitution and laws of the United States the President was not exempt from the process of the Court in a criminal trial, nevertheless, he also ruled that the President was free to keep from view such portions of the letter which the President deemed confidential in the public interest. The President alone was the judge of what was confidential (Robertson, Burr's Trial, vol. 1, pp. 177, 180, 187-8).

The Court also considered for the first time in our history, the problem of official and private papers, and stated that it would not lightly force official records and papers into public view by subp^{ea}. What lead the Court to its decision, among other things, was that the letter in question was not in the files of the War Department, or in any other department of the Government. The Court appears to have been largely influenced by Colonel Burr's argument that the President, who had publicly accused him of traitorous conduct, in a special message to the Congress, and had been primarily responsible for bringing him to trial and for bringing the weight of the Government behind the prosecution, ought not, in fairness to an accused person on trial for his life, keep from him a private communication which the accused thought would help prove his innocence (*ibid.* 186).

Jefferson, according to both historians and writers on constitutional law, proved himself, in this one instance, to be a better lawyer than Marshall when he paid no attention to the subp^{ea}, did not even reply to the Court's order, but wrote the United States district attorney in charge of the prosecution that under our framework of government, the judicial branch had no authority to order him, as Chief Executive, to do anything. Jefferson made the letter in question available by delivering it to the Attorney General, with instructions to keep out of court such portions thereof as the United States attorney deemed confidential; nevertheless, he made it perfectly clear that he stood ready to resist, by force, if necessary, the unauthorized trespass by the judicial branch upon the independence of the executive (Dillon, Marshall, Life Character, Judicial Services, vol. I, introduction, p. 49; Ford, Thomas Jefferson, Writings, vol. 9, p. 62).

The immunity from giving testimony and producing papers in court which Jefferson claimed for himself, he also claimed for the heads of departments. While Jefferson had no objection to the use at the trial of certain portions of the Wilkinson letter, he vigorously objected to Burr's blanket request for copies of orders which had been issued by the Secretaries of the War and Navy Departments. Those orders covered a correspondence of many months—

with such a variety of officers, civil and military, over all the United States as would amount to the laying open the whole executive books.²¹

The subp^{ea} which had been issued from the district court apparently required both the President and the Secretaries of War and the Navy to personally attend with certain documents. The two Secretaries did not attend. Jefferson contenting himself with a statement that if Burr supposed that there were any facts within the knowledge of the heads of departments or of himself which would be useful in his

²¹ Letter dated June 12, 1807, Jefferson to Hay, Thomas Jefferson, Writings (Ford), vol. 9, p. 55.

defense, Jefferson would, in furtherance of justice, give the defendant the benefit of the facts by way of deposition to be taken at Washington, the seat of the Government.⁵²

Congressional committees, intent at times on seeing papers and documents in the executive branch, have urged the Burr case as a precedent for the amenability of a Cabinet officer to process, by subp^{ea} issued by a committee of the House or the Senate. That case, however, has certain definite limitations, as laid down by Judge Marshall. In the first place, Judge Marshall made it clear that if a letter in the possession of the President, material to the trial, contains matter—

which it would be imprudent to disclose, which it is not the wish of the executive to disclose; such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.⁵³

In the second place, Marshall held that if the President declared that a letter in his possession ought not to be exhibited in public, he had a privilege to withhold it.

The gist of Judge Marshall's qualification upon the right of a court to compel production of papers from the President were thus stated by him:

* * * The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. * * * I can readily conceive that the President might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. I admit, that in such a case, much reliance must be placed on the declaration of the President; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: letters to the President in his private character, are often written to him in consequence of his public character, and may relate to public concern. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view (Robertson, *Burr Trials*, vol. 2 (1808, pp. 535-536).

Thus, we see that a letter addressed to the President in his private character may take on the stamp of an official paper or document which the President, apparently, has the right to keep from public view.

That part of Judge Marshall's decision which claims for a court the right to issue a subp^{ea} against the President has been attacked by writers on constitutional law and scholars as unsound, for the reason that courts cannot order the President to do anything. The President, as the Chief Executive Officer of the Nation, is in a position to completely disregard the court's subp^{ea} or order. Since such disregard brings contempt upon a court, it would appear wise for the court not to issue a futile order or command.⁵⁴ It is curious that Judge Marshall stated, in his opinion, that he was not familiar with any case which held that a subp^{ea} cannot issue to the President.⁵⁵ Marshall apparently ignored or was not familiar with the decision which had been

⁵² *Ibid.*, pp. 56-57, letter, Jefferson to Hay, June 17, 1807.

⁵³ *Ibid.*, *Burr's Trials*, vol. 1, p. 187.

⁵⁴ For unfavorable comment on Judge Marshall's ruling see John F. Dillon, *Marshall, Life, Character, and Judicial Services*, by James Bradley Thayer, vol. 1, pp. 232-233; by Henry Cabot Lodge, vol. 2, p. 228; by Corwin, *John Marshall and the Constitution*, pp. 97-98; Joseph P. Cotton, *The Constitutional Decisions of John Marshall*, p. 99; Bates, *The Story of the Supreme Court*, p. 102; Palmer, *Marshall and Taney*, p. 99. Favorable comment on Judge Marshall's rulings can be found in Magruder, *John Marshall*, pp. 199, 221, 226; Dillon, *Marshall, Life, etc.*, vol. 1, Introduction XXXVII; vol. 3, U. M. Rose, pp. 132-133.

⁵⁵ *Burr's Trials*, vol. 1 (Robertson), p. 181.

made by the court in the trial of Thomas Cooper,⁵⁶ where one of the judges, Samuel Chase, was also a member of the United States Supreme Court. Justice Chase's decision to the effect that a subpoena cannot issue on the President remains good law today. The quite uniform action of our Presidents, as shown in part I of our discussion, and court decisions since 1807, have demonstrated that the Marshall ruling concerning the propriety of issuing a subpoena on the President, has not been followed.

The fundamental soundness of Jefferson's legal position may be thus summarized. With respect to papers, there is a public and private side to the office of President. To the former belong grants of land, patents for inventions, certain commissions, proclamations and other papers patent in their nature. To the private side belong mere executive proceedings.

He, of course, (the President) from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed; * * *⁵⁷

The leading principle of our Constitution is the independence of the legislative, executive, and judiciary of each other. Would the executive be independent of the judiciary if he were subject to the commands of the latter, and to imprisonment for disobedience? The intention of the Constitution, that each branch should be independent of the other is manifested by the means it has furnished to each, to protect itself from enterprise of force attempted on it by the others. To none has the Constitution given more effectual or diversified means than to the executive.⁵⁸

The President was prepared to resist, by force if necessary, the execution of the process of the court.⁵⁹ Jefferson appears to have taken drastic steps in order to avoid the consequences of Judge Marshall's issuance of the subpoena to himself and the heads of departments. He advised Mr. Hay that he wished to avoid a conflict of authority between the executive and the judiciary which would discredit the Government at home and abroad. Jefferson felt that prudence and good sense would keep the Chief Justice from pressing the conflict. However, if the Chief Justice proceeded to issue any process which should involve any act of force to be committed on the persons of the executive or heads of departments, Jefferson requested Hay to give him instant notice. Hay was also required to advise the United States marshal on the latter's conduct, since the marshal would be critically placed between the two branches of the Government. Jefferson wrote:

His [the marshal's] safest way will be to take no part in the exercise of any act of force ordered in this case. The powers given to the Exve by the constn are sufficient to protect the other branches from Judiciary usurpation of pre-eminence, & every individual also from judiciary vengeance, and the marshal may be assured of it's effective exercise to cover him.⁶⁰

⁵⁶ See p. 48 of this memorandum.

⁵⁷ Letter of June 17, 1807, Thomas Jefferson Writings (Ford), vol. 9, p. 57.

⁵⁸ Ibid., p. 60.

⁵⁹ Ibid., p. 62, draft of a letter to United States Attorney Hay which may never have been sent, but which is of utmost importance.

⁶⁰ Ibid., p. 62. See also Dillon, John Marshall, vol. 1, introd., p. 49.

Happily, for the history of the country, the conflict which Jefferson took measures to meet did not take place. No student of this subject, however, can escape thinking of the dire consequences which might result from the attempted use of force by one branch of the Government against another.

HEADS OF DEPARTMENTS MAY NOT BE COMPELLED TO ATTEND A TRIAL NOR TO GIVE CONFIDENTIAL INFORMATION OR PAPERS (UNITED STATES v. SMITH, CIR. CT. D. N. Y. (1806))

In June and July 1806, William S. Smith and Samuel G. Ogden, of New York, were tried in the United States Circuit Court of New York, on indictments charging them with having aided Miranda in his attack on Caracas, Venezuela. The defendants submitted an affidavit that the testimony of James Madison, Secretary of State; Henry Dearborn, Secretary of War; Roger Smith, Secretary of the Navy, and three clerks of the State Department, was necessary to their defense. The three Cabinet members were summoned to appear in court. They refused, and on July 8, 1806, wrote to the judges presiding at the trial:

* * * We have been summoned to appear, on the 14th day of this month, before a special circuit court of the United States for the District of New York, to testify on the part of William S. Smith and Samuel G. Ogden * * * it is with regret we have to state to the court, that the president of the United States, taking into view the state of our public affairs, has specially signified to us that our official duties cannot, consistently therewith, be at this juncture dispensed with. * * *

The letter went on to say that since it was uncertain whether they could at any subsequent time, as heads of departments, absent themselves from their official duties, they suggested the issuance of a Commission for the purpose of taking their respective testimonies.

A motion for an attachment to bring the Secretaries into court was argued for 3 days. The court disagreed and no action was taken.

STATE OF MISSISSIPPI v. JOHNSON (71 U. S. 475 (1866))

The court held that the President of the United States could not be restrained by injunction from carrying into effect an act of Congress which was alleged to be unconstitutional. Attorney General Stanbery had occasion, in arguing on behalf of President Johnson, to refer to the Burr subpoena which had been issued to President Jefferson. He stated that Chief Justice Marshall had made a very grave error in holding that the President of the United States was liable to the subpoena of any court, as President (p. 483). Mr. Stanbery had occasion to refer to the cases where heads of departments had been ordered by the court to do certain acts. He pointed out that the only cases in which the court maintained jurisdiction over heads of departments, in order to compel them to execute laws were cases of mandamus to compel a Postmaster General, a Secretary of State, or a Secretary of the Treasury to do something; that the court had been very cautious at every step in maintaining that jurisdiction. While exercising jurisdiction, the court had stated that the thing which was required to be done was a ministerial act, and not one involving discretion (pp. 489-490).

⁶ 27 Fed. Cas. No. 16, 342, pp. 1192, 1194. See also, Beveridge, *The Life of John Marshall*, vol. 3, p. 436.

The opinion of the court had this to say concerning the performance of ministerial duties by heads of departments:

A Ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law (p. 498).

The court cited the cases of *Marbury v. Madison*, *supra*, and *Kendall v. Stockton* (12 Peters, 527), as illustrations where the court by mandamus ordered the performance of ministerial duties.

However, the court pointed out:

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. * * * The Duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance" (p. 499).

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences (p. 500).

TOTTEN, ADMINISTRATOR v. U. S. (92 U. S. 105)

This case involved an attempt to recover compensation for services rendered by claimant's intestate, W. A. Lloyd, under a contract with President Lincoln, by which Lloyd was to ascertain certain facts behind the rebel lines, and to transmit the information concerning the strength, resources, and movements of the enemy to the President. Lloyd was to have been paid \$200 per month for his service. Lloyd performed the services within the rebel lines, throughout the war, and sent the information to the President. Upon the close of the war, he was reimbursed only his expenses.

The question in the case was not the authority of the President to employ Lloyd nor of the binding nature of the contract upon the Government to pay for the services rendered. With those matters the Supreme Court had no difficulty. What troubled the Court was the secret nature of the services Lloyd was to have performed. The service stipulated by the contract was a secret service; the information sought was to have been obtained clandestinely and was to be communicated privately. The Court found that both the employment and the service were to be equally concealed.

The Court thus stated the general principle:

* * * public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. * * * Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

The Court also held that in secret employments of the Government, in time of war and in matters affecting our foreign relationships, where disclosure of a service rendered might embarrass our Government in its public duties, or endanger the person or injure the character of the agent performing the service, the Court will not force public disclosure.

APPEAL OF MARTRANFT (85 PENN. STATE REPT. 433 (1877))

This case is frequently cited by the courts and writers on the subject we are discussing. It stands for the proposition that Cabinet officers are not bound to produce papers or disclose information in a judicial inquiry, when in their own judgment the disclosure would, on public grounds, be inexpedient.

The Governor of the State of Pennsylvania, the Adjutant General, and others were subpoenaed to appear before a grand jury and were required to give certain information which they deemed confidential. The court said :

* * * We had better at the outset recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts. * * *

* * * We are inclined to think the conclusion thus reached is wise and discreet: and it is supported by the best text writers of our times. These state the law to be, that the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient (1 Greenf. on Ev., sec. 251; 1 Whart. Law of Ev., sec. 604). Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. * * *⁴²

Attorney General James Speed thus stated the principle to President Lincoln:

Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, if has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence (11 Op. A. G. 142 (1865)).

Attorney General Olney advised President Cleveland in response to this question, "Can a court require, on subpena, the production of any application or examination papers or other records of the boards of civil service examiners?" as follows:

The application and examination papers or other records of the civil-service examiners are therefore the official records or papers of the President or of the head of a Department.

Being records and papers of the character described, their production can not be compelled by the courts whenever the general public interest must be deemed paramount to the interests of private suitors.

