

# **FREEDOM OF INFORMATION AND SECURITY IN GOVERNMENT**

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**HEARING**  
BEFORE THE  
**SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS**  
OF THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
EIGHTY-FIFTH CONGRESS  
SECOND SESSION  
ON  
**S. 921**  
AND  
THE POWER OF THE PRESIDENT TO WITHHOLD  
INFORMATION FROM THE CONGRESS

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MARCH 6, 1958

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**PART I**

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Printed for the use of the Committee on the Judiciary



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## TABLE OF CONTENTS

---

	<i>Page</i>
<b>Statement of—</b>	
Hon. William P. Rogers, Attorney General of the United States.....	1-48
Additional statement.....	52
<b>Exhibits:</b>	
Copy of S. 921, 85th Congress, to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.....	4
Copy of S. 2148, 85th Congress, to amend section 3 of chapter 324 of the act of June 11, 1946 (60 Stat. 238) to clarify and protect the right of the public to information.....	4
List of agencies and executive departments citing title 5, United States Code, section 22.....	28
<b>Letters:</b>	
President Dwight D. Eisenhower to the Secretary of Defense, May 17, 1954, including a memorandum to the President from the Attorney General.....	271
Senator Thomas C. Hennings, Jr., to Attorney General Herbert Brownell, Jr., March 13, 1957.....	61
Senator Thomas C. Hennings, Jr., to Attorney General William P. Rogers, March 25, 1958.....	54
Senator Thomas C. Hennings, Jr., to Attorney General William P. Rogers, April 3, 1958.....	55
Representative George Meader, to Attorney General William P. Rogers, March 28, 1958.....	58
Gerald D. Morgan, Special Counsel to the President, to Clark R. Mollenhoff, October 26, 1956.....	278
Andrew P. Murphy, editor-in-chief, Federal Bar Journal, to Charles H. Slayman, Jr., March 5, 1958.....	146
Deputy Attorney General William P. Rogers, to Senator Thomas C. Hennings, Jr., April 10, 1957.....	62
Deputy Attorney General William P. Rogers, to Senator James O. Eastland, June 13, 1957.....	25
Attorney General William P. Rogers, to Senator Thomas C. Hennings, Jr., March 13, 1958.....	52
Attorney General William P. Rogers, to Representative George Meader, March 14, 1958.....	56
Attorney General William P. Rogers to Senator Thomas C. Hennings, Jr., April 4, 1958.....	56
Attorney General Willam P. Rogers to Representative George Meader, April 4, 1958.....	61
Acting Attorney General Lawrence E. Walsh to Senator Thomas C. Hennings, Jr., May 9, 1958.....	278
<b>Studies:</b>	
Article, "Demands of Congressional Committees for Executive Papers," (in three installments) by Herman Wolkinson, Federal Bar Journal, April, July, October, 1949.....	147-270
Department of Justice study, "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?".....	63-146
Library of Congress study, "Selected Cases in Which Information Has Been Withheld From Congress By the Executive Department," by Mary Louise Ramsey and Michael Daniels, American Law Division, Legislative Reference Service.....	428-446
Senate Document No. 99, 83d Congress, 2d session, "Congressional Power of Investigation, A Study Prepared at the Request of Senator William Langer, By the Legislative Reference Service of the Library of Congress".....	447-513
Survey, of Withholding of Information From Congress, made by the Senate Subcommittee on Constitutional Rights.....	287-428
<b>Appendix:</b>	
Detailed table of contents for appendix.....	49-50
<b>Index</b> .....	514



# FREEDOM OF INFORMATION AND SECRECY IN GOVERNMENT

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THURSDAY, MARCH 6, 1958

UNITED STATES SENATE,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 11:03 a. m., in room 104-B, Senate Office Building, Senator Thomas C. Hennings, Jr., chairman of the subcommittee, presiding.

Present: Senators Hennings and Hruska.

Also present: Charles H. Slayman, Jr., chief counsel and staff director; William D. Patton, assistant counsel; and Wayne H. Smithey, professional staff member, Committee on the Judiciary.

Senator HENNINGS. Since the hour of 11 is a few moments past, the subcommittee will please come to order.

I would like to make just a short opening statement, if I may.

The Senate Constitutional Rights Subcommittee is very pleased indeed, and I want to add that I am particularly pleased, to have my friend, the Attorney General of the United States, accept our invitation to be with us today for a discussion of the important matter of freedom of information and its corollary, alleged unnecessary secrecy in Government. It is indeed most gratifying that we have our new Attorney General accepting our first invitation to be with us. The time and date agreed upon are those which proved most convenient and mutually satisfactory. To have the chief legal officer of the United States Government here this morning is indeed most gratifying to us all.

We meet here today in the absence of any hostility or acrimony whatsoever. Questions of whether there is a legally recognized privilege lodged in the Chief Executive to withhold information from the Congress and the public on his own determination and, if so, whether such a privilege may be delegated to remote subordinate officials and employees are the basic questions which the chief legal officer of the executive branch, the Attorney General, we hope will discuss with us today. We look forward to hearing his analysis of the issues which are so intricately connected with the whole doctrine of checks and balances in our form of National Government. Only when the American people and their lawmakers have maximum access to accurate information, commensurate with genuine national defense interests, can our system of government operate in the most enlightening and useful manner. Accordingly, many of us believe the burden should be on public officials who withhold information to furnish sound reasons and lawful authority for so doing.

Again, I want to repeat that we are fortunate to have our Attorney General here with us today, in the spirit of good will, mutual respect, and trust.

Now, Mr. Attorney General, you may, if you care to, proceed with any written statement that you have prepared that you would like to read, or you may testify in a more or less impromptu fashion, predicated upon your study and familiarity with this subject matter, or you may read your statement and intersperse it as you please. In other words, we are happy to give you full latitude to do exactly as you wish. I now recognize the distinguished Attorney General of the United States, Mr. William P. Rogers.

**STATEMENT OF HON. WILLIAM P. ROGERS, ATTORNEY GENERAL  
OF THE UNITED STATES**

Mr. ROGERS. Mr. Chairman, thank you for your comments and also I want to thank you for your courtesy in delaying my appearance until now. I do recall that I told you I would be happy to appear.

Senator HENNINGS. You did, indeed.

Mr. ROGERS. And I appreciate your giving me this time because I have been rather busy the last few weeks, and it was very helpful to me to be permitted to appear at this time this morning.

I would like, with your permission, to read the prepared statement I have. I, of course, would be perfectly happy to be interrupted at any time.

Senator HENNINGS. I might say, Mr. Attorney General, that Senator Roman Hruska, the distinguished Senator from Nebraska, has just come to the hearing. I have just made a short statement, Senator, a copy of which I will hand you if you care to read it, expressing our appreciation to the Attorney General for his being here this morning.

Senator HRUSKA. Thank you.

Senator HENNINGS. You may now proceed in any fashion you please, Mr. Rogers.

Mr. ROGERS. I was saying, Mr. Chairman and Senator Hruska, that I think it advisable to present this statement or parts of it, at least, because I do think there is a good deal of misunderstanding in this field and I think that this committee is serving a useful purpose in that regard because I think it helps to clarify the matter.

Preliminarily, I might say that I think that the mere stating of the question quite often causes misunderstanding because usually the question is stated in terms of what right does the Executive have to withhold information, and, is secrecy a good thing, and so forth, which suggests the answer. I think it is just as incorrect to state the question in those terms, suggesting that there is secrecy that should not exist and that the Executive is withholding things as it would be to state the question this way: What right does Congress have improperly to demand documents from the executive branch of the Government? I think if the question was stated that way, it would be unfair to the Congress.

Senator HENNINGS. Yes, I think the converse would be equally true.

Mr. ROGERS. I think that, really, the way to state the question is, as between the two branches of the Government and considering their powers under the Constitution, what exchange of information can be given.

Senator HHRUSKA. Mr. Attorney General, would an alternate way of putting it be this, if you don't mind. I have heard it put this way one time: The duty of the President and the executive department on occasion is to withhold information. Isn't there an affirmative duty on occasion to do that?

Mr. ROGERS. I think so, but I think the mere suggestion of withholding and secrecy carries that implication. I think really the question is how does Government properly function with mutual regard and respect for the other branch's functions. Our Congress has very clear functions and it requires information from the executive branch and it is entitled to get a good deal of information. On the other hand, I think you recognize the problems in the executive branch, that the executive branch of the Government has. There are certain things that can't be given, just the way there are certain things the executive branch of the Government certainly cannot demand from the judiciary branch of the Government, and so forth.

I don't want to dwell on this too much to begin with because I think I deal with this considerably in the statement, but I do think that the stating of the question is apt to affect your attitude toward the subject. And I might say, from my personal opinion, I have great respect for the work of a congressional committee and for the work of the Congress generally, that I think that over the years the work of congressional committees has been very effective in the cause of good government, and I would think that overemphasis on questions like the right to withhold and too much secrecy, and so forth, is a disservice to the operation of the Government because somehow it creates in the public mind that there is secrecy for the sake of secrecy. The fact of the matter is there is probably no government in the world that provides more information to its citizens than the American Government, and one of the difficulties you have in the executive branch of the Government is to have preliminary discussions without having to kind of publicize it or about it, and that can be very destructive of the whole governmental process, if that is the case.

Fortunately we don't have that problem in the Department because lawyers, I think, are a little more aware of their obligation to their clients than others. But it seems to me that this idea of exchange of information between the branches of the Government can be worked out very intelligently and reasonably by men who are willing to do it, and for that reason I compliment you, Mr. Chairman, and this committee for pursuing this in the spirit you have.

Senator HENNINGS. The Attorney General is aware that there are two bills, one which I introduced, S. 921, and one which Senator Johnson of Texas introduced on my behalf, S. 2148. S. 2148 would amend section 3 of chapter 324 of the act of June 11, 1946 (60 Stat. 238) "to clarify and protect the right of the public to information." The first bill, S. 921, has as its title, "To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records."

Mr. ROGERS. I will comment on those later.

Senator HENNINGS. I assume the Attorney General has seen those.

Mr. ROGERS. Yes, I have.

Senator HENNINGS. I ask that they now be made a part of the record.

(Bills S. 921 and S. 2148 are as follows:)

[S. 921, 85th Cong., 1st sess.]

A BILL To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 161 of the Revised Statutes of the United States (5 U. S. C. 22) is amended by adding at the end thereof the following new sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

—  
[S. 2148, 85th Cong., 1st sess.]

A BILL To amend section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238) is amended to read as follows:

"SEC. 1002. Public Information.

"In order to provide adequate and effective information for the public—

"(a) ORGANIZATION AND FORMS.—Every agency shall separately state and promptly file for publication in the Federal Register and the Code of Federal Regulations: (1) descriptions of its central and field organizations, including delegations by the agency of final authority; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available; (3) descriptions of all forms for public use and instructions related thereto including a statement of where and how such forms and instructions may be obtained; and (4) every reorganization, amendment, or revision of the foregoing.

"(b) RULES.—Every agency shall separately state and promptly file for publication in the Federal Register and in the Code of Federal Regulations: (1) all procedural rules; (2) rules relating to the availability of information to the public; (3) all statements of general policy or interpretation formulated and adopted; (4) all other rules; and (5) every amendment, revision, or repeal of the foregoing.

"(c) ORDERS AND OPINIONS.—Every agency shall promptly file its orders and opinions, or make them available to the public in accordance with a rule published in the Federal Register and the Code of Federal Regulations stating where and how they may be obtained, copied, or examined. No order or opinion shall be valid or effective until it has been published or made available for public inspection.

"(d) PUBLIC RECORDS.—Every agency shall promptly make available to the public, in accordance with a published rule stating where and how such records may be obtained, examined, or copied, all records, files, papers and documents submitted to and received by the agency. Public records include, but are not limited to, all applications, petitions, pleadings, requests, claims, communications, reports or other papers and all records and actions by the agency thereon, except as the agency by published rule finds that withholding is required by subsection (f) hereof. Every individual vote and official act of an agency shall be entered of record and made available to the public.

"(e) EFFECT OF FAILURE TO PUBLISH.—No rule, order, opinion or public record, shall be relied upon or cited by any agency against any person unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be required to resort to any organization or procedure not so published.

"(f) EXCEPTIONS.—The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national security, or (3) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy; however, nothing in this section authorizes withholding of information or limiting availability of records to the public except as specifically stated in this subsection."

Senator HENNINGS. Proceed.

Mr. ROGERS. Mr. Chairman, as you might expect, this question of jurisdiction of respective branches of the Government has arisen from time to time since the beginning of our National Government. In the Department of Justice we have made a careful study of numerous incidents which have occurred and which illustrate many facets of the problem. We have submitted to the committee, Mr. Chairman, through you, a lengthy compilation of those cases and we are in the process of preparing some additional ones from the year 1948 to 1953, which we will submit to you. I think when that is completed you will have about as thorough a documentation of the history of this problem as I know about.

Mr. SLAYMAN. Mr. Chairman.

Senator HENNINGS. Mr. Slayman.

Mr. SLAYMAN. At the time of the Judiciary Committee hearing on Mr. Rogers' nomination, we discussed this material. He gave his permission for us to print it. We have received copies from the Government Printer.

Senator HENNINGS. Thank you very much.

Mr. SLAYMAN. It probably could go in the appendix of the record at this time.

Senator HENNINGS. Yes. Without objection, it will be received and made a part of the appendix of the record.

[The study submitted, "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?" is appendix exhibit No. 10.]

Mr. ROGERS. I will, as I say, in due time submit for your consideration the experiences in 1948 and 1953, which will, I think, make a very complete study of this whole problem.

Now I think I mentioned just a moment ago that in the Department of Justice we try to make all the information available to the Congress and to the press that we can, and I think that we have been able to provide a great deal of information that in some instances was withheld formerly. I think that we will continue to do that, bearing in mind that the legal problems are a little different sometimes from others because there are certain matters that we can't discuss because we would otherwise violate the canons of ethics.

With reference to the right of the public to know generally as distinguished from the legislative branch, it seems to me that there are four principles which it is well to keep in mind:

1. While the people are entitled to the fullest disclosure possible, this right like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest.

2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process.

3. A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying nondisclosure no longer pertain.

4. Nondisclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal, or pecuniary reasons.

All persons agree, I think, that information which would adversely affect our national security should not be disclosed. Then, too, there are compelling reasons for nondisclosure in the field of foreign affairs,

in the area of pending litigation and investigations which may lead to litigation, information made confidential by statute, investigative files and reports, and, finally, information relating to internal government affairs. President Eisenhower's letter of May 17, 1954, to the Secretary of Defense concerns this last category of information.<sup>1</sup> I will discuss it a little later, if I may, in my prepared statement.

Now with reference to my own general views on the subject, I stated them a couple years ago and if the committee would permit me, I would like to restate them here because I believe them equally strongly today.

\* \* \* Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators, or executive officials cannot conduct all public business at every step of the way in public.

A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of Government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and Members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if Government is to function.

The question was discussed a year or so ago in the Yale Law Journal by a former Government official who said this:

There are serious weaknesses in the assumption \* \* \* that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. \* \* \* The executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberation incidental to the making of policy decisions. Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him must be answerable only to him. \* \* \*

\* \* \* \* \*  
It is one thing for a Cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public: it is quite another thing for a middle-aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guaranty that he will not long tolerate incompetent or disloyal advisers; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee of Congress.

I think maybe that is a little overstated. I don't believe I would state it quite that strongly, but at least it does present another point of view.

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<sup>1</sup> Appendix exhibit No. 18.

Jenkin Lloyd Jones, editor of the Tulsa Tribune and formerly president of the American Society of Newspaper Editors, in delivering the William Allen White lecture at the University of Kansas last month had this to say:

Many of my colleagues in the newspaper business have leaped to the conclusion that all public affairs, not directly connected with national defense, must be conducted in the open. \* \* \* I disagree. I think that much of the important business in a republican form of government will be carried on behind closed doors. I see few dangers in that. I see many advantages. For it is only behind closed doors \* \* \* that most politicians—yea, even statesmen—honestly express their views and try to get at the meat of the question.

I don't mean to imply that legislative voting should not be in the open, nor that the public should be denied the right to appear before all committees, nor that any legislator should be excused from explaining why he voted as he did. But I do mean that \* \* \* in the National Capitol, the White House, and various Washington departments no sound policy is decided upon without frank exchange of views. And a frank exchange of views is rarely reached with the public and the press looking over the shoulders of the policymakers.

The Government of Athens was an absolute and complete democracy, with all deliberations carried on in a goldfish bowl of open debate. But Athens became smothered with oratory, paralyzed with demagogery, and finally wound up with such an unstable mobocracy that nearly every able Athenian was banished from the land.

There, again, I think that may be overstated, but it does present another view which I think we ought to take into consideration.

Now in the Department of Justice we have, in the last few years, taken certain steps to make available more information about our daily operations than was available before. For example, we have now the practice of making all pardons and commutations of sentences a matter of public record. Thus in the event a question arises as to the propriety of a pardon, any interested person may examine the record. We make those available at any time. We don't have to have a request from a congressional committee.

I will say in this connection that the press has been very helpful, and I think in a constructive way, because they have not given undue publicity to these pardons. These pardons, as you know, refer to people who have made a complete rehabilitation in the community, and the mere fact that there was a lot of publicity about it would, in a sense, destroy the purpose of the pardon because it would advertise the fact that the fellow committed a crime many years ago. The press has been conscious of that and they have not given undue publicity to this, and I think the only time they would be tempted to do it would be when some question was raised about the propriety of a pardon. But the information is there and available to anyone who wants to see it.

Senator HRUSKA. When was that action taken?

Mr. ROGERS. In 1953. We also include the names of all persons who interceded on behalf of or expressed interest in the convicted person. I think it is a good idea that intercessions by people that are not a matter of record, even when they are made in complete good faith, are apt to cause some question to arise about it, and we have felt it is better to make any intervention of that kind a matter of record. It has worked out very well because in many instances it is very appropriate for public officials, Members of Congress, leading citizens in the States and communities to point out what they know about a person who has made a complete rehabilitation, and that information is available and there, again, the press has been very considerate in not publicizing it.

Seantor HENNINGS. Now, General Rogers, does that same policy obtain as to consent decrees in antitrust cases?

Mr. ROGERS. Yes; we publicize all consent decrees and at the conclusion of the settlement of any type of case in the Department, where otherwise there would be no public record of proceedings, our practice now is to make all of the pertinent facts available. We didn't use to do that, but we have them available on all settlements of any kind.

Senator HENNINGS. That is since when?

Mr. ROGERS. 1953.

I have already mentioned the canons of professional ethics which you, as a distinguished lawyer, know about and you know that we do have problems in the Department. For example, we have to be extremely careful in announcing an investigation because the mere announcement of an investigation serves to indict a person.

Senator HENNINGS. Or even to frustrate the investigation itself.

Mr. ROGERS. Yes. Now there are times when a matter is a matter of public knowledge. For example, if the facts have been produced before a congressional committee which indicate the law has been violated, the announcement of investigation there is not the same because the publicity that is already attendant has the effect of calling to the attention of the public the fact that this person is under suspicion, so that we sometimes in that case do announce an investigation. But normally we do not announce investigations because it is harmful. The way to indict people in our country is to present matters to the grand jury, and we are not authorized and it is improper for Government officials to indict people by press releases.

Now after the indictment is voted and filed, or after a case is started, it is improper for us to discuss it. It is improper for us to put out any derogatory information about the defendant, either in a civil or a criminal case. Our job is to present the evidence in court, not to discuss it. And during the last 5 years we have had, I think, very satisfactory relationships with the Congress. I don't know of any instance in which we failed to give information and had any lingering controversy afterwards.

There have been times when the Members of Congress would ask us for information that we felt we were not able to give, but after we explained the reasons, usually there was an understanding arrived at and, as I say, I don't believe we have had any difficulty, and I know of none now.

I have already mentioned the letter that President Eisenhower wrote, the May 17 letter, which I will come to later.

I would like to discuss briefly now some of the precedents. I think it is helpful to understand them and maybe to take a little time going over them because it does show how this question has been resolved over the years and how sound and intelligent our forebears were in deciding things as they did. They have developed a system of Government based upon the separation of powers that has worked exceedingly well. So, as I say, I think it is unfortunate to suggest to the public from time to time, and I am certainly not suggesting this committee has; because you have not—you have been very careful in that regard—but for anyone to suggest there is a great secrecy in Government and people are doing things behind closed doors that the public doesn't know about, I think that is all harmful of the

Government. I don't think it is true. I think there may be differences of opinion occasionally, but I think that our Government, and regardless of which party is in power, over the years has operated with great regard to the public good and it has given, as I say, more information to the public than any other government in the world.

Let us start by noting the action of the Continental Congress under the Articles of Confederation which preceded the adoption of the Constitution. On February 21, 1782, some 176 years ago, the Continental Congress passed a resolution creating a Department of Foreign Affairs under the direction of a Secretary to the United States of America for the Department of Foreign Affairs. The resolution provided:

That the books, records, and other papers of the United States, that relate to this Department be committed to his custody, to which, and all other papers of his office, any Member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

Moreover, the same resolution also provided:

That letters (of the Secretary) to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national objects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted.