Whether such general public interest forbids the production of an official record or paper in the courts and for the purposes of the administration of justice, is a question not for the judge presiding at the trial in aid of which the record or paper is sought, but for the President or head of Department having the legal custody of such record or paper (20 Op. A. G. pp. 557-558 (1893)).

Attorney General Moody upheld the right of the head of an executive department to refuse confidential information in a law suit be-

⁴² 85 Penn. State Rept., pp. 445, 447 (1877).

tween private parties. He advised the Secretary of Commerce and Labor that the Commissioner General of Immigration, who had been subpoenaed by the court, was not legally bound to appear and testify in obedience to the subpoena. Nevertheless, he counseled that since Attorney General Lincoln, in the case of *Marbury v. Madison*, saw fit to respond to a subpoena, that it would be wise for the officer to appear in court and to make an arrangement whereby as the head of an executive department of the Government such testimony as he deemed proper could be taken at the Department of Commerce and Labor (25 Op. A. G. 326 (1905)).

We have already adverted to Attorney General Bonaparte's opinion which stated that the Head of the Bureau of Corporations was not obliged to deliver papers to a Senate committee, pursuant to a subpoena which had been served upon him.⁶³ Instead, he counseled the Head of the Bureau to deliver the papers to President Theodore Roosevelt, who had the authority to determine the propriety of making public the information sought by the Senate.

Attorney General Jackson's opinion, that Federal Bureau of Investigation records could not be delivered to the chairman of the House Committee on Naval Affairs, has also been referred to.⁶⁴ The Attorney General pointed to the confidential nature of all investigative records in the executive branch of the Government, and to a discretion, in the executive branch, which had been upheld and respected by the judiciary, to determine the propriety of withholding information and papers from the legislative branch, in the public interest.

The best reasoned summary we have found of the reasons which prevent disclosure of confidential information by the executive departments, both to the judicial department and to the legislative branch, is contained in the well-documented speech of Senator Jackson, who became a Justice of the Supreme Court in 1893, in the famous Cleveland controversy with the Senate:

Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the coordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers.⁶⁵

A practical application of the foregoing principle, that Congress has not the power, under the Constitution, to force the President or the heads of departments to divulge information against what the President believes to be the public interest, is found in the case of George F. Seward. Seward was Counsel General of the United States in China. He appeared before the House Committee on Expenditures in the State Department, which was in charge of investigating his

⁶³ See pp. 17 and 18 of this memorandum, and 27 Op. A. G. 150 (1909).

⁶⁴ Vol. 40, Op. 8 A. G. (1941). See also p. 22 of this memorandum.

⁶⁵ March 22, 1886, 17 Congressional Record, p. 2623.

official conduct. A subpoena duces tecum had been served upon him to produce certain books and papers. Seward refused. The Committee on Expenditures brought Mr. Seward before the House to show cause at its bar why he should not obey the order of the House through its subpoena. The House referred the question to the House Judiciary Committee. Benjamin F. Butler, chairman of that committee, submitted a report which stated that a subpoena duces tecum was not the proper manner of compelling disclosure. If the committee believed that the books and records desired were public books, then the subpoena should have been issued to the highest executive officer having charge and custody of the public records. The report proceeded to state that 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. Although the House sometimes sends resolutions to a head of a department to produce such books and records; nevertheless, in any doubtful case, no head of department would bring before a committee of the House any of the records of his office without permission of, or consultation with, the President of the United States. All resolutions directed to the President of the United States, if properly drawn, contained a clause, "if in his judgment not inconsistent with the public interest" (Rept. No. 141, p. 3, March 3, 1879, 45th Cong. 3d sess.).

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.⁶⁶

Finally, the report stated that the highest exercise of the power calling for documents would be, in the course of justice, by the courts of the United States, but the House would not for a moment permit its journals to be taken from its possession by one of its assistant clerks and carried into a court in obedience to a subpoena duly issued by the court. The report indicated the perils incident to divulging to any committee of the House "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 department kept secret. 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.⁶⁷

The report appears to have been adopted by the House.⁶⁸ The record of the subsequent proceedings taken in the House show that the recommendations of the Committee on the Judiciary, that Seward was not in contempt for failure to obey the subpoena, were followed.

THE VIEWS OF TEXT WRITERS

Dean Wigmore, in his work on Evidence, discusses the subject of Privilege for Secrets of State and Official Communications. He asks

⁶⁶ Ibid., Rept. No. 141, p. 3, 45th Cong., 3d sess.

⁶⁷ Ibid., pp. 3-4.

⁶⁸ Congressional Investigations, Eberling, p. 253. Hinds, Precedents of the House of Representatives, vol. 3 (1907), secs. 1699, 1700.

whether there is a genuine testimonial privilege which is to protect public officers from the disclosure of certain kinds of facts or communications received through their official duties. He answers that such a privilege undoubtedly exists, but the scope of that privilege has not yet been defined with certainty. Wigmore collects the authorities in England, and in the United States, and states:

(3) Again, several precedents (representing England, the United States Federal Court, and some State Courts) have declared a privilege of secrecy in general for official documents in an officer's possession, particularly (so far as any definition has been attempted) for communications between officials; and in these precedents no question whatever of international politics or military defense was involved (Wigmore on Evidence, vol. 8, sec. 2378 (3)).

The considered view of writers, who have given study to this subject, generally confirms the soundness of the actions of our Presidents and the decisions of the courts which lodges in the executive branch the power to determine what information to divulge and what to keep secret. Thus Corwin in *The President, Office and Powers*, states:

* * * Thus neither the President nor the Secretary of State is ever "directed" by the house to furnish desired information or papers, but only "requested" to do so, and then only if it is "in the public interest" that they should comply—a question left to be determined by the President. More than that, however, Presidents have sometimes intervened to exonerate other heads of departments than the Secretary of State, and even lesser administrative officials, from responding to congressional demands for information, either on the ground that the papers sought were "private," "unofficial," or "confidential," or that the demand amounted to an unconstitutional invasion of presidential discretion.

Nevertheless, should a congressional investigating committee issue a subpoena duces tecum to a Cabinet officer ordering him to appear with certain adequately specified documents, and should he fail to do so, I see no reason why he might not be proceeded against for contempt of the house which sponsored the inquiry. And the President's power of pardon, if measured by that of the King of England, does not extend to contempts of the houses of Congress (pp. 281-282).

We have seen in part I of our discussion that never in our history has either House of Congress tested its power to punish a head of department for contempt, despite numerous failures by heads of departments to obey resolutions of the Houses of Congress to furnish papers. We will show in parts III and IV, which deal with the Constitution and statutes, that Mr. Corwin is probably in error in stating that a Cabinet officer can be held in contempt by reason of a failure to produce papers or give testimony which he or the President considers confidential in the public interest.

Mr. Corwin also states that he knows of no instance in which a head of a department has testified before a congressional committee in response to a subpcena; nor does he know of a case where such head of department has been held in contempt for refusal to testify. All appearances by these high officials seem to be voluntary (p. 445, *ibid.*).

Mr. Corwin was apparently unaware of the instances, cited in the footnote, where several Cabinet officers did appear before congressional committees and testified pursuant to a summons of some kind.⁶⁹ It does not seem that the authority of committees was in any way questioned.

In a paper by Edward Campbell Mason, entitled "Congressional Demands upon the Executive for Information," the author asks the question:

Can the President of the United States, or his subordinates in the Executive Department, be compelled to transmit papers or give information to Congress? (Papers of the American Historical Association, vol. 5 (1891), p. 33).

The instances which he examined did not disclose any power sufficient to compel compliance. While the House may lay claim to the necessary power because of its authority in impeachments, such power was never exercised or even clearly defined. The author next turns to the power of the Senate to act as in impeachment proceedings and inquires whether the Senate can compel the Executive to furnish information. However, since a court has not the power to compel an executive officer to disclose matters which in his opinion should be kept secret, it would appear to follow that unless the Constitution grants such power, the Senate likewise cannot compel disclosure of confidential information.

The foregoing reasoning led Mr. Mason to conclude that the Congress may not compel the Executive to give information by its power of impeachment. He refers to United States Revised Statutes 102, 103, and 104, which were passed in 1857. Those give either branch of Congress the right to summon witnesses. It would appear, however, that the Executive is outside the operation of that power.

If my reasoning is sound, Congress derives no power from its legislative authority, to compel the President or the officers under him in the Executive Department, to furnish papers or to testify (*ibid.*, p. 40).

Finally, the author urges a practical argument against coercing the executive branch. The three departments of our Government are supreme and independent. It would be impossible for the Congress to coerce the executive branch except by a resort to arms. While a President might be impeached for high crimes and misdemeanors, the author concedes that it is difficult to imagine an impeachment based on a refusal to furnish information. Such a refusal is neither a crime nor a misdemeanor.

John Philip Hill, in *The Federal Executive*, has this to say:

* * * Courts cannot usually call upon heads of departments to answer in relation to official acts. The court said, in *Decatur v. Paulding* (14 Peters, 522), that many acts required of the heads of the executive departments required use of discretion, and where not purely ministerial were not subject to order of the courts * * * (p. 55).

⁶⁹ "1881. *Members of the President's Cabinet appear before committees of the House and give testimony.*"—Cabinet officers frequently appear before committees of the House. Thus, on February 3, 1837, Hon. Levi Woodbury, Secretary of the Treasury, appeared in obedience to a summons, before the committee appointed to investigate the Executive Departments, and gave his testimony. Also, on February 13, Hon. John Forsyth, Secretary of State, appeared and testified before the same committee.

"1882. On February 13, 1839, Levi Woodbury, Secretary of the Treasury, appeared before the select committee appointed to investigate the defalcations in the New York customhouse, and was sworn as a witness and testified.

"1883. On January 16, 1861, the chairman of the select committee on seizure of forts, arsenals, etc., by direction of the committee, addressed the Secretary of the Navy requesting him to attend the committee and give testimony. The chairman concluded as follows: 'Please state whether a formal subpoena will be required.'

"The Secretary attended without the subpoena" (Hinds' *Precedents of the House of Representatives*, vol. 3 (1907), p. 179).

On the point that the President is responsible for all acts of his Cabinet and heads of departments, the author states:

The position of the heads of the executive departments is summed up in Cooley's *Blackstone's Commentaries* (book 1, pp. 231 and 236). He there states: "The President, not the Cabinet, is responsible for all the measures of the Administration, and whatever is done by one of the heads of departments is considered as done by the President, through the proper executive agent. In this fact consists one important difference between the Executive (King) of Great Britain and of the United States; the acts of the former being considered as those of his advisers, who alone are responsible therefor, while the acts of the advisers of the American Executive are considered as directed and controlled by him" (*ibid.*, pp. 55-56).

Willoughby, in *The Constitutional Law of the United States*,⁷⁰ and John H. Finley and John F. Sanderson, in *The American Executive and Executive Methods*, state, that the President has always exercised a discretion as to giving or withholding information upon the request of either House for it, and that heads of departments may decline, upon public considerations, to furnish communications or papers in their custody in response to legal process.⁷¹

Herman Finer⁷² gave his views to Senator La Follette, chairman, Joint Committee on the Organization of Congress, in a paper which was incorporated in a joint committee print.⁷³ Professor Finer took up the question of how far the Executive could be compelled to answer demands of Congress for information and papers. He stated that the Executive was highly protected. After citing the famous debates in Congress during the Cleveland and Theodore Roosevelt administrations, which we discussed in part I, he concluded:

All this means that the President could protect any departmental chief who asked him for protection; that the President himself is immune; and that, therefore, the Congress to get its answers must depend upon either comity, or the indirect power available to it in its power of the purse.⁷⁴

On the subject of the President's sole constitutional authority to see that the laws were faithfully executed, Professor Finer stated:

It is the President who has the sole constitutional authority to see that the laws are faithfully executed, with the vast meaning this phrase has acquired—the maker of the Republic's policy, the watcher of the finances, the supreme manager of the machinery of administration. He is responsible for the everyday conduct of foreign affairs. His cabinet has small authority distinct from his authority: In the sense that really matters they are subordinates.⁷⁵

Ernest J. Eberling in his book, *Congressional Investigations* (1928), writes:

It is also true that congressional committees in their ardor to investigate have at times pushed their demands to a point where compliance with them would have interfered with the Executive in the discharge of his constitutional duties. It would seem that the Executive is justified in resisting, therefore, any demand when it is believed that compliance therewith would be incompatible with the public interest. Members of Congress have frequently admitted this point. The decision of the Executive in the case of a dispute must necessarily be final. The question would not be justiciable and the infliction of punishment by one coordinate branch upon the other would be wholly repugnant to the constitutional

⁷⁰ Vol. 3, sec. 968.

⁷¹ Finley and Sanderson, pp. 199, 264.

⁷² Visiting professor of political science at Harvard University, and a lecturer on government for many years at the London School of Economics.

⁷³ *The Organization of Congress, Suggestions for Strengthening Congress by Members of Congress and Others*, 79th Cong., 2d sess., June 1946, p. 49.

⁷⁴ *Ibid.*, p. 56.

⁷⁵ *Ibid.*, p. 57.

scheme. The Executive, no less than Congress, is accountable directly to the people and the ultimate decision must rest in such matters with the electorate (p. 282).

We might conclude our discussion of the court decisions by paraphrasing Jefferson's crucial question:⁷⁶ Would the President and the heads of departments be independent of the judicial or legislative branches, as contemplated by the Constitution, if they were subject to their commands, and to imprisonment for disobedience of court or legislative subpoenas? It is the answer to that question, that the President and heads of departments must and do have the last word, under our theory of government, respecting the propriety of withholding papers, which led the Judiciary Committee of the House to conclude, in the famous Seward case,⁷⁷ that the restraints imposed by the Constitution and the courts, as voiced by Judge Marshall in *Marbury v. Madison*,⁷⁸ apply with equal force to the House of Representatives and the Senate. That conclusion is amply fortified by the decisions we have examined, by the opinions of the Attorney General, and by the views of almost every writer on this subject.