In short, under the Continental Congress, the Department of Foreign Affairs and its Secretary were almost completely subject to the directions of the Continental Congress. Every Member of the Continental Congress was entitled to see anything in the records of the Department of Foreign Affairs, including secret matters. Indeed, he could make a copy of anything, except secret matters.

Much has been written of the inadequacies of that prototype of our National Government. I do not propose to review those writings or to comment on those inadequacies.

Suffice it to say that it came increasingly to be recognized by the leaders of our country then that the design of that pilot plant had grave and serious defects which made it incapable of serving adequately as the engine of the National Government. The designers so discovered by practical experience with its shortcomings.

Finally, at the Constitutional Convention in Philadelphia in 1787 that prototypes was redesigned as the engine of government which is still operating today. As we all know, it was designed on the principle that our Federal Government is divided into three equal departments or branches, a political innovation not included in the older Articles of Confederation.

Now let us see what action the opening session of the first Congress of the United States took when it came to create the Department of Foreign Affairs under the Constitution. Section 4 of the act of July 27, 1789, establishing an executive department, to be denominated the Department of Foreign Affairs, provides:

\* \* \* That the Secretary \* \* \* shall forthwith after his appointment, be entitled to have the custody and charge of all records, books, and papers in the office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled.

Compare this language with the resolution creating the old Department of Foreign Affairs under the Articles of Confederation.

Here is no language which makes the books and records of the Department of Foreign Affairs virtually the books and records of Congress; here is no language which requires that the Secretary of this Department shall submit his correspondence to Congress before transmittal. The difference is obvious and fundamental. Under the Constitution the first Congress was creating a Foreign Affairs Department of the Executive branch, pursuant to the grand design of the new Constitution based on the political principle of separation of powers.

The difference in the language of the old resolution and the new statute under the Constitution is no matter of legislative oversight. Many of the men who sat in that first Congress had served earlier in the Continental Congress where they had the right of access to the papers of various departments because those departments were in legal effect merely creatures of the Congress. In the light of their knowledge of the earlier practice, it can only be concluded that they deliberately recognized that the continuance of that former privilege was incompatible with the grand design of the Constitution for the separation of powers between the three branches.

The question of the production of documents before Congress arose in George Washington's first term as President. The first investigation by the legislative branch of the administration of governmental affairs by the executive branch was an investigation of a military expedition led by General St. Clair under the direction of the Secretary of War. When the congressional committee called for the papers pertaining to this campaign, President Washington convened his Cabinet, because it was the first instance of a demand on the executive branch for papers, and so far as it should become a precedent he wished it to be right.

Washington did not question the propriety of the investigation, but said that he could conceive that there might be papers of so secret a nature that they should not be given up. He and his Cabinet came to a unanimous conclusion, and this was the first one of its kind, that:

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 the 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.

Having formulated these principles, the Cabinet agreed, however, that "There was not a paper which might not be properly produced." It is, of course, well known that acting on the same principles Washington later refused to lay before the House a copy which it had requested of instructions to the United States Minister who negotiated a treaty with the British Crown. In declining to do so, because of the secrecy required in negotiations with foreign governments, Washington referred to his constitutional oath to "preserve, protect, and defend the Constitution," and to his belief that—

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.

Thus there were established four principles:

1. That the Constitution fixes boundaries between the three branches of the Government: Legislative, executive, and judicial.
2. That the documents of the executive branch are within the control of that branch, not of all branches.
3. That the legislative branch can make inquiry of the executive for its documents, but in response to congressional requests for documents, the executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest.
4. That the authority of the President for the conduct of foreign affairs does not oblige him to produce the instructions which had been given to his representatives in negotiating a treaty. It seems clear that they constituted advice within the executive branch on official matters. The official action of the Executive was embodied in the treaty which was submitted to the Senate for its advice and consent.

So were the basic principles fixed in the administration of our first President when both the executive and legislative branches were comprised of many men who had served in the Continental Congress, who had participated in the Constitutional Convention, and who successfully assisted in achieving the ratification of the Constitution.

Jefferson, who had participated in the formulation of these principles as Secretary of State, was also confronted with the same question during his presidency, when the Burr conspiracy was stirring the country. By resolution, the House asked for any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching certain matters related to the Burr conspiracy, although it was not so identified. Jefferson gave certain information, but declined to give certain other information as being ex parte and uncorroborated and delivered in some instances under the restriction of private confidence.

Thus two additional principles were established:

1. That documents containing information of uncertain reliability apparently reflecting adversely on individuals should not be disclosed.
2. That documents containing information given in confidence to the executive branch should not be disclosed by that branch.

Some 40 years later, the House of Representatives was conducting an investigation of the administration of Cherokee Indian affairs. In a special message dated January 31, 1843, President Tyler vigorously asserted that the House of Representatives could not 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 President.

President Tyler's refusal established additional principles:

1. That it would be contrary to the public interest for the executive branch to produce documents which might affect its settlement of pending claims against the United States.
2. That it would be contrary to the public interest for the executive branch to produce documents on official matters before they had been embodied in official actions.

I might say in that connection that occasionally we have requests in the Department from the Members of Congress for information about settlements before the settlement is made, and occasionally the

request will be, What is the plaintiff offered by way of settlement and what would you accept? and we have, in those cases, not given that information. We have explained that it would be inappropriate to give that information in the process of settling a case. We have notified the particular Congressman or Senator that we would be happy, after the settlement of the case, to explain the terms of settlement and explain the reason for it, and if there was any criticism, we would be glad to discuss it with them, but if we permitted that type of disclosure, then the executive branch of the Government would not be able to function because the person who had the information would be in a position to effect the decision. I think that Tyler was right in establishing the principle, and it is a principle that has stood the country in good stead since that time.

Again some 40 years later, in challenging the attitude that because the executive departments were created by Congress, the latter had any supervisory powers over them, President Cleveland declared:

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 government growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.

Senator HENNINGS. Is that "either branch of government" or "either branch of Congress"? My copy says "branch of Congress."

Mr. ROGERS. Yes, "either branch of Congress."

That was a case where the argument was made that because Congress had created the agency, that therefore by that fact they were entitled to have all of the documents, and Cleveland answered the argument that way. Thus was emphasized the fact that the separation of powers applies to all agencies of the Government, whether created by the Constitution or by Congress. To hold otherwise would be to destroy the entire basic principle of separation itself.

In 1909 the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against United States Steel Corp., and, if not, the reasons for nonaction. President Theodore Roosevelt replied, refusing to honor this request upon the grounds that—

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 direction whatever.

This refusal reiterated the principle that the executive branch will maintain the inviolability of documents in official files containing information from private sources which has been communicated to it in confidence.

Incidents in more recent times are relatively well known and need not be detailed here. However, let me turn your attention for illustrative purposes to two such incidents in the Truman administration. One incident involved the request of a congressional committee for the loyalty-security file with respect to Dr. Condon, then the Director of the National Bureau of Standards of the Department of Commerce. On March 3, 1948, the committee adopted the extraordinary course of issuing a subpoena to Secretary of Commerce Harriman to

produce the file, which by order of President Truman Mr. Harriman refused to do.

On March 13, President Truman issued a directive to all officers and employees in the executive branch, forbidding the disclosure of loyalty files and directing that any demand or subpoena for such files from sources outside the executive branch should be declined and the demand or subpoena referred to the Office of the President. On April 22, the House of Representatives adopted a resolution preemptorily ordering the Secretary Harriman to surrender the desired data respecting Dr. Condon. Citing the President's directive, the Acting Secretary wrote the Clerk of the House that he respectfully declined to transmit the requested document and that in accordance with the directive, he was referring the matter to the President. President Truman had earlier stated that he would not accede to the House resolution.

In connection with the Condon incident there was introduced on March 5, 1948, a resolution which would have directed all executive departments and agencies to make available to any and all congressional committees information which may be deemed necessary to enable them to properly perform the duties delegated to them by Congress.

I won't read each of these, but it is interesting to see that the St. Louis Post-Dispatch wrote two very interesting editorials which opposed that, and I think made a very good case in opposition.

The second one says:

Congress is entitled to any record it needs to formulate public policy. Other records, however, such as personnel files, are the property of the executive branch. To reveal them to Congress might seriously endanger governmental administration.

For example, sound executive decisions are usually reached through an exchange of views among various officials. Naturally, these views differ, and some of them are rejected before the official decision. But the \* \* \* bill would empower Congress to drag out and harp on the rejections. With such a threat over their heads, officials would fear to commit their views to writing; and the quality of decisions would suffer accordingly.

The joint resolution was referred to the Senate Committee on Expenditures, where it died.

So we see from the beginning of our Government the position of the President and the executive branch has been that while no one could question the constitutional right of Congress to inform itself on subjects falling within its legislative competence, yet, as Professor Corwin puts it:

This prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself.

The constitutional authority of the Chief Executive over the executive branch is illuminated by the ultimate fate of a proposed amendment to the Atomic Energy Act of 1946. It provided that where the appointment of members of personnel of the Atomic Energy Commission is subject to Senate confirmation the Senate members of the Joint Committee on Atomic Energy may direct the FBI to investigate the character, associations and loyalty of any such appointee, and that the Director of the FBI should file a written report of any such investi-

gation and thereafter should furnish such amplification or supplementation as the Senate committee may direct.

Senator Morse opposed the bill as clearly unconstitutional as an infringement on the appointive power of the President. A proponent of the bill argued that it did not attack the appointive power and that it dealt only—

\* \* \* with the right of Congress to have the Federal Bureau of Investigation, which is a creature of Congress, perform a function for Congress; and it provides that Congress may use the FBI report as a basis of consideration as to whether or not the nomination of a particular person should be confirmed by the United States Senate.

The late Senator McMahon, of Connecticut, who had served earlier as Assistant Attorney General in charge of the Criminal Division, answered this contention. He declared that the best statement in the cases on the point at issue was to be found in *Kilbourn v. Thompson*, to which I shall refer later. There then ensued the crux of the argument as to the power of Congress to provide by statute for its utilization of the services, facilities, investigative files and reports of a unit of the executive branch. Because of the wide power conferred upon the Atomic Energy Commission, it was urged that:

We should not have an iron curtain lowered so that we may not have all the facts which we need in discharging our responsibilities.

Senator McMahon answered :

I do not believe that the Congress can say to the President of the United States, "We are bypassing you. We are not going to talk to you. We are not going to talk to the Attorney General, who is one of your Cabinet officers and who is responsible to you. We are going to reach over both of you and tell a bureau chief that he shall do this, that, and the other thing, and report to us." It is my contention that the Constitution will not permit the Congress legally to do such a thing.

Now following that there was considerable debate, and then Senator McMahon and Senator Barkley both opposed this. Senator Barkley said at one point :

\* \* \* We are authorizing a committee to command that executive appointees shall be the servants of a committee, and if we can do that with respect to the Atomic Energy Commission, we can do it with respect to postmasters, district attorneys, United States judges, and even members of the Cabinet, because they are creatures of the Congress.

The bill was finally passed and the President vetoed it and the Senate failed to override that veto.

Congressional efforts to obtain loyalty-security files respecting various individuals continued into President Eisenhower's administration. An editorial in the Washington Post and Times Herald for March 10, 1953, made the following observations:

So far as executive files are concerned, President Eisenhower would do well, we believe, to follow the example of almost every earlier occupant of the White House. "Full cooperation" (a phrase used by the State Department officer in charge of such investigations) means, among other things, that no congressional committee should claim what it has no right to receive.

A year later the President issued his March 17 letter to the Secretary of Defense, and I set that forth in my statement. This letter at that time, as you remember, Mr. Chairman, received very favorable public response. I just quote a couple to show the type of favorable response we had at the time and I think the comments, the public re-

action to the letter, were just as sound then as they are now, and I think the letter is just as sound now as it was then.

The New York Times said this:

The committee seems to feel that it has the right to pry farther into the conversations and discussions among members of the executive branch while they were considering a serious problem and, perhaps, reaching important decisions. The committee has no more right to know the details of what went on in these inner administration councils than the administration would have the right to know what went on in an executive session of a committee of Congress.

An editorial in the Washington Post and Times Herald for May 20, 1954, made the following observations:

The question is simply whether the executive departments are to be administered by the properly constituted executive officials, or whether there is to be a sort of government-by-McCarthy. President Eisenhower was abundantly right in protecting the confidential nature of executive conversations in this instance.

Now I talk briefly about the separation of powers here. Because it will take too long to read it—

Senator HENNINGS. Right at this point, Mr. Attorney General, may I ask a question which relates to a letter to Mr. Clark Mollenhoff, a very distinguished member of the press, who happens to be here this morning. The letter is from Mr. Gerald D. Morgan, special counsel to the President, to Mr. Mollenhoff, reporter for the Des Moines Register & Tribune.<sup>1</sup>

Now, Mr. Attorney General, shortly after the President's agreement with the Vice President relating to the matter of succession, it was made public 2 or 3 days ago by Mr. Hagerty, the press secretary to the President, who said that the statement was, and I quote Mr. Hagerty, "more or less a copy of an understanding the President and Vice President have." Now, to your knowledge, Mr. Attorney General, does the public statement issued by the White House, which we understand you helped prepare, constitute the entire agreement between the President and Vice President on the matter of presidential inability, and don't you think that the public and the Congress are entitled to know the rest of this agreement, if such there is?

Mr. ROGERS. Well, I think that it has been made pretty clear, Mr. Chairman, that the statement that was issued from the White House represents the understanding between the President and the Vice President. I do not agree with the idea that the President and the Vice President ought to be forced to disclose all of the conversations leading up to such an agreement for the reasons that I have stated. I think that would be wholly contrary—

Senator HENNINGS. I am not referring to conversations, Mr. Attorney General. Don't you think the withholding of any part of any such agreement cannot be squared with the President's language quoted in Mr. Gerald Morgan's letter of October 26, 1956, to Mr. Mollenhoff?

Mr. ROGERS. Mr. Chairman, you are rather suggesting that maybe this isn't the agreement. I think it is the agreement. In other words, I think the agreement that the President released is the agreement.

As I say, I think somehow that the word "agreement" may carry a connotation that isn't quite right.

Senator HENNINGS. Mr. Hagerty says that it was "more or less a copy of an understanding."

<sup>1</sup> Appendix, exhibit No. 14.

Mr. ROGERS. I don't know. You will have to ask Mr. Hagerty about that, but as far as I am concerned this is the agreement.

Senator HENNINGS. I am quoting him.

Mr. ROGERS. Well, he may have thought there were conversations leading up to it.

Senator HENNINGS. I am not trying to get into conversations, Mr. Attorney General, and most respectfully I suggest what I am trying to inquire into is whether we have the substance in its entirety or the verbatim agreement or do we have a distillation of it or do we have, perhaps, a conclusion as to what the agreement itself may or may not mean?

Mr. ROGERS. As I said to the chairman, the agreement that was made must be the agreement.

Senator HENNINGS. In toto?

Mr. ROGERS. As far as I know, it is the agreement that the President and the Vice President had, and they issued it on the day it was issued.

Senator HENNINGS. Thank you, sir.

Mr. ROGERS. As I say, whether they had any preliminary discussions that led up to it, I have no idea. They probably did.

Senator HENNINGS. I am not getting into discussions. I didn't mean to get into that at all.

Mr. ROGERS. Well, I don't know what the preliminary arrangements were.

Senator HENNINGS. It was only as to the substance of the agreement itself that I was inquiring.

Mr. ROGERS. The agreement that has been released is the agreement and, as I say, I think in that connection I might mention, Mr. Chairman, I think it has been made clear now. We discussed it at quite some length yesterday. I had a press conference on it. The original thought was and some of the papers carried the suggestion that somehow this was an agreement that somehow was different from the Constitution and different from the law. Quite the contrary. Really what it amounts to is an understanding between the President and the Vice President as to the meaning of the Constitution and how they would act in the event of an emergency.

Now it is that very fact that has caused the trouble in the past, the fact that there was no understanding between the President and the Vice President and the other members of the administration which has prevented the Government from acting in time of emergency.

For example, in Garfield's time, he was shot and for 80 days he couldn't do anything. He signed 1 piece of paper during the 80-day period, an extradition paper. There was no question about the inability of Garfield to act. Everybody agreed on that fact. His Cabinet at that time was made up of seven members and they were unanimous in the opinion he was unable to act. They were also of the opinion that action should be taken to protect the interests of the country, and the reason that no action was taken is because the President and Vice President never talked it over and there was no understanding on it. So that Arthur, who was then Vice President, said that he wouldn't assume the powers and duties of the office on a temporary basis without notifying Garfield, that there might be some question raised as to whether it was permanent or temporary.

The doctor at the time said that if that information was given to Garfield, it might cause him to have a shock and it might result in his death, and the result was that nothing was done.

Now if Garfield and Arthur talked it over and if they understood at that time in advance of any such exigency that Arthur would have acted merely on a temporary basis and assumed the powers and duties of the office, there would have been no problem.

The same thing is true in the case of Wilson; and I think that the country in the years ahead will come to look at this understanding and the fact that the President had the foresight and good judgment to enter into it so that there would be no confusion in the event of emergency, I think the public in the years to come will think that that is one of the really significant historic events in our history.

Senator HENNINGS. As the Attorney General may know, some of us are sponsoring a bill providing for a constitutional amendment to take care of the Presidential disability.

Mr. ROGERS. Yes.

Senator HENNINGS. We realize it is very vexing and a very difficult job. Some of us have been thinking about it for a long, long time. And there certainly are great varieties of respectable opinion upon various phases of it, as the Attorney General knows.

Mr. ROGERS. Yes; and I think that the amendment that you have holds promise of being very constructive, indeed.

Senator HENNINGS. I am very glad to hear you say that. It is not perfect, but at least it is a start, and we hope that at the end of the debate and discussion we may get somewhere with it and bring something out of the Senate that will be of substantial value to the country in the future.

Mr. ROGERS. Yes.

Mr. Chairman, I have a discussion here of separation of powers, which I would like to enter into the record. I think that the area of separation of powers is pretty well settled, pretty well established, so I will not take up the time of the committee to read it, but I do think it is important for the record to have it included.

Senator HENNINGS. Without objection, we will be glad to make it a part of the record of these proceedings.

Mr. ROGERS. Thank you.

(The statement on separation of powers is as follows:)

#### SEPARATION OF POWERS

Much has been written respecting the doctrine of separation of powers under the Constitution. In such a statement as this, it is obviously impracticable to discuss its full application. I shall, however, make these comments.

The Supreme Court's classic statement of this doctrine arose in connection with a congressional investigation. In the 1870's the firm of Jay Cooke & Sons went into bankruptcy, and the appropriate judicial proceedings were instituted. As Navy funds were deposited with the firm, the United States was a creditor. Upon that basis a House committee instituted an investigation of a real-estate pool in which the Cooke firm had participated.

The committee issued a subpoena duces tecum to one Kilbourn. When he refused to produce certain documents, the House held him to be in contempt, and ordered him confined to the District of Columbia jail until he purged himself of his purported contempt. Thereafter, Kilbourn instituted an action for false imprisonment. In reviewing the congressional proceedings the Supreme Court said:

"It is believed to be one of the chief points of the American system of written constitutional law, that all powers intrusted to government, whether State or

National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of Government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

\* \* \* \* \*

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the Government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century [in 1880] has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made \* \* \*." *Kilbourn v. Thompson* (103 U. S. 190-191. (1880)).

The court held that the subject matter of this congressional investigation was judicial, and not legislative, that it was then pending before the proper court, and that the House lacked power to compel Kilbourn to testify on the subject.

The proposition in the Kilbourn case is that one of the three grand departments should not encroach upon the other. Thus what is true of the relationship between the legislative branch and the judicial branch is likewise applicable to attempted encroachment by the legislative branch with respect to the executive branch.

At an earlier day in our national history the Supreme Court summarized the responsibility of the President for the administration of the executive branch in the celebrated case of *Marbury v. Madison*. There Chief Justice Marshall said:

"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 orders. 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" (1 Cranch (5 U. S.) 137, 164 (1803)).

This extract from Chief Justice Marshall's opinion in *Marbury v. Madison* certainly indicates a measure of the extent to which the President's discretion may be exercised by his subordinates, subject, of course, to conformity with his orders.

I recognize, of course, that Congress has broad powers of inquiry and investigation as an "attribute of the power to legislate."<sup>28</sup> I have had some years of personal experience as counsel to legislative investigations. I recognized then and do now that the power to legislate is itself subject to constitutional limitations. So, too, is the power to investigate. It is limited by the fourth amendment prohibition against unreasonable searches and seizures<sup>29</sup> and the privilege against self-incrimination protected by the fifth amendment.<sup>30</sup> Although the exact scope of the limitations is unclear the protections of the freedoms of religion, speech, and the press contained in the first amendment also operate to limit congressional investigative power.<sup>31</sup>

The limitations on the investigative power are not confined to those expressly set forth in the Constitution. The classic expression of this principle is contained in *Kilbourn v. Thompson*, previously mentioned:<sup>32</sup>

<sup>28</sup> *McGrain v. Daugherty*, 273 U. S. 135, 175 (1927).