III. THE CONSTITUTION AND THE STATUTES CREATING THE EXECUTIVE DEPARTMENTS

We have seen in part I of this memorandum that beginning with 1792, when President Washington first dealt with the subject of giving information and papers to Congress, that all our Presidents have exercised a discretion, which was shared by their heads of departments, to withhold certain information in the public interest.

In part II, we dealt with the court decisions which sanctioned, both for Presidents and for their heads of departments, the privilege of keeping confidential the testimony and records of the executive branch. Courts will not expose to public view what the head of a department desires to keep secret for the public good. The views of writers on the law of evidence, and of those who have written on the Constitution and the President's office and powers confirmed what the court decisions had held, and what our past Presidents had in practice done.

We now turn to the Constitution of the United States and to the laws creating the executive departments. Do they contain provisions making it mandatory for heads of departments to give information to Congress?

The Constitution provides "The Executive Power shall be vested in a President of the United States of America."⁷⁹

Before entering on the "Execution of his Office," the President must take an oath:

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States—⁸⁰

and he is also required to "Take Care that the Laws be faithfully executed."⁸¹

⁷⁶ See p. 37 of this memorandum.

⁷⁷ See p. 41 of this memorandum.

⁷⁸ See p. 32 of this memorandum.

⁷⁹ Art. II, sec. 1, clause 1.

⁸⁰ Art. II, sec. 1, clause 7.

⁸¹ Art. II, sec. 3.

The Constitution does not mention the words "Cabinet Officer" or "Cabinet Member." It does state that the President may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices. The President is also given the power to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, and all other officers of the United States whose terms are not otherwise provided for in the Constitution, and which shall be established by law.⁵²

The words "Head of Department" appear in the same section which empowers the President to nominate and to appoint the various officers of the United States. The section provides that Congress may by law vest the appointment of inferior officers in the President alone, in the courts of law, "or in the Heads of Departments."⁵³

Attorney General Cushing, in an opinion to the President, dealt at length upon the organization of the various departments of the executive branch.⁵⁴

Commencing with July 27, 1789, Congress proceeded to establish the Department of Foreign Affairs, later changed to the Department of State, which was to perform such duties respecting foreign affairs as the President should assign to the head of that department. On August 7, 1789, Congress established the Department of War, which was to perform such duties as might be entrusted to the head of that department by the President. In the same year the Department of Treasury was established. A prominent fact in connection with the Treasury Department was that the Secretary of the Treasury, instead of being made subject only to the President's direction, was required, in addition to the performance of such services as he shall be directed to perform, to—

make report and give information to either branch of the legislature, *in person or writing, as he may be required*, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office.

On September 24, 1789, Congress established the Office of the Attorney General, who was, in addition to the prosecution of all suits in the Supreme Court, to give his advice and opinion upon questions of law, when required by the President. On September 22, 1789, the Office of Postmaster General was created, who again was to be subject to the direction of the President.

The foregoing was the original basis of the executive organization of the Government. The Secretaries of State, War, Treasury, and the Attorney General were the immediate superior ministerial officers of the President and his constitutional counselors during the period of Washington's administration.

During the administrations of Jefferson, Madison, Monroe, and John Quincy Adams there was no change in the general character of the executive departments. During the administration of Jackson, the Postmaster General also became a Cabinet counselor of the President. On March 3, 1849, the Department of the Interior was established. The act establishing that Department does not provide, in terms, that the Secretary of the Interior shall be subject to the gen-

⁵² Art. II, sec. 2, clause 2.

⁵³ Art. II, sec. 2, clause 2.

⁵⁴ Office and Duties of the Attorney General (6 Op. A. G. 326, March 1854).

eral direction of the President, as in the case of the Secretaries of State, War, Navy, and Postmaster General; nor do the acts appointing the Secretary of the Treasury and the Attorney General. On the other hand, Attorney General Cushing points out that none of the acts, except the one establishing the Treasury Department, subject the chief executive officers to the duty of responding to direct calls for information on the part of the two Houses of Congress. Attorney General Cushing adds:

* * * This, however, has come, by analogy or by usage, to be considered a part of their official business. And the established sense of the subordination of all of them to the President, has, in like manner, come to exist, partly by construction of the constitutional duty of the President to take care that the laws be faithfully executed, and his consequent necessary relation to the heads of departments, and partly by deduction from the analogies of statutes (6 Op. A. G. 332-33).

Attorney General Cushing calls particular attention to one other fact. While, by express provision of law, the Secretary of the Treasury was given the duty to communicate information to either House of Congress when desired, and while it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General, the provision of law, which enacts that the Secretary of the Treasury shall make report and give information in person, does not appear to have been at any time practiced upon by Congress, either in regard to the Secretary of the Treasury or any other head of department. "But heads of departments have in some cases been called on to make explanations in person to committees of Congress" (*ibid.*, p. 333).

Attorney General Cushing also rendered an opinion to the President wherein he wrote at some length of the "Relation of the President to the Executive Departments."^{ss} He reviewed the laws which created the original seven executive departments. In summarizing those laws, Attorney General Cushing stated that the original theory of departmental administration continued unchanged, namely, executive departments, with the heads thereof discharging their administrative duties in such manner as the President should direct. The heads were, in fact, executors of the will of the President. It could not, wrote Attorney General Cushing, be otherwise in view of the constitutional provisions, quoted above, which lodge the executive power in the President, and which make him the "responsible executive minister of the United States" (7 Op. A. G. 463).

Attorney General Cushing then stated the general rule:

* * * I think here the general rule to be as already stated, that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless, whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution (7 Op. A. G. 469-70).

The foregoing quotation poses an interesting question: Suppose Congress should pass a law which would compel heads of departments to give information and papers to either House of Congress

or its committees? Suppose further that the law left no discretion whatever in the head of the department or in the President? According to Attorney General Clark such a law might well be subversive of our form of Government and might well render our Chief Executive a President in name, but "utterly powerless."

We have thus far dealt with the establishment, by 1849, of the Departments of State, War, Treasury, Justice, Post Office, Navy and Interior. In 1889, the Department of Agriculture was made an executive department. The original statute of 1862 required the Commissioner of Agriculture to make annual reports to the President and Congress, containing an account of his receipts and expenditures, and special reports on particular subjects whenever required to do so by the President or either House of Congress. In 1928, the statute was amended to provide for the making by the Secretary of Agriculture of an annual general report of his acts to the President; the provision concerning special reports on particular subjects when requested by the President or either House of Congress is still retained.^{ss}

A Department of Labor, with a Commissioner of Labor was first created in 1888, with provision for an annual report to the President and Congress "of the information collected and collated by him." He was likewise authorized to make special reports on particular subjects whenever required to do so by the President or either House of Congress, and he was directed to make a detailed report of his expenditures to Congress.st

In 1903, a Department of Commerce and Labor was established as an executive department.^{ss} The act requires the Secretary of Commerce and Labor to annually report to Congress, accounting for all receipts and expenditures, and describing the work done by him. He is also required to make special investigations and reports when required by the President or either House of Congress. The act also provides for the creation of a Bureau of Corporations, with a Commissioner of Corporations at its head, whose duties were to gather information for the President, in order to enable him to recommend legislation to Congress. The Commissioner is required to report to the President, who is responsible for making public so much of the information collected for him as he (the President) sees fit.^{so}

I have referred to the Commissioner of Corporations and his duties prescribed in this act of 1903, because it furnishes an excellent illustration of a demand by the Judiciary Committee of the Senate upon the Attorney General and the Commissioner of Corporations for records which by express provision of law the President had the right not to make public. It will be recalled that President Theodore Roosevelt directed all the papers to be brought to him, despite a threat of imprisonment of the Commissioner of Corporations for contempt of a Senate subpoena, and he defied the Senate committee to do its worst.^{so}

^{ss} May 29, 1928, 45 Stat. 993.

st 25 Stat. 183, sec. 8.

^{ss} 32 Stat. 825.

^{so} 32 Stat. 828.

^{so} See pp. 30-32 of this memorandum. An interesting account of the removal of a trunkful of papers by the Commissioner of Corporations to President Theodore Roosevelt is contained in 43 Congressional Record 3728 (1909).

The Department of Labor was made an executive department in 1913,⁹¹ with a separate head known as the Secretary of Labor. By the same act of March 4, 1913, the Department of Commerce and Labor was thereafter to be called the Department of Commerce, with a Secretary of Commerce at the head thereof. The Secretaries of Labor and Commerce must each make annual reports to Congress of receipts and expenditures; and describing the work done by their respective departments; they are also required to make such special investigations and reports as the President or Congress may require.

We note differences in the wording of the report requirements by the three departments just discussed. The Secretary of Agriculture must report annually to the President; the Secretaries of Commerce and Labor to the Congress. The Secretary of Agriculture is to make special reports on particular subjects whenever required to do so by the President or either House of Congress; the Secretaries of Commerce and Labor must make special investigations and reports when required to do so by either House or by the President.

Title 5 of the United States Code deals with the executive departments. Sections 1 through 117 of chapter 1, dealing with salaries of heads of departments, vacancies in office, etc., are specifically made as applicable to the 3 departments just discussed, as they are to the other 7 departments created between 1789 and 1849.⁹² By definition, the word "department" means 1 of the 10 executive departments enumerated in section 1 of title 5.

The establishment of the executive departments by the first constitutional Congress, the maintenance of the same "great outlines" of those departments in 1855,⁹³ and the addition of the three last named departments, partake of one uniform system and function—to enable the President to perform his duties under the Constitution as the Chief Executive Officer of the Nation.

Two famous debates, one in the first administration of President Cleveland, the other in Theodore Roosevelt's administration, witnessed the conflict between the Senate and the Executive concerning the right of the former to demand and the latter to withhold information and papers.⁹⁴ Both of those conflicts were resolved in favor of the Executive. Papers demanded of heads of departments by resolutions, by committees, and by subpoena were not produced. It was admitted during these debates that there was nothing in the wording of the acts creating the departments as they existed in 1886 and 1909, nor in any other provision of law, which could compel the production of documents or information by the executive departments. Public interest was invoked by the Executive or by the heads of departments as a reason for forbidding disclosure.

Despite the provisions relating to the establishment of the Treasury Department,⁹⁵ which require the Secretary of the Treasury to give information to either branch of the Legislature respecting all matters referred to him by the Senate or the House or which shall appertain to his office, and despite the wording above discussed in the acts cre-

⁹¹ March 4, 1913, 37 Stat. pp. 736 and 738.

⁹² See, 512, 591, 611 of title 5 of U. S. C.

⁹³ Attorney General Cushing to the President, on the Relation of the President to the Executive Department, 7 Op. A. G. 353, 430.

⁹⁴ For summaries of the arguments during those debates, see pp. 14-16 and 18 of pt. I of this memorandum.

⁹⁵ 1 Stat. 65, 5 U. S. C. 242.

ating the Secretaries of Agriculture, Commerce, and Labor, we must remember that they are executive departments. As members of the executive branch, the Constitution places independent duties and obligations upon them to the President within the scheme and framework of our Government. Thus we saw Secretary of the Treasury Mellon and President Coolidge successfully resisting demands for information and papers, which had been requested by Senate resolutions, from the Internal Revenue Department. Ogden Mills, Secretary of the Treasury in President Hoover's administration, similarly refused to disclose confidential data in the Treasury Department following a request therefor by resolution of the House of Representatives.⁹⁶ Secretary of the Treasury Sherman, in President Hayes' administration, refused to comply with a request of the chairman of the Committee on Commerce of the Senate on the ground that the papers were of a confidential character and would disclose confidential communications between the President and the Secretary of the Treasury.⁹⁷

The fundamental public interest to be served may always be cited by a head of a department or by the President in opposition to a blanket demand for information or papers by a congressional committee or by a resolution of either House. This view is supported by Alexander Hamilton, Secretary of the Treasury in Washington's administration, who stated that although his Department was subject to Congress in some points—

he thought himself not so far subject as to be obliged to produce all the papers they might call for. They might demand secrets of a very mischievous nature.⁹⁸

Attorney General Cushing, in an opinion entitled "Resolutions of Congress," wrote in 1854:

In a word, the authority of each Head of Department is a parcel of the executive power of the President. To coerce the Head of Department is to coerce the President. This can be accomplished in no other way than by a law constitutional in its nature, enacted in accordance with the forms of the Constitution.

Of course, no separate resolution of either House can coerce a Head of Department, unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House (6 Op. A. G. 682-83).

Attorney General Cushing, in the same opinion, referred to the act of 1789, which made it the duty of the Secretary of the Treasury to give information to either branch of the Legislature, in person or writing, as may be required by the Senate or the House of Representatives. He concluded, however, that every communication of the head of a department to either House must be understood to be made with the assent, express or implied, of the President.

THE JOINT RESOLUTION AUTHORIZING THE SECRETARY OF AGRICULTURE TO PUBLISH THE NAMES AND ADDRESSES OF TRADERS ON THE BOARDS OF TRADE

An illustration of Attorney General Cushing's opinion that only a law, constitutional in its nature, approved by the President, can force

⁹⁶ See pp. 19-21 of this memorandum.

⁹⁷ 17 Congressional Record 2332 (1886), 2618.

⁹⁸ The Writings of Thomas Jefferson (1905), vol. 1, p. 304.

the head of a department to communicate information, otherwise confidential, is furnished by the joint resolution which became law on December 19, 1947.²⁹ That resolution authorized the Secretary of Agriculture to publish the names and addresses of persons transacting business on the boards of trade and the amounts of commodities purchased or sold by them. It also required the Secretary of Agriculture to furnish to committees of Congress, upon request, any such information in his possession.

The Secretary of Agriculture had been subpoenaed by the Senate Committee on Appropriations to furnish it with a list of traders in commodity futures. The Secretary pointed to the Commodity Exchange Act,¹ which prohibited him from furnishing data and information which would disclose the business transactions of any person and the trade secrets of names of customers. He also cited the opinion of his counsel to the effect that it would be a violation of law to comply with the Senate committee's request.² The Senate, therefore, by the resolution aforementioned, amended the Commodity Exchange Act so as to permit the Secretary of Agriculture, in his discretion, to disclose and make public the information. President Truman signed the resolution and thereafter the Secretary of Agriculture released the information to the newspapers and communicated it to the committee.³

In view of the public statements by both President Truman and Secretary of Agriculture Anderson on the subject of speculation in commodities,⁴ particularly in basic food products and its effect on the national economy, we must conclude that the President deemed it in the public interest to sign the joint resolution. Had the President thought otherwise, he undoubtedly would have vetoed the resolution, and directed the Secretary to keep the information which he had collected confidential.

THE CIVIL SERVICE COMMISSION RECORDS

The withholding of confidential papers, in the public interest by the executive branch of the Government, applies also to records of the Civil Service Commission. The Commission was created by act of Congress in 1883.⁵ The President is authorized to appoint, by and with the Senate's consent, three Commissioners, and he alone may remove any Commissioner. The President is authorized to prescribe regulations for the admission of persons into the civil service; it is the duty of the Commissioners to aid the President in preparing, and in carrying into effect those regulations.⁶

The act provides that the Commission shall, subject to rules made by the President, make regulations for, and have control of, examinations, and shall supervise and preserve the records. The Commission is required to make an annual report to the President for transmission to Congress. There appear to be no other statutory provisions relating to the records of the Commission.⁷

²⁹ Public Law 392, ch. 523, 80th Cong., 1st sess.

¹ 7 U. S. C. 12; 42 Stat., sec. 8, p. 1003.

² 93 Congressional Record 11738, 11739, Dec. 18, 1947.

³ 93 Congressional Record 11735-11736, Dec. 18, 1947.

⁴ See Senator Ferguson's references to President Truman and Secretary Anderson's statements concerning speculations in grain, and the address of the President of the United States to joint session of the House and Senate, November 17, 1947, wherein he said: "Legislation is required, moreover, to prevent excessive speculation on the commodity exchanges," 93 Congressional Record 19704.

⁵ January 16, 1883; 22 Stat. 403; 5 U. S. C. 632.

⁶ 5 U. S. C. 631, 633 (1).

⁷ 5 U. S. C. 633 (3) and (5).

We have shown that a court may not compel the production of applications or examination papers or other records of the civil-service examiners.⁸ The opinion of Attorney General Olney stated that the records of the civil-service examiners were official records of the President or of the head of a department, that the public interest was paramount to that of private suitors and forbade the production of such records in court.

In another opinion, the Attorney General ruled that the Civil Service Commission was not attached to any of the executive departments, nor is it subject to the control of any head of a department. The Commission was subject only to the President's control.⁹ It should be pointed out, however, that section 5 of the United States Code, dealing with the executive departments, devotes the first 11 chapters to the 10 principal executive departments and chapter 12 to the Civil Service Commission.

While it is true that section 2 of title 5 defines the word "department" to mean 2 of the 10 principal executive departments, enumerated in section 1 of title 5, it has been held that the Civil Service Commission is not a subordinate Commission attached to one of the so-called executive departments. It is in itself an independent division of the executive branch of the Government with certain independent duties and functions.

* * * Therefore, in the light of the Supreme Court's definition of the word "Department" as it appears in Section 2, Article II of the Constitution, it is my conclusion that the Civil Service Commission constitutes a subdivision of the power of the Executive for the more convenient exercise of that power, and as such is a "Department" within the meaning of the Constitution. Therefore, the three Commissioners, who constitute the Commission, are the "head of a Department" in the constitutional sense (37 Op. A. G. 231 (1932-34)).

It appears to be clear, therefore, that all records of the Civil Service Commission are subject to the direction and control of the President, in carrying out the regulations which the statute requires and obligates him to prescribe. If the Civil Service Commission has kept its records of investigations confidential, then it may with propriety decide, in a given case, whether the records demanded of the Commission by either of the Houses of Congress, or its committees, shall be withheld from publication. The President may overrule the Commission. In doing so, however, he would necessarily be guided by the fact that much of the information collected by the Civil Service Commission deals with character information of candidates for Government employment. Such information must necessarily be collected from diverse sources—some reliable, some not. Persons who are solicited by the Civil Service Commission for information, dealing with the character and qualifications of applicants, give the information in confidence. The questionnaires sent to character references ordinarily state on their face that all answers will be treated on a confidential basis. It would, therefore, violate a cardinal rule of all investigative agencies,¹⁰ and of sound public administration, to keep the word of the Government to the individual sacred.¹¹ Hence, the case would have to be an extraordinary

⁸ See p. 40 of this memorandum; 20 Op. A. G. 557 (1893).

⁹ 22 Op. A. G. 62.

¹⁰ 40 Op. A. G. No. 8, April 30, 1941, p. 2.

¹¹ See President Theodore Roosevelt's classic statement, p. 17 of this memorandum.

one which would outweigh the compelling reasons for keeping all records of the Commission confidential.

An illustration of an attempt to coerce the President, by coercing the Civil Service Commission to produce records which were confidential, is afforded by a joint resolution which was introduced in the House of Representatives on January 7, 1948.¹² The joint resolution authorized and directed the Commission "to make available to, permit examination of, and furnish to the House Committee on Expenditures in the Executive Departments" records and information which disclose the acts, opinions, or policies of Members of Congress, and individuals who are not Federal employees and not applicants for positions in the Federal Government, when such records and information may be deemed necessary by the committee in connection with any investigation held by it to ascertain the manner in which the Commission is expending its funds, compiling or holding in its possession the information above referred to, and in connection with investigations to be conducted under House Resolution 118, 80th Congress.

Section 2 of the joint resolution authorized and directed the Commission to permit the committee or a representative thereof to examine the so-called investigator's leads file, and all duplications thereof, whether in the offices of the Commission in Washington or elsewhere.

It will be recalled that President Tyler, in response to a resolution of the House of Representatives which called upon him and heads of departments to furnish information regarding Members of Congress who had applied for office, declined.¹³ He based his refusal upon two grounds: (1) that applications for office are of a confidential nature, and (2) that compliance with the resolution would involve a surrender of duties exclusively conferred by the Constitution on the Executive.

Aside from questions of wisdom, policy and precedent, passage of the joint resolution would raise serious questions of a constitutional nature. The Constitution lodges the executive power in the President. Among his duties is that of appointing those persons who are to aid him in executing the laws. The joint resolution would, it would seem, constitute legislative interference with this important executive function.¹⁴

It is fitting to conclude our discussion of the Constitution and of the acts creating the executive departments with a reference to three cases through which runs the same strain: that the Chief Executive has an exclusive and illimitable power to control his subordinates in the executive branch.

In *In re Neagle* (135 U. S. 1), the Court said:

The Constitution, section 3, article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in numbers from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance

¹² H. J. Res. 289, 80th Cong., 2d sess.

¹³ See Tyler's Message to the House of Representatives, p. 8 of this memorandum.

¹⁴ See the quotations from William Howard Taft and Attorney General Jackson, pp. 4, 22 of this memorandum.

of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed [pp. 63-64].

In *Myers v. United States* (272 U. S. 52), the majority of the court spoke through Chief Justice Taft. After quoting the foregoing words with approval, the Court answered the contention that executive officers, appointed by the President with the consent of the Senate, are bound by the statutory law and are not his servants to do his will, by pointing out:

The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. (*Kendall v. United States*, 12 Peters, 524 at p. 610). Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority [pp. 132-133].

Referring to instances of executive dealings with foreign governments and with domestic problems, Chief Justice Taft stated:

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith [p. 134].

The Court went on to say that the duties of the heads of departments and bureaus in which the discretion of the President is exercised were the most important in the whole field of executive action of the Government (p. 134).

In *Humphrey's Executor v. United States* (295 U. S. 602), it was pointed out that the Myers case found support in the theory that a purely executive officer, serving in one of the units in the executive department was "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is" (p. 627). Concerning the necessity of keeping each of the three departments of the Government free from the coercive influence of either of the others, the Court stated:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution: and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there [pp. 629-630].

The persuasiveness of Attorney General Cushing's opinion concerning the ineffectiveness of resolutions of either or both Houses to coerce the head of a department to furnish information or papers against the President's wishes, becomes apparent in the light of the foregoing cases. To paraphrase Chief Justice Taft's statement in the Myers case: The discretion is that of the President to determine the national public interest, in directing his executive subordinates to withhold confidential information from congressional committees.

IV. THE STATUTES DESIGNED TO COMPEL TESTIMONY AND THE PRODUCTION OF RECORDS IN CONGRESSIONAL INVESTIGATIONS

TITLE 2, UNITED STATES CODE, SECTIONS 192, 193, 194

Title 2 of the United States Code deals with The Congress; chapter 6 thereof is entitled "Congressional Investigations." Section 192 of title 2 deals with the refusal of a witness to testify. It provides that—

every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House—

or any committee thereof, willfully makes default, or refuses to answer a question pertinent to the inquiry, shall be guilty of a misdemeanor. Punishment by fine and imprisonment is provided. Section 193 deals with "Privilege of Witnesses." It states that no witness is privileged to refuse to testify or to produce papers, upon the ground that his testimony or his production of papers may tend to disgrace him or render him infamous. Section 194 deals with the citing of a recalcitrant witness by the Speaker of the House or the President of the Senate before the appropriate United States attorney, whose duty it becomes to bring the matter before a grand jury for action.

The foregoing sections were last amended in 1938.¹⁵ They have their origin in Revised Statutes 102, 103, and 104, which were derived from the acts of January 24, 1857, and January 24, 1862.¹⁶

In re Chapman (166 U. S. 661 (1897)), involved the refusal of Chapman, who was a member of a firm of stockholders in the city of New York and who appeared as a witness before a special committee of the Senate, to answer certain questions put to him by the committee. At that time, sections 102, 103, and 104 of the Revised Statutes were invoked in connection with Chapman's indictment. The court held that Congress had the power to enact a statute to enforce the attendance of witnesses, and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legislative functions.

It is important to note that sections 102 and 103 of the Revised Statutes, upon which sections 192 and 193 are based, also used the words "any matter under inquiry before either House." Referring to the word "any" the Court stated:

We think that the word "any" as used in these sections, refer to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action * * * [p. 667].

The Court also held:

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offense against the United States [p. 671].

The Chapman case was decided in 1897. For approximately 40 years prior to that decision, there had been a law similar to the present statutes, designed to compel the testimony of witnesses before the Houses of Congress. Nevertheless, in the famous Senate debates of 1886 and 1909, above referred to,¹⁷ it was freely admitted that there

¹⁵ 52 Stat. 942-3.

¹⁶ 11 Stat. ch. 19, 155, and 12 Stat. ch. 11, 333; see also *In re Chapman*, 166 U. S. 665-6.

¹⁷ See pp. 14, 18 of this memorandum.

was no law which could compel the head of a department to give information or papers to the Houses of Congress against the President's wishes.¹⁸ Moreover, in the precedents cited in parts I and II of this memorandum, covering a period of 155 years, beginning with 1792 to the present time, heads of departments had failed to comply with congressional demands for papers; in not a single instance was any action taken by the Houses of Congress against a head of a department who thus refused to comply.

We must conclude, therefore, that sections 192, 193, and 194, dealing with the refusal of witnesses to testify in congressional investigations, apply to private citizens and persons. They are inapplicable to the executive departments.

TITLE 5, UNITED STATES CODE, SECTION 105A, INFORMATION FURNISHED COMMITTEES OF CONGRESS ON REQUEST

One might be led to believe from a reading of section 105a, that every executive department is obliged to furnish *any information*, when requested to do so, by the Committees on Expenditures of the House and Senate. Section 105a reads as follows:

Information furnished Committees of Congress on Request.—Every executive department and independent establishment of the Government shall, upon request of the Committee on Expenditures in the Executive Department of the House of Representatives, or of any seven members thereof, or upon request of the Committee on Expenditures in the Executive Departments of the Senate, or any five members thereof, furnish any information requested of it relating to any matter within the jurisdiction of said committee (May 29, 1928, ch. 901, sec. 2, 45 Stat. 996).

There appears to be one limitation on the powers of the Committees on Expenditures, namely, they can only request information relating to any matter within their jurisdiction. It is important to give a brief history of the section in order that we may arrive at its meaning. I am satisfied from a reading of the Congressional Record, and from the House and Senate reports on the bill which incorporates the section, that the section was not intended to enable the Committee on Expenditures to make blanket calls for information and papers upon the executive departments. Heads of departments are therefore not obliged to change their practices, as they have been established by the precedents heretofore cited, by reason thereof.