<sup>29</sup> In *Hearst v. Black*, 87 F. 2d 68 (D. C. Cir. 1936), a legislative subpoena was held to be too broad contrary to the fourth amendment. Cf. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 299, 307 (1924). "We cannot attribute to Congress an intent to defy the fourth amendment or even to come so near to doing so as to raise a serious question of constitutional law." But see *In re Chapman*, 166 U. S. 661, 668 (1897).

<sup>30</sup> *McGrain v. Daugherty*, *supra*, note 28, at 173-174; *Kilbourn v. Thompson*, *supra*; *Quinn v. United States*, 349 U. S. 155 (1955).

<sup>31</sup> See *Rumely v. United States* (App. D. C.), 197 F. 2d 166, 173; affd. *United States v. Rumely*, 347 U. S. 41 (1953). The Supreme Court declined to decide the issue on constitutional grounds. It held that the questions asked were outside the scope of the House resolution authorizing an inquiry into lobbying; that only direct pressures were intended to be investigated, and not attempts to influence public opinion by books and other writings.

<sup>32</sup> 103 U. S. 191.

"It is \* \* \* essential to the successful working of this system that the persons intrusted 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 by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." \* \* \*

This is not mere doctrine. It was regarded by the Founders as necessary to prevent the tyranny and dictatorships that result from the undue concentration of governmental powers in the same hands. Mr. Justice Brandeis has observed:

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."<sup>33</sup>

Nor is there any question that protection against legislative autocracy was one of the principal aims of the Founders. From their knowledge of English history, the early settlers knew of the tyranny of the Long Parliament and others that followed it. What was particularly vivid in their minds were the harsh measures which colonial legislatures adopted for the early settlers. Those who dared criticize legislative proceedings or to reflect upon their integrity were punished directly and without the intervention of courts or the authority of statutes, and the punishments were frequently severe and degrading.<sup>34</sup> The Supreme Court has said:

"When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned."<sup>35</sup>

It was probably based upon experiences such as these that Jefferson concluded: "One hundred and seventy-three despots would surely be as oppressive as one."<sup>36</sup> So too, Alexander Hamilton out of his experience declared: "The tendency of the legislative authority to absorb every other has been fully displayed and illustrated."<sup>37</sup> Therefore, it is not surprising that when the Federal Convention met in 1787 to adopt a new Constitution, its members were determined to enhance the powers of the Executive and to restrict the powers of the legislative branch.<sup>38</sup>

The doctrine of the separation of powers was thus the very foundation stone of the Federal Government as established by the Constitution. It was regarded as the basic guaranty of the liberties of the people against tyranny. In view of this background, it is not remarkable that it has retained vitality and been given practical application throughout our history. Each branch has acted upon it and been protected by it. It has been held that the legislative branch in the exercise of its investigatory powers may not exercise basically judicial functions. *Kilbourn v. Thompson, supra*; *United States v. Icardi* (140 F. Supp. 383 (D. C. D. C. 1956)). Similarly the courts may not properly intrude on the exercise of legislative functions. *Methodist Federation For Social Action v. Eastland* (141 F. Supp. 729 (D. C. D. C. 1956)), or on the Executive, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Co.* (333 U. S. 103 (1948)). And the President may not exercise legislative functions. *Youngstown Sheet & Tube Co. v. Sawyer* (343 U. S. 579 (1952)).

A wise exercise of restraint has operated to prevent a test of all the possible situations in which one branch might invade the functions of another. However, there is little doubt that the investigative power of Congress could not constitutionally support an investigation into the discussions of the members of a Federal court relating to the decision in a specific case because this would be utterly destructive of a free judiciary. This certainly was the view of the House of Representatives in the converse situation, involving attempts to require the disclosure of certain information to courts. It resolved that:

"No evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordi-

<sup>33</sup> *Myers v. United States*, 272 U. S. 52, 293 (dissent) (1926).

<sup>34</sup> Potts, Power of Legislative Bodies To Punish for Contempt, 74 U. Pa. L. Rev. 691, 697-712 (1926).

<sup>35</sup> *United States v. Lovett*, 328 U. S. 303, 318 (1946).

<sup>36</sup> Jefferson, Notes on the State of Virginia, p. 120 (1954 ed.).

<sup>37</sup> The Federalist, No. 71.

<sup>38</sup> Warren, Presidential Declarations of Independence, p. 10, Boston U. L. Rev., pp. 1, 2 (1930).

nary courts of justice, be taken from such control or possession but by its permission."<sup>39</sup>

The same considerations may be said to operate with respect to an investigation of confidential advice within the executive branch. It has long been believed that the President may in his own discretion withhold documents from a court. In the trial of Aaron Burr, Chief Justice Marshall said:

"In no case of this kind would a court be required to proceed against the President as against an ordinary individual. \* \* \* In this case, \* \* \* the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others which must be respected by the Court."<sup>40</sup>

Under the doctrine of *Marbury v. Madison*, *supra*, this power may be exercised on his behalf and with his approbation by those whose acts "are his acts." This finds support in the judicial recognition, without reference to statute, of the fact that the privilege against revealing military secrets "is a privilege which is well established in the law of evidence." *United States v. Reynolds* (345 U. S. 1, 7), and cases there cited. The Reynolds case also indicates that the privilege "which protects \* \* \* state secrets" stands on a parallel footing with the military secrets privilege. (id.).

To conclude that a constitutional privilege exists in the President and in those acting on his behalf and pursuant to his direction to withhold documents and information as against a congressional demand for production or testimony does not wholly dispose of the problem. A further question arises. Is the Executive or the Congress to determine whether the privilege is appropriately asserted in a given case? There is no judicial precedent governing this question.

As a practical matter only the President can make the determination as to disclosure. A House Judiciary Committee took this view in deciding who is the best judge in a close case, of the propriety of divulging to any committee of the House state secrets. It first noted 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." Then it recognized what is so plainly implicit in the doctrine of separation of powers:

"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."

Finally, it came to the question as to whose decision must be accepted in this matter. Its report stated:

"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. \* \* \*"<sup>41</sup>

One of our great legal scholars, William Howard Taft, following his term as President and prior to his appointment as Chief Justice, summarized the situation succinctly and accurately when he said:

"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."<sup>42</sup>

We are dealing in this field with one of the most difficult, delicate, and significant problems arising under our system. The doctrine of separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no 1 of the 3 elements could become preeminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry.

<sup>39</sup> H. Res. 427, 81st Cong., 2d sess. See 96 Congressional Record 565-566.

<sup>40</sup> 2 Burr Trials 536 (1808).

<sup>41</sup> H. Rept. 141, 45th Cong., 3d sess. 3-4 (1879).

<sup>42</sup> Taft, Our Chief Magistrate and His Powers, 129.

The dangers which follow from the failure of one branch of the Government to respect the powers of any of the others is as great today as when Washington, in his farewell address, felt impelled to caution that:

"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 encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. \* \* \*

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation, for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any practical or transient benefit which the use can at any time yield." <sup>43</sup>

Mr. ROGERS. Now to go on to the principle of separation of powers as it relates to independent agencies. The principle of separation of powers indicates the relationship of the independent regulatory agencies to this question of the extent of the inquiry which can be made by Congress of another branch. I refer to such regulatory agencies, sometimes styled independent commissions, as the Federal Communications Commission, Interstate Commerce, Federal Trade, Federal Power, and Securities and Exchange Commissions. They have been frequently described as exercising quasi-judicial, quasi-executive, and quasi-legislative functions.

No categorical statement as to the extent of the inquiry which can be made by Congress will be applicable equally to each of the independent agencies. Statutes created these agencies at different times in our history and contain varying mixtures of judicial, executive, and legislative functions. Some statutes create agencies which have predominantly legislative functions. Some statutes create agencies which are predominantly legislative in character, others subject the agency to a strong proportion of executive control, in others the judicial function predominates. It is clear then that no answer to the question of the extent of permissible congressional inquiry of the independent agencies, or of permissible executive direction of independent agencies, can be given without considering the specific agency concerned, the statute creating it, the fact situation involved, and the particular function which the agency is exercising.

Not only by the original statutes creating the agencies, but by other legislation, Congress has itself subjected the independent regulatory agencies to executive control. For example, the President has been authorized to apply the Federal employees security program to all departments and agencies of the Government. This includes the regulatory commissions. Hence the regulatory commissions are also subject to the requirements of secrecy governing employee security matters. The President's power to remove commission members for inefficiency, neglect of duty, or malfeasance (as specified in the Federal Trade, Interstate Commerce, and Atomic Energy Commissions and the Civil Aeronautics Board) imply that he may exercise a certain amount of managerial authority over the commissions.

Thus in many respects the functions and operations of the so-called independent regulatory agencies are subject to executive control. Referring to my discussion of the fundamental principle of separation

<sup>43</sup> 1 Richardson, op. cit. supra, note 5, at 219.

of powers above, the extent of the inquiry which can be made by Congress of one of the independent agencies should be determined on this principle. To the extent that the agency exercises executive functions it would have the right and duty to furnish or withhold information from congressional inquiry to the same extent as would other executive departments and officers of the Federal Government.

On July 12, 1955, Attorney General Brownell had occasion to advise the Chairman of the Securities and Exchange Commission as to limits of congressional inquiry into executive functions of the SEC. Attorney General Brownell stated:

With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within the executive branch of the Government on the principles as set forth in the President's letter of May 17, 1954, to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and the employees is privileged and need not be disclosed outside of the agency. Likewise, any communication from others in the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954.

Senator HENNINGS. In connection with that, General, may I ask you whether you believe, and I think I know what your answer would be, that a Presidential assistant may intervene with a regulatory agency without such authorization from the President himself?

Mr. ROGERS. Well, I don't think that I can answer that without knowing the facts. I mean the question of intervention.

Senator HENNINGS. Well, intervention, as we would understand it, would be an undertaking to influence the action or decision of the independent agency as such.

Mr. ROGERS. In this case, the particular case at issue was a case where a call had been made from the White House for a postponement of a hearing before the SEC and the Attorney General at that time wrote a letter in which he said that the executive privilege did not apply to that conversation and the parties involved testified fully on the conversation, so the answer, I think, on that question is that no, the executive privilege would not apply to that type of conversation.

Now it would apply if the conversation related to the efficiency of the members or malfeasance on the part of members or if the conversation referred to appropriations, the need for appropriations, if it referred to possible qualifications of new commissioners, and so forth.

Senator HENNINGS. Suppose it referred to the actions to be taken or to be withheld by the independent agency itself?