Section 105a is the same as section 2 of chapter 901, Public Law 611, of May 29, 1928 (45 Stat. 996). Chapter 901 is entitled: "An Act to discontinue certain reports now required by law to be made to Congress." The first section of the chapter states that the reports which were then required by law to be made to Congress shall be discontinued. It proceeds to enumerate 127 different kinds of reports of the executive departments and various governmental agencies which are so discontinued. Section 2 then follows and, as we shall show, was intended for one purpose only—to enable the Committees on Expenditures in the Executive Departments of the House and of the Senate to request of the executive departments in special cases such information as they had theretofore been able to receive through the filing of the reports. In a word, as the House and Senate reports plainly state, the United States Bureau of Efficiency conducted a sur-

¹⁸ See p. 19 of this memorandum and 43 Congressional Record 3730 (1909).

vey and study of all the reports which, up to that time, had been furnished annually by the heads of departments and independent establishments of the Government. The Bureau came to the conclusion that the reports served no useful purpose. Hence, it was a waste of time and money to have hundreds of reports furnished annually to Congress, and the Bureau recommended their discontinuance. However, it was felt that there might be special occasions when the Committees on Expenditures of the House and of the Senate might need information relating to subjects, which were previously covered by the reports, which the heads of the departments should be requested to furnish. For that purpose, section 2 of chapter 901 was inserted. We quote from the conclusions of the House report:¹⁹

To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven Members thereof.

The Senate report concludes with words similar to those just quoted.²⁰

There is nothing in the remarks of the Congressmen and Senators who spoke on the bill on the floors of the House and Senate which alters our conclusion.²¹ Thus we see that section 105a does not change the law with respect to the right of heads of departments to keep from public view matters which in their judgment should remain confidential.

We noted above that the only limitation upon the right to demand information, which appears from a reading of section 105a, were the words: "within the jurisdiction of the committee." The Committees on Expenditures of the House and Senate may not request information concerning matters outside their jurisdiction. The Legislative Reorganization Act of 1946²² defines the duties of the Committee on Expenditures in the Executive Departments in both the House and the Senate.²³ The powers and duties of both committees are identical. Without enumerating the matters which those committees may properly concern themselves with, I believe, first, that the history of the bill confines the committees to information previously available to them in the reports of the executive departments, and second, the Constitution and the manner in which the decisions cited have interpreted it, would entirely negate an intent or desire by Congress, entirely unexpressed in the legislative history of the bill, to compel heads of departments to surrender information or papers against the wishes of the President, or their own better judgment, and against the public interest.

SECTIONS 134 (A) AND 136 OF THE LEGISLATIVE REORGANIZATION ACT OF 1946 (PUBLIC LAW 601, 79TH CONG.)

Section 134 (a) provides that each standing committee of the Senate is authorized to require by subpena or otherwise the attend-

¹⁹ H. Rept. No. 1757, 70th Cong., 1st sess., May 18, 1928 (p. 6), to accompany H. R. 12064.

²⁰ S. Rept. 1320, 70th Cong., 1st sess., May 28, 1928 (p. 4).

²¹ 69 Congressional Record 10613-10614, 10615-10616 (1928), 69 Congressional Record 9413-9417.

²² Ch. 753, Public Law 601, approved August 2, 1946, 79th Cong.

²³ Sec. 102 (g) (1); sec. 121 (h) (1).

ance of such witnesses and the production of such correspondence as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction.

Section 136 provides that to assist Congress in appraising the administration of the laws, and in developing necessary legislation, each standing committee of the Senate and the House shall exercise continuous watchfulness of the execution by the administrative agencies concerned of all laws, the subject matter of which is within the jurisdiction of such committee.

There is nothing in the legislative history of the two sections, nor in their provisions, which conflicts with our conclusions that heads of departments may refrain, in their own discretion, from disclosing confidential papers in the public interest.

Our conclusion is supported by the report of the Special Committee on the Organization of Congress.²⁴ Senator La Follette, who submitted the report, states therein that Congress has long lacked adequate facilities for the continuous "inspection and review" of administrative performance. The report continues to state that, armed with the power of subpena, the standing committees of both Houses would conduct "a continuous review of the activities" of the agencies administering laws originally reported by the legislative committees.²⁵ The La Follette report was of course submitted before the debate on the Legislative Reorganization Act of 1946. It appears from the Senate debate that, in order to carry out the original recommendations of the special committee, section 136 contained the word "surveillance," so that the section read that "each standing committee of the Senate and the House of Representatives shall exercise continuous surveillance of the execution by the administrative agencies concerned of any laws." The word "surveillance" was stricken out, following debate, on motion of Senator Donnell. Senator La Follette, coauthor of the Legislative Reorganization Act, although he pressed for the incorporation of the words "inspection and review," which are contained in the report aforementioned, finally yielded to Senator Donnell. The word "watchfulness" was substituted for the word "surveillance," and the reason for the elimination of the later word strikes deeply into the very roots of the constitutional question involved.

Senator Donnell forcefully urged that surveillance, by definition, means to control, to supervise, to superintend. He conceived that under our type of Government, with its three distinct divisions, the legislative branch had no power to administer the laws which it passed. If section 136 had permitted standing committees to review executive action, the legislative department would then have made of itself an adjunct to the executive department, with the responsibility for seeing that there was proper administration of the law which it itself had passed.²⁶ Senator Donnell added that it was very important to observe the line between legislation on the one hand, and executive duties on the other hand.²⁷

To my mind, we are discussing something of fundamental importance. To my mind the obligation of the Congress of the United States does extend to the point

²⁴ S. Rept. 1400, 79th Cong., 2d sess., May 31, 1946. A section of the report deals with "Oversight of Administrative Performance."

²⁵ Ibid., p. 6.

²⁶ 22 Congressional Record, 6441-6447.

²⁷ Ibid., p. 6446.

of watchfulness, and to the extent of subsequent legislation which may prove necessary in order to correct abuses. But I do not believe that it is duty of the Congress of the United States to undertake to administer the respective executive branches."²⁸

The crux of the debate yields this salient fact: After careful consideration, the Senate adopted Senator Donnell's view. The executive function of the Government cannot be invaded, under our Constitution, by the legislative branch, and the moment Congress attempts to substitute its judgment, whether by review or otherwise, for executive judgment, we have, in the words of Senator Donnell, a legislative department which both passes and executes the laws. It was to prevent such an invasion of the executive branch by the legislature, that "watchfulness" was substituted in section 136 for "surveillance."

The foregoing enables us to better understand the meaning of section 134 (a). To one unacquainted with the legislative history which we have just discussed with relation to section 136, section 134 (a) would seem to empower a standing committee of the Senate to require a head of a department, by subpena, to disclose information, whether it was deemed by him to be confidential or not. However, the moment we recall that the Senate refused to adopt the view that it was entitled to pass judgment, by inspection and review, upon the work of administrative agencies, we are driven to the conclusion that section 134 (a) merely empowers the standing committees of the Senate to do what, before passage of the Legislative Reorganization Act of 1946, the Senate was obliged, by resolution, to authorize the select or special committees to do, namely, to require testimony and records from witnesses. Now, each standing committee may require, by subpena, the attendance of witnesses and the production of records. The basic laws, however, remain unchanged. There was altogether absent any intent to change a fundamental practice and precedent which has been acted upon by the President and the heads of departments almost from the beginnings of our Government: that there is a discretion in the executive branch to withhold confidential papers. The record of the debate on the Legislative Reorganization Act shows that there was no attempt made to interfere, by sections 134 (a) and 136, with that discretion.

Indeed, the legislative history shows that Senator McClellan felt that the Legislative Reorganization Act had shortcomings, with respect to the compulsion of testimony and records from the executive branch, which he proposed to remedy. He wished to set up a joint committee of the two Houses of Congress, in order that it might conduct a better surveillance over the executive and administrative agencies of the Government. He proposed to enable the joint committee to subpena any employee in the Federal Government to appear before the committee to give an account and report of his activities. In short, Senator McClellan's proposal was to enable the House and Senate to supervise the executive agencies.²⁹ Accordingly, Senator McClellan offered an amendment which provided for the creation of a Joint Committee on Administrative Practices and Efficiency. One of the provisions of the amendment proposed was to give employees of the joint committee the right to examine books and papers in any department of the Government. Another provision gave the joint

²⁸ Ibid., p. 6446.

²⁹ 92 Congressional Record, 6555.

committee power to conduct investigations into the practices of the agencies of the Government, with subpoena powers to compel the attendance of witnesses and the production of papers by the Government agencies. Finally, in order that penalties might attach to violations of a subpoena thus issued by the joint committee, Senator McClellan's amendment provided that the provisions of sections 102-104 of the Revised Statutes (2 U. S. C. 192-194) should apply in case of failure by any witness to comply with any subpoena. Senator La Follette spoke briefly against the amendment, and it was rejected.⁵⁹

The conclusions to be drawn from the discussion of sections 134 (a) and 136 are:

(1) Their legislative history point to no fundamental change in the laws, and that the President and the executive departments continue to enjoy the same privileges and immunities from communicating confidential records in the executive departments which they have always exercised.

(2) While section 136 aims at continued watchfulness by the standing committees of Congress of the manner in which administrative agencies of the Government carry out the laws passed by Congress, the term "watchfulness" is not to be confused with the terms "inspection and review," or "surveillance," or superintendence, all of which were considered and rejected by the Senate in favor of the present wording.

(3) The Senate rejected an amendment which aimed at the compulsion of both testimony and papers from the heads of departments and other Government employees and officials.

DEPARTMENTAL REGULATIONS CONCERNING USE OF RECORDS

The head of each department is authorized by title 5, United States Code, section 22, to provide regulations, not inconsistent with law, for the custody and use of the records and papers of his department. Speaking of this section, Attorney General Moody has said:

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 [25 Op. A. G. 329].

This section has received construction in *Boske v. Comingore* (177 U. S. 459) and *Ex Parte Sacket* (74 F. 2d 922 (1935)). In the former case, the Supreme Court sustained a Rule of the Treasury Department relating to the custody of records, which took from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any purpose other than collection of the revenues, and reserving for the Secretary's own discretion all matters of that character. In the latter case, the Attorney General's power to make rules concerning the papers in his Department was upheld. A special agent in charge of the Division of Investigation of the Department of Justice was upheld in his refusal to produce records under subpoena in a court

⁵⁹ Ibid., p. 6566.

proceeding where the agent was barred from so doing by a regulation issued by the Attorney General under section 22 aforementioned.

The power of heads of departments to control the use of their records in the best interests of the public finds illustration in Revised Statutes 1076, which provides that the Court of Claims shall have power to call upon any of the departments for any information or papers it may deem necessary. However—

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.

A similar provision, recognizing the public interest, is found in title 5, section 488, which provides that the Secretary of the Interior may, when not prejudicial to the interests of the Government, furnish copies of any official papers within his custody.

SOME LEADING DECISIONS

The following are leading cases, and involve the power of the House of Representatives and the Senate to punish for contempt a witness who refuses to obey a subpoena to produce information or papers:

- Anderson v. Dunn* (6 Wheat. 204)
- Kilbourn v. Thompson* (103 U. S. 168)
- In re Chapman*, discussed above
- McGrain v. Daugherty* (273 U. S. 135)
- Sinclair v. United States* (279 U. S. 263)

The Daugherty case held that the Senate or the House has power to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution. The subject of investigation in that case was the administration of the Department of Justice, a subject on which legislation could plainly be had.³¹ The Sinclair case involved section 102 of the Revised Statutes, above discussed, under which Sinclair was fined and imprisoned after a trial for refusing to answer questions before a Senate committee.

None of the foregoing cases involved the refusal by a head of a department to obey a call for papers or information. There has been no Supreme Court decision dealing squarely with that question. As one writer puts it:

The committees of earlier years did, on occasion, encounter refusals by administrators to supply information. But, because both the Senate and the House eventually retreated upon the flat refusal of the executives to answer questions, the legal problems which are involved were never presented to the courts. Thus, it remains an open question whether the executive officers must submit all the information which Congress may request.³²

The *McGrain v. Daugherty* case, *supra*, throws some light on this question: How is the United States Supreme Court likely to decide the issue, in the light of the long continued practice of the Executive, from 1796 to date,³³ to withhold confidential papers from the legislative branch, and the latter's acquiescence in that practice?

³¹ 273 U. S. 135, 177.

³² The Developments of Congressional Investigative Power (1940), by M. Nelson McGahey, pp. 102-104.

³³ See p. 31 of this memorandum.

The opinion of the Court, written by Judge Van Devanter, was unanimous. The case came to the Supreme Court on an appeal from a final order in a habeas corpus proceeding, which discharged Mally S. Daugherty, a recusant witness, from custody under process of attachment issued from the Senate. The Senate was conducting an investigation into the administration of the Department of Justice. Harry M. Daugherty, a brother of Mally Daugherty, was the Attorney General from March 1921 until March 1924, when he resigned. Later in that period charges of misfeasance had been made concerning the Department of Justice, after Mr. Daugherty became its head. The Senate passed a resolution directing a select committee to investigate the facts concerning the Attorney General's failure to prosecute violators of the Sherman Antitrust Act, and the Attorney General's failure to prosecute Fall, Sinclair, Doheny, and others, for defrauding the Government. The committee was directed to report to the Senate concerning the activities of the Attorney General and any of his assistants which would tend to impair the Department's efficiency.

The committee caused to be served a subpoena on Mally Daugherty, which commanded him to appear and give testimony to the committee concerning certain bank deposits and withdrawals in an Ohio bank, of which Mally Daugherty was president. The witness failed to appear. The committee made a report to the Senate, which adopted a resolution directing the President of the Senate to issue a warrant commanding the Sergeant at Arms to take Mally Daugherty into custody, and to bring him before the bar of the Senate. The Sergeant at Arms took Mally Daugherty into custody. A writ of habeas corpus was granted by the district court in Cincinnati, the court holding that the attachment of the witness was unlawful.

One of the principal questions before the court was whether the Senate had the power, through its own process, to compel a private individual to appear before one of its committees, in order that he might give testimony needed to enable the Senate efficiently to exercise a legislative function belonging to it under the Constitution.

After reviewing the legislative practice, beginning with the investigation by the House of Representatives in 1792,³⁴ the statutes relating to the compulsion of the testimony of private persons³⁵ and the court decisions,³⁶ the Court states its conclusions on the principal question before it in these words:

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. * * * So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful [p. 174].