Mr. ROGERS. I don't think that would be privileged.

Senator HENNINGS. That would not be privileged?

Mr. ROGERS. No.

Senator HRUSKA. Will the Senator yield?

Senator HENNINGS. Yes.

Mr. ROGERS. May I say, Mr. Chairman, of course, in those instances where—

Senator HENNINGS. Such as television applications?

Mr. ROGERS. No, sir. What I was thinking about is CAB at present, as you know, has certain functions in CAB route applications, so that there might be a situation where it would be a privileged communication.

Senator Hruska. Wouldn't there be a difference also, Mr. Attorney General, in certain of the duties which are really legislative in character, which are performed by these regulatory bodies?

Mr. ROGERS. Yes.

Senator Hruska. Where there is a delegation of certain rulemaking powers, like in the CAB. Now that is a totally different situation from situations where the matter under consideration is adjudicatory in nature and really partakes of judicial nature, rather than rule-making.

Mr. ROGERS. Yes, I think that is right and I will come to that in a moment in my statement, Senator.

Getting back to this letter, Mr. Brownell's letter thus advised that the executive privilege applied to the independent agencies as to "communications within the executive branch" and "with respect to administrative matters." The executive privilege of course does not apply where the independent agencies are exercising judicial functions. And that is what we were just talking about, Mr. Chairman.

However, by analogous reasoning the doctrine of separation of powers provides a guide to the limits of congressional inquiry, not only in relation to executive functions of the independent agencies, but also to judicial functions. Let me make this clear. In my view, whatever the practice has been in the treatment of these independent regulatory agencies, whenever an agency is exercising its judicial function by deciding an adversary proceeding before it, it should be just as free of any demand from Congress or the executive branch as a court would be.

I might interpolate here, Mr. Chairman, to say that in adversary proceedings before independent agencies, which are certainly judicial in character, that there should be no ex parte communications from any source, any more than there would be in a lawsuit. If a judge is trying a case, people don't call the judge and say "I want you to know that I am a friend of the plaintiff's and I don't want you to be affected by my call, but—"

Senator Hennings. Sometimes they do, but they shouldn't.

Mr. ROGERS. Well, I will say this, Mr. Chairman: I do not know of any occasion during the last 5 years when that has happened in the Federal courts.

Senator Hennings. It is not prevalent.

Mr. ROGERS. I think it is one of the reasons our court system is respected, because judges do not receive ex parte communications from anybody—from litigants or lawyers or from friends, or anybody else, and I think that the same principles should apply to independent agencies when they are performing these judicial functions.

Senator Hennings. I think there is no doubt whatsoever about that, Mr. Attorney General.

Mr. ROGERS. Nor does the executive privilege apply to the independent agencies where they are exercising legislative functions, and that is the question Senator Hruska asked me. Congressional inquiry is thus not so limited as in regard to exercise of judicial functions. But I would caution that other considerations might cause Congress itself to limit its inquiries on even legislative functions. Information of importance to competitors gathered in confidence from private businesses, for example, should not be publicized.

Now if the world got out that independent agencies collected private information from businesses, which later was going to be given to a congressional committee and made public, it would seriously hamper the work of those independent agencies.

It should not be forgotten that, the more frequent and the more extensive the congressional inquiries made of the independent agencies, the less free and truly independent those regulatory agencies will become.

In summary:

(1) The executive privilege applies to the executive functions of the independent agencies;

(2) The executive privilege obviously does not apply to judicial functions, but I think that the same rules that apply to the judiciary should apply to those communications and those documents, but for another reason—not because it is an executive privilege, but because it is harmful to these independent agencies if the information about the judicial functions were to be made public:

(3) Legislative inquiry into the legislative functions of the independent agencies is not limited by any executive privilege, but there are other restraining considerations, some of which I have noted above.

Now I come finally to the proposed legislation. There are two bills; the first is S. 921 of the 85th Congress, which would amend section 161 of the Revised Statutes. That section is a codification for the 10 executive departments of today of that provision of the 1789 act respecting the Department of Foreign Affairs. You will recall that I discussed that act in the second part of my statement.

Section 161 now provides:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

S. 921 would amend section 161 by adding a last sentence:

This action does not authorize withholding information from the public or limiting the availability of records to the public.

When I was Deputy Attorney General, I sent a letter on this bill to Senator Eastland, and I would like to summarize my views. My views are the same as they were then.

Insofar as the purpose of S. 921 is to assure the full and free flow of information to the public where not inconsistent with the national interest, the Department of Justice is in full accord. We believe that within limits the executive and legislative branches should keep the public informed of their activities, and should make available information, papers, and records. Without doubt both branches are in accord with this fundamental principle.

We do believe that S. 921 would not clarify section 161 of the Revised Statutes. In the absence of legislative history or more specific language we cannot determine with any degree of certainty the effect of S. 921.

A recent example of the current application of this principle to the legislative branch is illustrated by an article in the Washington Evening Star on September 12, 1956. The article reads in part as follows:

Congress barred the public from 1,131 of its 3,121 committee meetings in 1956, or more than one-third of them.

Spokesmen for several of those committees listed such things as national security, Government efficiency, and preserving the private rights of witnesses as reasons for closing meetings.

Senator HENNINGS. May I interrupt there, Mr. Attorney General? You have already adverted to your letter to Senator Eastland under date of June 13, 1957.

Mr. ROGERS. Yes.

(The letter referred to is reprinted below:)

DEPARTMENT OF JUSTICE,  
Washington, D. C., June 13, 1957.

Hon. JAMES O. EASTLAND,

*Chairman, Committee on the Judiciary,*

*United States Senate, Washington, D. C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 921) to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

Section 161 of the Revised Statutes of the United States (5 U. S. C. 22) provides:

*"Departmental regulations.*—The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

This bill would add to the quoted statute a sentence reading: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

Insofar as the purpose of this legislation is to assure the full and free flow of information to the public not inconsistent with the national interest, the Department of Justice is in full accord. We believe that within limits the executive and legislative branches should keep the public informed as to their activities, and should make available information, papers, and records. Without doubt the legislative and executive branches are in agreement with this fundamental principle.

The Attorney General has publicly stated his awareness of the importance of seeing to it that the obstacles to the free flow of information are kept to a minimum. In line with this, provision has been made for pardons and commutations of sentence to be matters of public record. Likewise, the settlement of litigation, the disposition of Government claims, and other phases of the Department's operations are matters concerning which the public and the Congress are kept advised.

Regarding the proposed amendment, we believe that it would not clarify the present law. Considerable study has been given to it, but in the absence of legislative history or more specific language we are unable to determine with any degree of certainty its effect. If the amendment could more precisely delineate its intended effect on the authority of the executive departments under this statute to regulate the orderly access of the public to their records we would be glad to amplify our comments.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,  
*Deputy Attorney General.*

Senator HENNINGS. And at that time you presented the Department of Justice views on S. 921. In that letter you said, and I quote:

In the absence of legislative history or more specific language, we are unable to determine with any degree of certainty its effect.

Now what was there about the language of S. 921 that was confusing and how could that language be made more specific, in your opinion?

Mr. ROGERS. Well, Senator, as I have attempted to suggest in my statement, the executive privilege is not related to any statute; the executive privilege is an inherent part of our Government, based upon the separation of powers, and this has been recognized from the beginning of our Government.

Now I don't recall any instances when Washington, Jefferson, or Truman or anyone else ever relied upon this statute as a basis of executive privilege. It is something entirely different. This is a bookkeeping statute, which says they keep the records, they hold them physically. It doesn't relate at all to executive privilege.

Senator HENNINGS. Does S. 921 raise any questions in your mind?

Mr. ROGERS. No; it is meaningless, that is all, and I think that the people that are sponsoring it are kidding themselves that it means anything. I think it is something they have been thrashing around with for several years, but I don't think it goes to the point at all.

The point we are discussing is executive privilege, which is fundamental to the separation of powers. This is a keeping of custody statute, a housekeeping statute. So that language, I don't know what it means.

Senator HENNINGS. Then, very simply, title 5, United States Code, section 22, after all, is merely a housekeeping statute, which I think we can agree, has been cited by a number of executive departments, as we know, as authority for keeping information and records from the public. Now, in my opinion this statute wasn't intended, and I am sure in your opinion, too, it wasn't intended, to convey such authority at all. S. 921, by adding one short sentence to the statute, attempts to make this very clear. Frankly, I can see nothing complicated about the language of the bill. It is simple and straightforward to me. I was a little surprised by your statement that in the absence of more specific language you were unable to determine with any degree of certainty its effect.

Mr. ROGERS. Well, Mr. Chairman, if there is a clear understanding that this sentence in here, by way of amendment, is not intended to impair the executive privilege which is basic to our system of government, then I don't care. It doesn't make any difference. If you put in here the words "but this amendment is not to apply to the executive privilege," I certainly would accept it. Maybe what that would do would be to prevent people from citing the statute as a reason for not giving information, but I don't think that is the reason you don't give information.

Senator HENNINGS. If S. 921 were enacted into law, do you know of any way it would interfere with the proper classification of military secrets and would it, in your opinion, jeopardize the defense or security of the country in any way?

Mr. ROGERS. As I say, Senator, I can't answer that because I am not sure what the effect of the sentence would be. If I knew how the committee thought that might be applied to the situation, I could answer the question, but I am not clear.

Senator HRUSKA. If in the making of legislative history on this it was made clear that it was the understanding of the sponsors of the act or of this bill that this section, which it seems is a housekeeping thing, and therefore the added sentence would be limited in its scope, would that be the type of thing that would enable you then to determine its meaning and its significance?

**Mr. ROGERS.** As long as it is made clear, either expressly or by legislative history, that this is in no way intended to impair the executive privilege that I have discussed, then I would have no objection to it. If that were the case, it wouldn't amount to much. All it would do is prevent people from citing the statute incorrectly. I think when they have cited the statute, it has been incorrectly cited because I don't believe the statute is the basis for not giving information. The basis for not giving information is an executive privilege.

Well, I think I have discussed that enough.

On the second bill, S. 2148, which is a bill to amend section 3 of the Administrative Procedure Act of 1946, let me say this: When Congress passed the Administrative Procedure Act it clearly recognized beyond question of doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively. These considerations, which Congress recognized then, I have discussed above, and because of these considerations I am opposed to the passage of S. 2148.

This is a complicated amendment and I would appreciate it, Mr. Chairman, if you would permit me to send up a letter discussing it in detail because there may be parts of it we would not object to, but there are other parts we would object to.

**Senator HENNINGS.** We will be very glad to receive your letter.<sup>1</sup> Now, to get back to our S. 921, I, too, am very, very astonished about the reiteration, the constant citing of section 161, when you, Mr. Attorney General, say it is utterly without meaning.