³⁴ See p. 4 of this memorandum.

³⁵ Rev. Stats. 102, 103, 104. See p. 56 of this memorandum.

³⁶ *Anderson v. Dunn*, *Kilbourn v. Thompson*, *In re Chapman*, and *Marshall v. Gordon*,

243 U. S. 521. The first three cases are mentioned on p. 62 of this memorandum.

Thus, we see that the reason the court found a legislative power to summon private persons for inquiry, in connection with the exercise of the legislative function, was because of a practice, long continued, of summoning private persons before the House of Congress to give testimony and to produce papers, and in the legislative acts which prescribed penalties for failure of such persons to appear.

In response to the contention of Mally Daugherty that the power of inquiry by Congress, if sustained, might be oppressively exerted, the court replied that neither House will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to the court's assumption, Congress did not keep its power of inquiry within restraint and proper bounds, "the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief" (p. 176).

On the facts before it, the court concluded that the purpose for which Mally Daugherty's testimony was sought, was to obtain information in aid of the legislative function. Hence, he was at fault in failing to appear.

It is the limitations upon the power of Congress to inquire, even when exerted against a private person, which concern us here. In the *Kilbourn* case³⁷ the Supreme Court held that the House of Representatives had exceeded its power, because it sought to inquire into a matter concerning which redress could be had only in a judicial proceeding, which was then pending. The United States Government was a creditor in a bankruptcy proceeding where its rights were being asserted in the bankruptcy court. The Supreme Court held, therefore, that conformably to the constitutional separation of governmental powers, it was for the Federal Bankruptcy Court to adjudicate the bankrupt's estate. The rights of the United States could be properly pressed before the court. Since the congressional investigation sought information from a private person concerning a matter which was pending before the court, and which could not be a proper subject of legislation, the court held that the witness who had refused to testify before the committee could not be punished for contempt.

In *Marshall v. Gordon*,³⁸ the district attorney of the southern district of New York had sent a letter to the chairman of a subcommittee of the House, which was ill-tempered and well calculated to arouse the indignation of the members of the subcommittee and of the House. The district attorney had given the letter to the press, so that it might be published contemporaneously with its receipt by the chairman of the subcommittee. A select committee of the House reported that the district attorney was guilty of contempt of the House, and a formal warrant for his arrest was issued to the Sergeant at Arms, which was followed by an application for discharge on habeas corpus. This is the only case we know of where the United States Supreme Court dealt with the right of the House of Representatives to adjudge in contempt an official of the executive branch.

The question before the Supreme Court was whether the House had the power, under the Constitution, to adjudge the district attorney in contempt and to punish him for such contempt, without subjecting

³⁷ See p. 62 of this memorandum.

³⁸ 243 U. S. 521, 546.

him to the statutory modes of trial provided for criminal offenses. The Court held that the writing of the irritating letter and its publication were "not intrinsic to the right of the House to preserve the means of discharging its legislative duties" (p. 546). The letter related only to the presumed operation which it might have upon the public mind and the indignation naturally felt by members of the committee on the subject.

The foregoing discussion of the Daugherty case focuses attention upon this important point: Congress has, in the past, exceeded its powers, both with respect to its attempted punishment for contempt of private persons and of a United States official, and the Supreme Court did not hesitate to reject the improper assertions of congressional power.

Returning to the question we asked, How is the Supreme Court likely to decide the issue concerning the withholding of confidential papers by the executive branch from Congress and its committees? We may thus summarize:

1. Ever since 1796, the executive branch has asserted the right to say "no" to the Houses of Congress, when they have requested confidential papers which the President or the heads of departments felt obliged to withhold, in the public interest.³⁹

2. Beginning with the denial by a court in a criminal trial, of a subpoena for the production of a letter by President Adams in 1800,⁴⁰ the courts have uniformly held that they will not compel a President or head of department to give testimony or to produce papers which, in his judgment, required secrecy.⁴¹

3. More significant still is the fact that never in our entire history has either House taken any steps to enforce requests for the production of testimony or documents which have been refused by the executive branch. In the two famous debates on this subject, in the Cleveland and Theodore Roosevelt administrations, it was admitted that it was useless to pass resolutions aimed at forcing compliance by the Executive with congressional requests for papers and documents, when the Executive could ignore such resolutions.⁴²

It appears clear, therefore, that we have, in the words of the Supreme Court in the *Daugherty* case, "a practical construction, long continued, of the constitutional provisions respecting their powers," by the executive and legislative branches.⁴³ The long-continued practice of the executive branch to withhold confidential papers, in the national public interest, from the legislative branch, and the passage of no law by Congress to change that practice, argue persuasively for the possession of such a power, under the Constitution, by the Executive. It is not likely that the United States Supreme Court will lightly ignore more than 150 years of legislative acquiescence in the assertion of that power.

Our conclusion is fortified by the views of William Howard Taft, who wrote, following his retirement from the presidency and prior to his appointment as Chief Justice:

There is in the scope of the jurisdiction of both the Executive and Congress a wide field of action in which individual rights are not affected in such a way

³⁹ See résumé and conclusions, p. 44.

⁴⁰ See p. 48 of this memorandum.

⁴¹ See pp. 32-40 of this memorandum.

⁴² See p. 19 of this memorandum.

⁴³ 273 U. S. 174.

that they can be asserted and vindicated in a court. In this field, the construction of the power of each branch and its limitations must be left to itself and the political determination of the people who are the ultimate sovereign asserting themselves at the polls. Precedents from previous administrations and from previous Congresses create an historical construction of the extent and limitations of their respective powers, aided by the discussions arising in a conflict of jurisdictions between them."⁴

Referring to the Daugherty case, the Supreme Court, in *Sinclair v. United States* (279 U. S. 263, 291), stated:

And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry.

It has always been recognized in this country, and it is well to remember, that few, if any, of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions (pp. 291-292).

Both the Daugherty and Sinclair cases dealt with private individuals who had refused to testify before Senate committees. We have noted the statement of the Supreme Court that there are bounds of power which Congress and its committees may not exceed in questioning private persons, whose rights are guarded "by fundamental law." The rights of the executive branch would seem to be guarded by the same fundamental law, the Constitution, which declares the executive branch to be independent of the other two branches, and gives it the right to resist unbounded assertions of inquiry. If, in the judgment of the Supreme Court, private witnesses may rightfully refuse to answer, the President and heads of departments have their rights, not to answer inquiries requiring disclosure of confidential information, which they have asserted almost from the beginnings of our Government.

PRESIDENT TRUMAN'S DIRECTIVE TO OFFICERS AND EMPLOYEES IN THE EXECUTIVE BRANCH

On March 13, 1948, President Truman, by memorandum addressed to all officers and employees in the executive branch of the Government, issued the following directive:

The efficient and just administration of the Employee Loyalty Program, under Executive Order No. 9835 of March 21, 1947, requires that reports, records, and files relative to the program be preserved in strict confidence. This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases.

For these reasons, and in accordance with the long-established policy that reports rendered by the Federal Bureau of Investigation and other investigative agencies of the executive branch are to be regarded as confidential, all reports, records, and files relative to the loyalty of employees or prospective employees (including reports of such investigative agencies), shall be maintained in confidence, and shall not be transmitted or disclosed except as required in the efficient conduct of business.

Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the executive

⁴ *Taft Our Chief Magistrate and His Powers* (1916), pp. 1-2.

branch of the Government who are entitled thereto by reason of their official duties, shall be respectfully declined, on the basis of this directive, and the subpoena or demand or other request shall be referred to the Office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of the provisions of this directive except with my express authority.

Simultaneously with the directive, the President issued a statement in which he called attention to the Federal employee loyalty program and the policy of the administration to carry out that program on a confidential basis. He called attention to the loyalty order,⁴⁵ which indicates, in part IV, the necessity of preserving reports and other information in strict confidence. The directive was aimed to effectuate that policy, even in cases where a subpoena was served upon the executive officials, whether the congressional committees or by courts. The President, in the public interest, was assuming the responsibility for informing the court or congressional committee if, in a particular case confidential information could be properly released.

The President's statement referred to his predecessors in office, beginning with 1796.⁴⁶ The declinations of information by Presidents Washington, Jefferson, Monroe, Jackson, and Cleveland to the Houses of Congress were cited by President Truman as historical precedents for his directive and policy to keep loyalty files of Government personnel confidential.

The Condon episode was, in all probability, the primary reason for the issuance of the President's memorandum. A House Committee on Un-American Activities had released a report charging disloyalty on the part of Edward U. Condon, Director of the National Bureau of Standards, and a subcommittee had thereafter sought to obtain all relevant papers, including investigative reports, from the Secretary of Commerce, of which Mr. Condon is a bureau head. The Secretary of Commerce refused to make available the contents of the confidential files relative to loyalty investigations with regard to Dr. Condon, although he had received a subpoena which directed him to supply such information.⁴⁷

Since the loyalty program provides for a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the United States,⁴⁸ it is easy to perceive the chaos which would result from exposing to public view investigative data and records gathered by the Government concerning its employees.

RESOLUTION DIRECTING ALL EXECUTIVE DEPARTMENTS TO FURNISH INFORMATION TO HOUSE AND SENATE COMMITTEES (H. J. RES. 342)⁴⁹

On March 5, 1948, Congressman Hoffman introduced a joint resolution directing all executive departments and agencies of the Federal Government to make available to any and all committees of the House of Representatives, and the Senate, any information which may be deemed necessary to enable them to properly perform the duties delegated to them by the Congress.

⁴⁵ Executive Order No. 9835 of March 21, 1947.

⁴⁶ See résumé and conclusions, p. 44 ff.

⁴⁷ 94 Congressional Record, vol. 41, p. 2261, Mar. 5, 1948. See also 94 Congressional Record, p. 2088, Mar. 2, 1948.

⁴⁸ Executive Order No. 9835, pt. I, sec. 1.

⁴⁹ 94 Congressional Record, vol. 42, p. 2317, Mar. 5, 1948.

The purport of the resolution is to require the executive branch of the Government to make available to congressional committees information, the disclosure of which, the President has expressly determined, would be contrary to the public interest.

The resolution is aimed at the coercion of the executive departments. Its purpose is to compel the heads of those departments, against the wishes of the President, to furnish information, papers and documents to congressional committees, after the President has determined that it would be against the national public interest to do so. In effect, the resolution proposes to make of the executive departments an adjunct of the legislative branch. Henceforth, says the resolution, heads of the executive departments are to be the servants of the majority of a congressional committee, which shall have the power to supervise the executive branch of the Government. In short, to the extent that congressional committees are to direct the executive departments, in violation of, and against the orders of the President, and the heads of those departments, those committees will be clothed with a supreme unrestrained executive power.

It will be recalled that the Legislative Reorganization Act of 1946 was the result of the work of Senator La Follette and Congressman Monroney, who headed a joint committee of both Houses in the preparation of the original bill. As finally adopted, the reorganization act was the "end product of more than a year of study, hearings, and deliberations conducted by the Joint Committee on the Reorganization of Congress."⁵⁰ It will also be recalled that, following debate, Senator La Follette yielded to Senator Donnell's amendment of section 136; the Senate was persuaded that the legislative branch had no power, under the Constitution, to inspect and review, or to conduct a surveillance or superintendence of the executive branch.

Tested by the Supreme Court decisions,⁵¹ and by the action of both Houses of Congress,⁵² the resolution constitutes an unconstitutional encroachment by the legislative branch upon the executive branch.

To conclude: The statutes designed to compel witnesses to testify and to produce records before congressional committees affect only private individuals. They do not cover heads of departments or other Government officials.

The most important contribution to clear thinking concerning the right of the legislative branch to compel the executive departments to furnish testimony and records, regardless of the public interest involved, as determined by the President, may be found in the legislative history of the Legislative Reorganization Act of 1946. The considered judgment of the Senate, after debate, concurred in by the House, was that there is no power, under the Constitution, in the legislative branch of the Government to impose its will upon the executive branch, whether under the guise of an "inspection and review" of its activities or a "surveillance," or a superintendence, or any other unrestrained control of the executive departments.

The clear import of the Daugherty and Sinclair cases is that the United States Supreme Court will not sanction unrestrained inquiry of the executive branch by the Houses of Congress.

⁵⁰ See Congressional Record 6344 (1946).

⁵¹ See pp. 54, 55 of this memorandum.

⁵² See the action of the Judiciary Committee of the House, in the Seward case, pp. 41-42 of this memorandum.

V. CONCLUSIONS

We stated in the introduction⁵³ that it was frequently a difference in political faith between the Chief Executive and the House of Representatives or the Senate which gave rise to insistent demands for information and papers by one of the Houses of Congress, and to equally insistent refusals by the President. Thus, Washington started his second term as President with a hostile Republican majority in the lower House.⁵⁴ President Jackson had to deal with a militant and powerful Whig Senate minority, very persuasive in debate, headed by Senators Webster, Clay, and Calhoun.⁵⁵ President Grant faced a swarm of committees from the Democratic House of Representatives who were investigating the executive departments.⁵⁶ President Hayes had difficulty with a Democratic House of Representatives, President Cleveland with a Republican Senate, and President Hoover with a Democratic House.⁵⁷

It was an improper demand by the House of Representatives for participation in the treaty-making power which compelled our first President to refuse examination by the House of instructions, documents, and letters relative to the Jay Treaty. Washington had consulted Hamilton for suggestions in drafting a reply to the House resolution which called for the papers. Hamilton suggested that the information sought by the House could serve no purpose unless impeachment proceedings against Washington were in contemplation.⁵⁸ In his message to Congress refusing the papers, Washington, apparently influenced by Hamilton's suggestion, advised the House that inspection of the papers asked for could only be properly sought for impeachment purposes, which the House resolution had not expressed.⁵⁹

While it may be difficult for us to properly gage the heat of public opinion in Washington's day as a result of the bitter controversy over the Jay Treaty, it does appear certain that the fate of the Government was then hanging in the balance. Had the House failed to appropriate the funds necessary to carry the Jay Treaty into effect, the country would have faced a crisis.⁶⁰ Faced with the refusal of the House of Representatives to appropriate moneys to carry the treaty into effect, unless it was shown all the documents which went into the negotiations and preparation of the treaty, Washington nevertheless firmly held his ground.