**Mr. ROGERS.** No, I didn't say it was utterly without meaning, but I say that I don't—

**Senator HENNINGS.** Maybe I misquote you. I didn't mean to do that.

**Mr. ROGERS.** I understand that. What I mean is this, that I have not followed all of these cases and we are not asked to pass on them, for the most part, but as I say we pass on the ones, as I did when I was deputy, the requests of the Department of Justice and I think that the refusals to provide information should not be based on this statute—as the reasons for.

**Senator HENNINGS.** Why have they cited this statute?

**Mr. ROGERS.** I don't know. What I mean is I would imagine they are perfectly proper in not disclosing information.

**Senator HENNINGS.** Their predicate, of course, is on the executive authority.

**Mr. ROGERS.** That is right, and I think they have been sound on that.

**Senator HENNINGS.** But they have been citing section 161. Can you understand my concern about that?

**Mr. ROGERS.** Yes; I can understand it.

**Mr. SLAYMAN.** Mr. Chairman—

**Senator HENNINGS.** Mr. Slayman.

**Mr. SLAYMAN.** Perhaps it would be helpful for the committee members to have in the record the citations by the various agencies of the statute, section 161 of the Revised Statutes, title 5, United States Code, section 22, the housekeeping statute, to be amended by S. 921.

<sup>1</sup> The letter, dated May 9, 1958, and received May 12, 1958, is appendix exhibit No. 15, at p. 278.

Senator HENNINGS. Without objection, that will be made a part of the record.

(The document referred to is as follows:)

MEMORANDUM

To: Charles H. Slayman, Jr., chief counsel and staff director, Subcommittee on Constitutional Rights.

From: Marcia J. MacNaughton, research assistant.

Subject: Citation of section 22, title 5, U. S. C., section 161 of the Revised Statutes, by Federal agencies and executive departments, as authority for withholding information from the public and the Congress.

Pursuant to your request, there follows a list of agencies and executive departments which have cited generally the "housekeeping statute" (5 U. S. C. 22 (sec. 161 of the Revised Statutes)) as basis for authority to withhold information from the public and the Congress.

This list is taken from a compilation made by the Legislative Reference Service of the Library of Congress and is based on an analysis of the replies by Federal departments and agencies to a questionnaire submitted by the special Subcommittee on Government Information of the Committee on Government Operations of the House of Representatives.

EXECUTIVE DEPARTMENTS

The record shows that in response to an inquiry about their authority to deny access to information possessed by the department, and to restrict availability of such information, the following departments cited title 5, United States Code, section 22, as basis for such authority:

- (1) Department of Agriculture
- (2) Department of Commerce
- (3) Department of Defense
- (4) Department of the Interior
- (5) Department of Justice
- (6) Department of Labor
- (7) Post Office Department
- (8) Department of State

INDEPENDENT AGENCIES

When asked the basis of their authority to deny access to information in the agency and to restrict availability of that information, the following independent agencies cited section 22 of title 5 of the United States Code:

- (1) Civil Service Commission
- (2) Housing and Home Finance Agency
- (3) Interstate Commerce Commission
- (4) Smithsonian Institution

In addition to the foregoing, we have learned that the Federal Mediation and Conciliation Service has cited, and continues to cite title 5, United States Code, section 22, as authority for withholding information.

Mr. ROGERS. I don't want to criticize people without knowing the circumstances. It may be they cited it in connection with executive privilege. I mean they would say there is an executive privilege and we are authorized by the statute to be custodians of these and we cannot make them available without violating the executive privilege. So I don't want to just with a wave of the hand criticize people without knowing the facts.

Senator HENNINGS. Yes.

Mr. ROGERS. It may be their refusal was a sound one—I don't know. But the point I am making is I don't believe—I am afraid that if this statute is passed now in view of the confusion that has occurred and all of the discussion about it, it might be argued that it somehow did impair or affect the executive privilege. Now if that is made clear in the language, that that is not the purpose of the amendment, I would have no objection to it.

Mr. SLAYMAN. Mr. Chairman, that could be made clear in the legislative history, too.

Senator HENNINGS. Of course.

Mr. ROGERS. I think it would be a good thing, though, if we could do it right in the language. I would like it better.

Mr. Chairman, that finishes my statement.

Senator HENNINGS. Thank you very much, Mr. Attorney General.

Senator Hruska, do you have any questions?

Senator HRUSKA. I have no questions, but I would like to say I enjoyed very much this clear and logical presentation of a very complicated subject. I would like to commend the Attorney General for that presentation.

Mr. ROGERS. Thank you very much, Senator.

Senator HENNINGS. Yes, indeed, and I have already undertaken, before you arrived, Senator, to express our appreciation to the Attorney General for being here this morning.

Now I have a few questions, Mr. Attorney General, if you would indulge me for a short time.

Mr. ROGERS. I would be very happy to.

Senator HENNINGS. Now, I think you have made it clear that there is nothing in the Constitution that specifically authorizes the President to withhold information from the Congress.

Mr. ROGERS. That is correct.

Senator HENNINGS. There is no question in your mind about that?

Mr. ROGERS. No.

Senator HENNINGS. And, to your knowledge, has there ever been a court decision in this country holding that the President has the power to withhold requested information from the Congress? Do you know of any such case?

Mr. ROGERS. I don't know of a precise holding on that.

Senator HENNINGS. Well, the fact is that there is no such reported case. That is true, isn't it?

Mr. ROGERS. I think that is correct. Of course, you know the reason for that is that the legislative branch has never brought the case. They have never tested it. I mean I was faced with that as counsel for the committee several times in the Remington case. I thought it was appropriate for the Congress not to get information about loyalty, but get information about how Remington was transferred from one key position to the other in Government. In other words, just how the transfer was made, and we were not able to get any information of the kind. We couldn't even get an answer to our letters. We talked at the time about bringing an action in court, and I made a pretty good study of it to see what success we would have, and I concluded we would have none, and I think that is the reason there is no lawsuit in the history of the country.

Senator HENNINGS. I think you are very likely right about that.

Now, Mr. Attorney General, what limitations are there, if any at all, on the President's power to withhold information from the Congress?

Mr. ROGERS. Well, I think I have tried to make it clear in my statement.

Senator HENNINGS. I think you have.

Mr. ROGERS. The executive branch should not withhold information unless there are sound reasons for it, for national security or the other reasons I cite. I think it is inherent in the constitutional system that Congress should have available for legislative purposes just as much information as they can get and it is proper to give them, as long as it does not impair the functioning of another branch of the Government.

The fact that we have three coordinate branches of the Government requires an understanding and a cooperative spirit in order to work, and it has worked well through the years.

As I say, I think the constant repetition that I see occasionally about secrecy, and all is harmful to the Government. I don't think that that is much of a problem. On the contrary, I think we have, in competing with the Russians, we have some decided disadvantages in that it is difficult to keep any information secret even for a short period of time.

Take the first launching at Cape Canaveral. I think there was a question then as to whether we gave out information too fast. That wasn't a question of secrecy; it wasn't a question of anybody trying to hide anything, but maybe a lot of people thought it would have been better if we had not given out so much information so fast. In fact, some people that are critical of secrecy are equally as critical that we give information out too fast at times.

Senator HENNINGS. Do you think, General, the President can delegate to others his power to withhold information from the Congress?

Mr. ROGERS. Yes. I don't think there is any question about it.

Senator HENNINGS. Assuming that the President can delegate his power to withhold information from the Congress, to whom may he delegate such power?

Mr. ROGERS. I think he can delegate it to anybody in the executive branch. I think the leading case is *Marbury v. Madison*, and in that case the Court held he can delegate the power to anybody to act on his behalf, at his direction. As a practical matter, it usually works out the head of the department has to make the final decision if there is a controversy.

Senator HENNINGS. Assuming the President may delegate his power to withhold information from the Congress, how may he delegate such powers? Are there any limitations on how the President may delegate his power to withhold? Must he follow any prescribed form, in your opinion? Must it be a general order, or must each case be handled individually, in your judgment?

Mr. ROGERS. In my judgment, he doesn't have to use any particular method. In practice, it works out that the department head is delegated that responsibility, just the way he is delegated other responsibilities to handle the affairs in his department. It can be done as President Truman did it, by Executive order. He just issued a blanket order to everybody and said if there was any request or phone call or anything, that the whole matter should be referred to the White House and the papers should be locked up and there shouldn't be any more discussion about it.

Senator HENNINGS. Aside from whatever authority may be delegated to them by the President or given them by Congress itself, do you think the heads of the various executive departments have any authority to withhold information from the Congress?

Mr. ROGERS. I didn't hear the first part of your question.

Senator HENNINGS. Aside from whatever authority may be delegated to them by the President or given to them by the Congress itself, do you think the heads of the various executive departments have any authority to withhold information from the Congress, and if that be true, does the same apply to other officers of the executive branch?

Mr. ROGERS. The answer is I don't think that they have any power independent from the executive privilege, as I mentioned, to withhold information. The answer to the last part of your question is "yes," it applies to everybody. In other words, the privilege stems from the constitutional power in the President as the Chief Executive.

Senator HENNINGS. I think that we have agreed that there is nothing in the Constitution that specifically authorizes the heads of any departments to withhold information from the Congress.

Mr. ROGERS. No. That is correct.

Senator HENNINGS. I think we are all certainly in agreement on that.

Mr. ROGERS. That is right.

Senator HENNINGS. Now, to be a little more specific, if we may be, Mr. Attorney General, just exactly what kind of information do you think the heads of departments and other executive officers may withhold from the Congress? Anything they wish?

Let's take, for example, a hypothetical case of an adviser or assistant to the President. Supposing he were to write a memorandum to the President advising him on some official matter. Do you think he could properly refuse to supply a copy of that memorandum to a congressional committee if a committee requested it?

Mr. ROGERS. See if I get the facts straight on that. You say the Presidential adviser writes something to the President—

Senator HENNINGS. Suppose the executive officer writes a memorandum to the President advising him about something.

Mr. ROGERS. There isn't any question but what the communications of the President of the United States are privileged.

Senator HENNINGS. Take another case. Do you think he could properly refuse demands by a congressional committee to appear and answer questions about a letter if we assumed the matter about which the White House assistant has written his letter, to a regulatory agency, in this case, is a matter over which the White House does not have jurisdiction?

Mr. ROGERS. I am not going to answer any such hypothetical question as that. I am sure you are suggesting a factual situation that I am not going to go into. I will be glad to discuss, if I know all the facts, any particular situation. I don't want to discuss that kind of hypothetical question. I don't think it is a fair question to ask me, as a matter of fact.