It appears that Washington was left with a strong and lasting impression of his experience with demands by the House of Representatives for information upon the executive branch. In his Fare-

⁵³ See pp. 1-2 of this memorandum.

⁵⁴ Binkley, *President and Congress* (1947), p. 38.

⁵⁵ Calvin Colton, *Life of Henry Clay* (1946), ch. 5, pp. 122 ff.

⁵⁶ Allan Nevins, *Hamilton Fish*, S12-S13; see also p. 13 of this memorandum.

⁵⁷ 17 *Congressional Record* 2331, 2445; Charles and Mary Beard, *Basic History of the United States*, p. 454; see also p. 14 of this memorandum.

⁵⁸ Letter, Hamilton to Washington, March 7, 1796; *The Works of Alexander Hamilton*, edited by John C. Hamilton, vol. 6, p. 90; and Claude Bowers, *Jefferson and Hamilton*, 297-298.

⁵⁹ Richardson, *Messages and Papers of the President*, vol. 1, p. 195.

⁶⁰ See *Letters and Writings of James Madison*, vol. 2 (1794-1815); *Letter to Thomas Jefferson* dated March 6, 1796, at p. 86; letter of Madison to James Monroe, April 18, 1796, at p. 96; and letter of Madison to Thomas Jefferson dated May 1, 1796, at p. 99; see also letters between Washington and Hamilton commencing with March 4, 1796, through March 31, 1796. *The Works of Alexander Hamilton*, edited by John C. Hamilton, vol. 6, pp. 95-100; Binkley, *President and Congress*, p. 44.

well Address, our first President warned against the unconstitutional encroachment by one department of the Government upon another. He cautioned that such encroachment led to despotism and he pointed to—

The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, * * *.⁶¹

It is well to point out that the legislative branch is justly entitled to be properly informed of the activities of the executive branch. Intelligent legislation, and the duty of the House and Senate to appropriate money for governmental expenditures, require access to information.⁶² However, we must not confuse comity and reasonableness, which should always exist between all three branches of our Government, with the sometimes asserted right of the Houses of Congress to all information and papers in the executive branch.

Our study has dealt with the precedents established by Presidential action and court decisions. The Constitution and the statutes creating the executive departments, and those dealing with the compulsion of testimony and the production of records before congressional committees have also been reviewed. We briefly state our conclusions:

1. The framers of the Constitution had taken pains to insure the independence of the executive branch. Historical precedents covering more than 150 years of Presidential action demonstrate that our Presidents have vigorously asserted that independence.⁶³

2. Under the Constitution, the executive power is lodged in the President. The determination of all executive questions belongs in theory and by constitutional right to him. The President is the responsible executive minister of the United States. The authority of each head of a department is a parcel of the executive power of the President. To coerce the head of a department is to coerce the President. This can be accomplished in no other way than by a law, constitutional in its nature, enacted in accordance with the forms of the Constitution. It follows that Congress cannot, under the Constitution, compel heads of departments to make public what the President desires to keep secret, in the public interest. The President alone is the judge of that interest, and is accountable only to his country in his political character, and to his own conscience.⁶⁴

3. Heads of the executive departments are subject to the Constitution and to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other directions whatever.⁶⁵

4. The rule may be stated that the President and heads of departments are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient.⁶⁶

5. The Chief Executive has an exclusive and illimitable power to control his subordinates in the executive branch. The highest and most important duties which the President's subordinates perform are those

⁶¹ See p. 6 of this memorandum, Richardson, *Messages and Papers of the President*, vol. 1, pp. 213, 219.

⁶² Robert Luce, *Legislative Problems* (1935), p. 587.

⁶³ See pp. 4-30 of this memorandum, and résumé of pt. I at p. 44.

⁶⁴ See pp. 47 and 51 of this memorandum.

⁶⁵ *Ibid.*, p. 16.

⁶⁶ *Ibid.*, pp. 2, 32-33.

in which they act for him. In such cases they are exercising not their own but his discretion. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority. In all such cases the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his Cabinet officers must do his will. He must place in each member of his official family and his chief executive subordinates implicit faith.⁶⁷

To paraphrase Chief Justice Taft's statement in the Myers case: The discretion is that of the President to determine the national public interest, in directing his executive subordinates to withhold confidential information from congressional committees.

6. How is the United States Supreme Court likely to decide the issue concerning the withholding of confidential papers by the executive branch from Congress and its committees? The case of *McGrain v. Daugherty*⁶⁸ points to the following conclusions:

(a) The Houses of Congress have, in the past, exceeded their powers, both with respect to their attempted punishment for contempt of private persons and of a United States official, and the Supreme Court did not hesitate to reject the improper assertions of congressional power.⁶⁹

(b) Ever since 1796, the executive branch has asserted the right to say "no" to the Houses of Congress, when they have requested confidential papers which the President or the heads of departments felt obliged to withhold, in the public interest. Since 1800, court decisions have uniformly held that the President or heads of departments need not give testimony or produce papers which, in their judgment, require secrecy.

(c) Never in our entire history has either House of Congress taken any steps to enforce requests for the production of testimony or documents which have been refused by the executive branch.

The foregoing, in the words of the Supreme Court in the Daugherty case, point to "a practical construction, long continued, of the constitutional provisions respecting their powers," by the executive and legislative branches. The long-continued practice of the executive branch, and the passage of no law by Congress to change that practice, argue persuasively for the possession of such a power, under the Constitution, by the executive. The United States Supreme Court is not likely to ignore more than 150 years of legislative acquiescence in the assertion of that power.

7. The history of our country⁷⁰ and the debates in Congress⁷¹ demonstrate conclusively that both the House and the Senate have recognized: (1) That up to the present time no statute has ever been passed which compelled heads of departments to give information and papers to Congress, or its committees, against the President's determination that the public interest required secrecy, and (2) that when the head of a department refused to obey a subpoena or resolu-

⁶⁷ See *Myers v. U. S.*, discussed at p. 55 of this memorandum.

⁶⁸ Discussed at pp. 62-66 of this memorandum.

⁶⁹ See *Kilbourn v. Thompson* and *Marshall v. Gordon*, discussed at pp. 64-65 of this memorandum.

⁷⁰ See résumé and conclusions, pp. 44 ff. of this memorandum.

⁷¹ See pp. 78, 19 of this memorandum.

tion of either of the Houses of Congress, there was no effective remedy for such refusal.

8. An important contribution to clear thinking concerning the right of the legislative branch to compel the executive departments to furnish testimony and records, regardless of the public interest involved, as determined by the President, may be found in the legislative history of the Legislative Reorganization Act of 1946. The considered judgment of the Senate, after debate, concurred in by the House, was that there is no power, under the Constitution, in the legislative branch of the Government to impose its will upon the executive branch, whether under the guise of an "inspection and review" of its activities, or a "surveillance," or a superintendence, or any other unrestrained control of the executive departments.⁷²

9. There is no power in Congress or the courts to compel the President's discretion or decision, respecting the propriety of surrendering papers, documents, or information deemed by him to be confidential in character, and the same holds true for the heads of departments. Their decision and discretion remain entirely unaffected by existing statutes, which relate only to private individuals who refuse to obey a subpoena of the House of Representatives or the Senate, or their committees.⁷³

10. Paraphrasing President Jefferson's crucial question:⁷⁴ Would the Executive be independent of the legislative branch, as contemplated by the Constitution, if the President or heads of departments were subject to the commands of the Houses of Congress, and to imprisonment for disobedience of a legislative subpoena? Jefferson's conclusion that the President and heads of departments must and do have the last word, under our theory of government, respecting the propriety of withholding information and papers when the public interest so requires, is amply fortified by the action of our Presidents, by court decisions, by the opinions of the Attorneys General, and by the views of almost every student of this subject.

⁷² *Ibid.*, pp. 58-61.

⁷³ Pp. 13-14 of this memorandum.

⁷⁴ "But would the Executive be independent of the judiciary if he were subject to the commands of the latter, and to imprisonment for disobedience; * * *?" Letter of Thomas Jefferson to United States Attorney Hay, June 20, 1807, *Thomas Jefferson's Writings* (Ford) (vol. 9, p. 60); p. 37 of this memorandum.

LETTER FROM DWIGHT D. EISENHOWER TO THE SECRETARY OF DEFENSE, MAY 17, 1954, INCLUDING A MEMORANDUM FROM THE ATTORNEY GENERAL TO THE PRESIDENT

The Honorable the SECRETARY OF DEFENSE,
Washington, D. C.

DEAR MR. SECRETARY: It has long been recognized that to assist the Congress in achieving its legislative purposes every executive department or agency must, upon the request of a congressional committee, expeditiously furnish information relating to any matter within the jurisdiction of the committee, with certain historical exceptions—some of which are pointed out in the attached memorandum from the Attorney General. This administration has been and will continue to be diligent in following this principle. However, it is essential to the successful working of our system that the persons entrusted with power in any one of the three great branches of Government shall not encroach upon the authority confided to the others. The ultimate responsibility for the conduct of the executive branch rests with the President.

Within this constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.

Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

I direct this action so as to maintain the proper separation of powers between the executive and legislative branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government.

By this action I am not in any way restricting the testimony of such witnesses as to what occurred regarding any matters where the communication was directly between any of the principals in the contro-

versy within the executive branch on the one hand and a member of the subcommittee or its staff on the other.

Sincerely,

DWIGHT D. EISENHOWER.

MEMORANDUM

For: The President.

From: The Attorney General.

One of the chief merits of the American system of written constitutional law is that all the powers entrusted to the Government are divided into three great departments, the executive, the legislative, and the judicial. It is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall be limited to the exercise of the powers appropriate to its own department and no other. The doctrine of separation of powers was adopted to preclude the exercise of arbitrary power and to save the people from autocracy.

This fundamental principle was fully recognized by our first President, George Washington, as early as 1796 when he said:

* * * it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved * * *.

In his Farewell Address, President Washington again cautioned strongly against the danger of encroachment by one department into the domain of another as leading to despotism. This principle has received steadfast adherence throughout the many years of our history and growth. More than ever, it is our duty today to heed these words if our country is to retain its place as a leader among the free nations of the world.

For over 150 years—almost from the time that the American form of Government was created by the adoption of the Constitution—our Presidents have established, by precedent, that they and members of their Cabinet and other heads of executive departments have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. American history abounds in countless illustrations of the refusal, on occasion, by the President and heads of departments to furnish papers to Congress, or its committees, for reasons of public policy. The messages of our past Presidents reveal that almost every one of them found it necessary to inform Congress of his constitutional duty to execute the office of President, and, in furtherance of that duty, to withhold information and papers for the public good.

Nor are the instances lacking where the aid of a court was sought in vain to obtain information or papers from a President and the heads of departments. Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest; they will not interfere with the exercise of that discretion, and that Congress has not the power, as one of the three great branches of the Government, to subject the executive branch to its will any more than the executive branch may impose its unrestrained will upon the Congress.

PRESIDENT WASHINGTON'S ADMINISTRATION

In March 1792 the House of Representatives passed the following resolution:

Resolved, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries (3 Annals of Congress, p. 493).

This was the first time that a committee of Congress was appointed to look into a matter which involved the executive branch of the Government. The expedition of General St. Clair was under the direction of the Secretary of War. The expenditures connected therewith came under the Secretary of the Treasury. The House based its right to investigate on its control of the expenditures of public moneys. It appears that the Secretaries of War and the Treasury appeared before the committee. However, when the committee was bold enough to ask the President for the papers pertaining to the General St. Clair campaign, President Washington called a meeting of his Cabinet (Binkley, President and Congress, pp. 40-41).

Thomas Jefferson, as Secretary of State, reports what took place at that meeting. Besides Jefferson, Alexander Hamilton, Henry Knox, Secretary of War, and Edmond Randolph, the Attorney General, were present. The committee had first written to Knox for the original letters, instructions, etc., to General St. Clair. President Washington stated that he had called his Cabinet members together, because it was the first example of a demand on the executive for papers, and he wished that so far as it should become a precedent, it should be rightly conducted. The President readily admitted that he did not doubt the propriety of what the House was doing, but he could conceive that there might be papers of so secret a nature that they ought not to be given up. Washington and his Cabinet came to the unanimous conclusion:

First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

The precedent thus set by our first President and his Cabinet was followed in 1796, when President Washington was presented with a resolution of the House of Representatives which requested him to lay before the House a copy of the instructions to the Minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and documents relative to that treaty. Apparently it was necessary to implement the treaty with an appropriation which the House was called upon to vote. The House insisted on its right to the papers requested, as a condition to appropriating the required funds (President and Congress, Wilfred E. Binkley (1947), p. 44).

President Washington's classic reply was, in part, as follows:

I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give, or which could be required of him by either House of Con-

gress as a right; and with truth I affirm that it has been, as it will continue to be while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof so far as the trust delegated to me by the people of the United States and my sense of the obligation it imposes "to preserve, protect, and defend the Constitution" will permit (Richardson's Messages and Papers of the Presidents, vol. 1, p. 194).

Washington then went on to discuss the secrecy required in negotiations with foreign governments, and cited that as a reason for vesting the power of making treaties in the President, with the advice and consent of the Senate. He felt that to admit the House of Representatives into the treaty-making power, by reason of its constitutional duty to appropriate moneys to carry out a treaty, would be to establish a dangerous precedent. He closed his message to the House as follows:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; * * * and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request (Richardson's Messages and Papers of the Presidents, vol. 1, p. 196).

PRESIDENT JEFFERSON'S ADMINISTRATION

In January 1807, Representative Randolph introduced a resolution, as follows:

Resolved, That the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same (16 Annals of Congress (1806-7), p. 336).

The resolution was overwhelmingly passed. The Burr conspiracy was then stirring the country. Jefferson had made it the object of a special message to Congress wherein he referred to a military expedition headed by Burr. Jefferson's reply to the resolution was a message to the Senate and House of Representatives. Jefferson brought the Congress up to date on the news which he had been receiving concerning the illegal combination of private individuals against the peace and safety of the Union. He pointed out that he had recently received a mass of data, most of which had been obtained without the sanction of an oath so as to constitute formal and legal evidence.

It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question (Richardson's Messages and Papers of the Presidents, vol. 1, p. 412, dated January 22, 1807).

SIMILAR ACTIONS BY PRESIDENTS JACKSON, TYLER, BUCHANAN, AND GRANT

On February 10, 1835, President Jackson sent a message to the Senate wherein he declined to comply with the Senate's resolution

requesting him to communicate copies of charges which had been made to the President against the official conduct of Gideon Fitz, late Surveyor General, which caused his removal from office. The resolution stated that the information requested was necessary both in the action which it proposed to take on the nomination of a successor to Fitz, and in connection with the investigation which was then in progress by the Senate respecting the frauds in the sales of public lands.

The President declined to furnish the information. He stated that in his judgment the information related to subjects exclusively belonging to the executive department. The request therefore encroached on the constitutional powers of the Executive.

The President's message referred to many previous similar requests, which he deemed unconstitutional demands by the Senate:

Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive (*ibid.*, p. 133).

The President next took up the fact that the Senate resolution had been passed in executive session, from which he was bound to presume that if the information requested by the resolution were communicated, it would be applied in secret session to the investigation of frauds in the sales of public lands. The President said that, if he were to furnish the information, the citizen whose conduct the Senate sought to impeach would lose one of his basic rights, namely—that of a public investigation in the presence of his accusers and of the witnesses against him. In addition, compliance with the resolution would subject the motives of the President, in the case of Mr. Fitz, to the review of the Senate when not sitting as judges on an impeachment; and even if such a consequence did not follow in the present case, the President feared that compliance by the Executive might thereafter be quoted as a precedent for similar and repeated applications.

Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate; * * *

I therefore decline a compliance with so much of the resolution of the Senate as requests "copies of the charges, if any," in relation to Mr. Fitz, and in doing so must be distinctly understood as neither affirming or denying that any such charges were made; * * * (*ibid.*, p. 134).

One of the best reasoned precedents of a President's refusal to permit the head of a department to disclose confidential information to the House of Representatives is President Tyler's refusal to communicate to the House of Representatives the reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practiced upon them. A resolution of the House of Representatives had called upon the Secretary of War to communicate to the House the reports made to the Department of War by Lieutenant Colonel Hitchcock relative to the affairs of the Cherokee Indians together with all information communicated by him concerning the frauds he was charged to investigate; also all facts in the possession of the Executive relating to the subject. The Secretary of War consulted with the President and under the latter's direction informed the House that negotiations were then pending

with the Indians for settlement of their claims; in the opinion of the President and the Department, therefore, publication of the report at that time would be inconsistent with the public interests. The Secretary of War further stated in his answer to the resolution that the report sought by the House, dealing with alleged frauds which Lieutenant Colonel Hitchcock was charged to investigate, contained information which was obtained by Colonel Hitchcock by ex parte inquiries of persons whose statements were without the sanction of an oath, and which the persons implicated had had no opportunity to contradict or explain. The Secretary of War expressed the opinion that to promulgate those statements at that time would be grossly unjust to those persons, and would defeat the object of the inquiry. He also remarked that the Department had not been given at that time sufficient opportunity to pursue the investigation, to call the parties affected for explanations, or to determine on the measures proper to be taken.

The answer of the Secretary of War was not satisfactory to the Committee on Indian Affairs of the House, which claimed the right to demand from the Executive and heads of departments such information as may be in their possession relating to subjects of the deliberations of the House.

President Tyler in a message dated January 31, 1843, vigorously asserted that the House of Representatives could not exercise a right to call upon the Executive for information, even though it related to a subject of the deliberations of the House, if, by so doing, it attempted to interfere with the discretion of the Executive.

The same course of action was taken by President James Buchanan in 1860 in resisting a resolution of the House to investigate whether the President or any other officer of the Government had, by money, patronage, or other improper means sought to influence the action of Congress for or against the passage of any law relating to the rights of any State or Territory. (See Richardson, Messages and Papers of the Presidents, vol. 5, pp. 618-619.)

In the administration of President Ulysses S. Grant the House requested the President to inform it whether any executive offices, acts, or duties, and if any, what, have been performed at a distance from the seat of Government established by law. It appears that the purpose of this inquiry was to embarrass the President by reason of his having spent some of the hot months at Long Branch. President Grant replied that he failed to find in the Constitution the authority given to the House of Representatives, and that the inquiry had nothing to do with legislation (Richardson, Messages and Papers of the Presidents, vol. 7, pp. 362-363).

PRESIDENT CLEVELAND'S ADMINISTRATION

In 1886, during President Cleveland's administration, there was an extended discussion in the Senate with reference to its relations to the Executive caused by the refusal of the Attorney General to transmit to the Senate certain documents concerning the administration of the office of the district attorney for the southern district of south Alabama, and suspension of George W. Durkin, the late incumbent. The majority of the Senate Committee on the Judiciary concluded that it was entitled to know all that officially exists or takes place in

any of the departments of Government and that neither the President nor the head of a department could withhold official facts and information as distinguished from private and unofficial papers.

In his reply President Cleveland disclaimed any intention to withhold official papers, but he denied that papers and documents inherently private or confidential, addressed to the President or a head of a department, having reference to an act entirely executive such as the suspension of an official, were changed in their nature and became official when placed for convenience in the custody of a public department (Richardson, *Messages and Papers of the Presidents*, vol. 8, pp. 378-379, 381).

Challenging the attitude that because the executive departments were created by Congress the latter had any supervisory power over them, President Cleveland declared (Eberling, *Congressional Investigation*, p. 258) :

I do not suppose that the public offices of the United States are regulated or controlled in their relations to either House of Congress by the fact that they were created by laws enacted by themselves. It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.

PRESIDENT THEODORE ROOSEVELT'S ADMINISTRATION

In 1909, during the administration of President Theodore Roosevelt, the question of the right of the President to exercise complete direction and control over heads of executive departments was raised again. At that time the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against the United States Steel Corp., and if not, the reasons for its nonaction. Request was also made for any opinion of the Attorney General, if one was written. President Theodore Roosevelt replied refusing to honor this request upon the ground that—

Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever (Congressional Record, vol. 43, pt. 1, 60th Cong., 2d sess., pp. 527-528).

When the Senate was unable to get the document from the Attorney General, it summoned Herbert K. Smith, the head of the Bureau of Corporations, and requested the papers and documents on penalty of imprisonment for contempt. Mr. Smith reported the request to the President, who directed him to turn over to the President all the papers in the case "so that I could assist the Senate in the prosecution of its investigation." President Roosevelt then informed Senator Clark of the Judiciary Committee what had been done, that he had the papers and the only way the Senate could get them was through his impeachment. President Roosevelt also explained that some of the facts were given to the Government under the seal of secrecy and cannot be divulged—

and I will see to it that the word of this Government to the individual is kept sacred (Corwin, *The President—Office and Powers*, pp. 281, 428; Abbott, *The Letters of Archie Butt, Personal Aide to President Roosevelt*, pp. 305-306).

PRESIDENT COOLIDGE'S ADMINISTRATION

In 1924, during the administration of President Coolidge, the latter objected to the action of a special investigating committee appointed by the Senate to investigate the Bureau of Internal Revenue. Request was made by the committee for a list of the companies in which the Secretary of the Treasury was alleged to be interested for the purpose of investigating their tax returns. Calling this exercise of power an unwarranted intrusion, President Coolidge said:

Whatever may be necessary for the information of the Senate or any of its committees in order to better enable them to perform their legislative or other constitutional functions ought always to be furnished willingly and expeditiously by any department. But it is recognized both by law and custom that there is certain confidential information which it would be detrimental to the public service to reveal (68th Cong., 1st sess., Record, April 11, 1924, p. 6087).

PRESIDENT HOOVER'S ADMINISTRATION

A similar question arose in 1930 during the administration of President Hoover. Secretary of State Stimson refused to disclose to the chairman of the Senate Foreign Relations Committee certain confidential telegrams and letters leading up to the London Conference and the London Treaty. The committee asserted its right to have full and free access to all records touching the negotiations of the treaty, basing its right on the constitutional prerogative of the Senate in the treatymaking process. In his message to the Senate, President Hoover pointed out that there were a great many informal statements and reports which were given to the Government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize all the negotiations and statements which went into the making of the treaty. He further declared that the Executive must not be guilty of a breach of trust, nor violate the invariable practice of nations. "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest" (S. Doc. No. 216, 71st Cong., special session, p. 2).

PRESIDENT FRANKLIN D. ROOSEVELT'S ADMINISTRATION

The position was followed during the administration of President Franklin D. Roosevelt. There were many instances in which the President and his executive heads refused to make available certain

information to Congress the disclosure of which was deemed to be confidential or contrary to the public interest. Merely a few need be cited.

1. Federal Bureau of Investigation records and reports were refused to congressional committee, in the public interest (40 Op. A. G. No. 8, April 30, 1941).

2. The Director of the Federal Bureau of Investigation refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interests of national security, to refrain from testifying or from disclosing the contents of the Bureau's reports and activities (hearings, vol. 2, House, 78th Cong. Select Committee To Investigate the Federal Communications Commission (1944), p. 2337).

3. Communications between the President and the heads of departments were held to be confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress (letter dated January 22, 1944, signed Francis Biddle, Attorney General, to Select Committee, etc.).

4. The Director of the Bureau of the Budget refused to testify and to produce the Bureau's files, pursuant to subpoena which had been served upon him, because the President had instructed him not to make public the records of the Bureau due to their confidential nature. Public interest was again invoked to prevent disclosure. (Reliance placed on Attorney General's Opinion in 40 Op. A. G. No. 8, April 30, 1941.)

5. The Secretaries of War and Navy were directed not to deliver documents which the committee had requested, on grounds of public interest. The Secretaries, in their own judgment, refused permission to Army and Navy officers to appear and testify because they felt that it would be contrary to the public interest (hearings, Select Committee To Investigate the Federal Communications Commission, vol. 1, pp. 46, 48-68.)

PRESIDENT TRUMAN'S ADMINISTRATION

During the Truman administration also the President adhered to the traditional Executive view that the President's discretion must govern the surrender of Executive files. Some of the major incidents during the administration of President Truman in which informa-

tion, records, and files were denied to congressional committees were as follows:

<i>Date</i>	<i>Type of Document Refused</i>
Mar. 4, 1948-----	FBI letter, report on Dr. Condon, Director of National Bureau of Standards, refused by Secretary of Commerce.
Mar. 15, 1948-----	President issued directive forbidding all executive departments and agencies to furnish information or reports concerning loyalty of their employees to any court or committee of Congress, unless President approves.
March 1948-----	Dr. John R. Steelman, confidential adviser to the President, refused to appear before Committee on Education and Labor of the House, following the service of two subpoenas upon him. President directed him not to appear.
Aug. 5, 1948-----	Attorney General wrote Senator Ferguson, chairman of Senate Investigations Subcommittee, that he would not furnish letters, memorandums, and other notices which the Justice Department had furnished to other Government agencies concerning W. W. Remington.
Feb. 22, 1950-----	S. Res. 231 directing Senate subcommittee to procure State Department loyalty files was met with President Truman's refusal, following vigorous opposition of J. Edgar Hoover.
Mar. 27, 1950-----	Attorney General and Director of FBI appeared before Senate subcommittee. Mr. Hoover's historic statement of reasons for refusing to furnish raw files approved by Attorney General.
May 16, 1951-----	General Bradley refused to divulge conversations between President and his advisers to combined Senate Foreign Relations and Armed Services Committees.
Jan. 31, 1952-----	President Truman directed Secretary of State to refuse to Senate Internal Security Subcommittee the reports and views of foreign service officers.
Apr. 22, 1952-----	Acting Attorney General Perlman laid down procedure for complying with requests for inspection of Department of Justice files by Committee on the Judiciary: Requests on open cases would not be honored. Status report will be furnished. As to closed cases, files would be made available. All FBI reports and confidential information would not be made available. As to personnel files, they are never disclosed.
Apr. 3, 1952-----	President Truman instructed Secretary of State to withhold from Senate Appropriations Subcommittee files on loyalty and security investigations of employees—policy to apply to all executive agencies. The names of individuals determined to be security risks would not be divulged. The voting record of members of an agency loyalty board would not be divulged.

Thus, you can see that the Presidents of the United States have withheld information of executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation. The courts, too, have held that the question whether the production of the papers was contrary to the public interest was a matter for the Executive to determine.

By keeping the lines which separate and divide the 3 great branches of our Government clearly defined, no 1 branch has been able to encroach upon the powers of the other.

Upon this firm principle our country's strength, liberty, and democratic form of government will continue to endure.