Senator HENNINGS. I don't mean to ask you unfair questions, Mr. Attorney General, but suppose the assistant was acting, as we lawyers would say, outside of the scope of his authority?

Mr. ROGERS. Mr. Chairman, I have answered the question that I think that anybody who has conversations with an independent agency relating to a judicial process, whether in the executive branch or the legislative branch, and I have said that that conversation is not privileged and I think it applies to Senators and Congressmen and members of the executive branch, period. Now I don't want to discuss hypo-

thetical questions which suggest cases, people, or incidents, without knowing all the facts, and I certainly think that kind of a hypothetical question just causes confusion.

I have made my position clear, that I don't think in these independent agencies, when they are exercising jurisdiction in adversary proceedings, that anybody who calls—I don't care who it is—I do not think that conversation is privileged.

Senator HENNINGS. I believe you said that earlier.

Mr. ROGERS. That is right.

Senator HENNINGS. So, as a matter of fact, your opinion is that such a question or inquiry is beyond the scope of the employment?

Mr. ROGERS. I don't think it makes any difference whether it is beyond the scope of the employment at all; I think if it relates to a judicial matter it is not privileged.

Senator HENNINGS. Well, I think we are in agreement on that, Mr. Attorney General.

Mr. ROGERS. Yes; we are in agreement on most of this, I think, Senator.

Senator HENNINGS. I believe we are.

Now, in response to a letter that I wrote on March 13, 1957,<sup>2</sup> to your predecessor, Mr. Attorney General, requesting the views of the Attorney General on the powers of the President to withhold information from Congress, you sent to this Subcommittee on Constitutional Rights a 102-page memorandum which you referred to in your letter of April 10 as, and I quote, "a study prepared in the Department." Do you know when that study was prepared?

Mr. ROGERS. I don't offhand, Senator. I can find out for you though.

Senator HENNINGS. Well, isn't it true this 102-page memorandum which you sent to the subcommittee is almost identical to a serialized article published in the April, July, and October 1949, issues of the Federal Bar Journal?

Mr. ROGERS. I wouldn't be surprised.

Senator HENNINGS. Wasn't it written by Herman Wolkinson, an attorney in the Department of Justice?

Mr. ROGERS. I don't know, sir. Senator Kefauver, I remember, probably because of the same source, asked me some questions about this.

Senator HENNINGS. I wasn't aware of that.

Mr. ROGERS. This, as I say, is not secret. There is no secret about this. This is a compilation of material that was in the Department when we got there, and it is just that—a compilation of material. I thought it would be helpful to the committee.

Senator HENNINGS. Which has been published in the Federal Bar Journal?

Mr. ROGERS. Yes. We are now, as I said to you, Mr. Chairman, preparing to bring it up to date, and we have that well underway and we will have it for you before too long. So we will have a complete compilation.

Senator HENNINGS. That we would appreciate very much.

Mr. ROGERS. That will be done by people now in the Department.

Mr. SLAYMAN. Mr. Chairman—

<sup>2</sup> Appendix exhibit No. 8.

Senator HENNINGS. Yes, Mr. Slayman.

Mr. SLAYMAN. We have permission of the copyright owners of the Federal Bar Journal to print that article. We can put that in the appendix.

Senator HENNINGS. The article written by Mr. Wolkinson?

Mr. SLAYMAN. Yes, sir.

Senator HENNINGS. The so-called study?

Mr. SLAYMAN. Yes.

Senator HENNINGS. Without objection, it may be made a part of the appendix.

Senator HRUSKA. What are you speaking of, the article itself?

Mr. SLAYMAN. The article and the copyright owner's permission.

Senator HENNINGS. The copyright owners of the Federal Bar Journal.

Senator HRUSKA. No objection. I imagine if it is identical to this it will be a little duplicatory, but if it will serve any purpose, I see no objection.

Senator HENNINGS. All right, it will be made a part of the appendix of the record.

(The letter and article appear as exhibits Nos. 11 and 12 of the appendix.)

Senator HENNINGS. Have you any further questions of the Attorney General, Mr. Slayman?

Mr. SLAYMAN. No, Mr. Chairman, because the hour is getting late and the Attorney General has accommodated himself very graciously to the committee.

Senator HENNINGS. Yes, Mr. Attorney General, this is a subject we can stay on a good part of the day or, indeed, the rest of the week, and then some.

Mr. SLAYMAN. Mr. Chairman, in connection with writing that study up to date, we might submit some further questions and just have those handled in writing.

Mr. ROGERS. I would be very happy to do that.

Senator HENNINGS. Thank you very much again for coming here and being with us.

(Whereupon, at 12:43 p. m., the hearing recessed, at the call of the chairman.)

(Subsequently, the Attorney General submitted an addendum to his testimony. See appendix, exhibit No. 1.)

(The complete text of Attorney General Rogers' prepared statement follows:)

I appreciate the opportunity of appearing before this Senate committee to present my views as to the extent of the inquiry which can be made by the legislative branch of the Government concerning the decision making process and documents of the executive branch. As might be expected from the division of our Government into three separate branches, this question has arisen from time to time from the earliest days of our National Government.

#### I. CURRENT PRINCIPLES AND PRACTICES

In the Justice Department over a period of time we have made a very careful study of numerous incidents which have occurred and which illustrate many facets of the problem. Before getting into a discussion of historical precedents and principles, however, I would like to acquaint the committee with my general views and with the particular practices we have followed and are following in the Department of Justice.

We live in a democracy in which an informed public opinion is absolutely essential to the survival of our Nation and our form of government. It likewise is true that Congress must be well informed if it is to do its legislative job realistically and effectively. The vast majority of requests by Congress for information from the executive branch as you know are honored quickly and complied with fully. The furnishing of such information is beneficial to Congress, the executive branch, and to the people themselves. In the Department of Justice we strive to furnish Congress with the requested information, and to make public that part of our activities which would be of interest to the public and which properly can be disclosed without interfering with the discharge of our duties and responsibilities or which might be improper or violate the canons of ethics.

With reference to the right of the public to know generally as distinguished from the legislative branch, it seems to me that there are four principles which it is well to keep in mind:

"1. While the people are entitled to the fullest disclosure possible, this right like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest.

"2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process.

"3. A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying nondisclosure no longer pertain.

"4. Nondisclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal, or pecuniary reasons."

All persons agree that information which would adversely affect our national security should not be disclosed. Then, too, there are compelling reasons for nondisclosure in the field of foreign affairs, in the area of pending litigation and investigations which may lead to litigation, information made confidential by statute, investigative files, and reports, and, finally, information relating to internal government affairs. President Eisenhower's letter of May 17, 1954, to the Secretary of Defense concerns this last category of information.

With reference to this last category, at Marquette University 2 years ago I stated my views on this subject and they have not changed:

"\* \* \* Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators, or executive officials cannot conduct all public business at every step of the way in public.

"A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Inter-departmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and Members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if government is to function."<sup>1</sup>

This question was discussed about a year ago by a former Government lawyer who wrote:

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<sup>1</sup> The speech is reproduced in 40 Marq. L. Rev., pp. 83-91 (1956).

"There are serious weaknesses in the assumption \* \* \* that public policy ought to draw a sharp distinction between 'military and diplomatic secrets' on the one hand and all other types of official information on the other, giving Congress free access to the latter. \* \* \* The executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberation incidental to the making of policy decisions. Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him must be answerable only to him \* \* \*."

\* \* \* \* \*

"It is one thing for a Cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle-aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guarantee that he will not long tolerate incompetent or disloyal advisers; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee of Congress."

Jenkin Lloyd Jones, editor of the Tulsa Tribune and formerly president of the American Society of Newspapers Editors, in delivering the William Allen White lecture at the University of Kansas last month had this to say:

"Many of my colleagues in the newspaper business have leaped to the conclusion that all public affairs, not directly connected with national defense, must be conducted in the open. \* \* \* I disagree. I think that much of the important business in a republican form of government will be carried on behind closed doors. I see few dangers in that. I see many advantages. For it is only behind closed doors \* \* \* that most politicians—yea, even statesmen—honestly express their views and try to get at the meat of the question.

"I don't mean to imply that legislative voting should not be in the open, nor that the public should be denied the right to appear before all committees, nor that any legislator should be excused from explaining why he voted as he did. But I do mean that \* \* \* in the National Capitol, the White House, and various Washington departments no sound policy is decided upon without frank exchange of views. And a frank exchange of views is rarely reached with the public and the press looking over the shoulders of the policymakers.

"The Government of Athens was an absolute and complete democracy, with all deliberations carried on in a goldfish bowl of open debate. But Athens became smothered with oratory, paralyzed with demagoguery, and finally wound up with such an unstable "mobocracy" that nearly every able Athenian was banished from the land."

In the Department of Justice we have in the last few years taken certain steps to make available more information about our daily operations than was available before. For example, we have now the practice of making all pardons and commutations of sentences a matter of public record. Thus in the event a question arises as to the propriety of a pardon, any interested person may examine the record, which now includes the names of all persons who interceded on behalf of or expressed interest in the convicted person. Similarly, at the conclusion or settlement of any type of case in the Department, where otherwise there would be no public record of the proceeding, our practice now is to make all the pertinent facts available.

We in the Department of Justice as the attorneys for the executive Branch of Government have a special obligation with regard to litigation. This is well expressed in the Canons of Professional Ethics of the American Bar Association. Canon 37 provides in pertinent part:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of those confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information \* \* \*."

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<sup>2</sup> Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale Law Journal, pp. 487-488 (1957).

On May 17, 1954, Present Eisenhower in a letter to the Secretary of Defense set forth basic policies which I would like to discuss in detail later. However, let me say now that this letter imposes no barrier to the disclosure of any official action. The end product of advice may be produced, where otherwise permissible, in response to an appropriate request for information as to what official action has been taken by the executive branch. This is a sound rule based upon his duty and authority under the Constitution; it is supported by the precedents in our national history; and it is in accord with the judicial decisions that our Federal Government is composed of 3 equal and coordinate branches, and that no one of the 3 branches shall encroach upon another.

Now let me turn to the historical precedents and then discuss the fundamental principle of separation of powers, and lastly some specific legislative proposals which have been made.

## II. PRECEDENTS AND PRINCIPLES

Let us start by noting the action of the Continental Congress under the Articles of Confederation which preceded the adoption of the Constitution. On February 21, 1782, some 176 years ago, the Continental Congress passed a resolution creating a Department of Foreign Affairs under the direction of a Secretary to the United States of America for the Department of Foreign Affairs. The resolution provided:

"That the books, records and other papers of the United States, that relate to this Department be committed to his custody, to which and all other papers of his office, any Member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."

Moreover, the same resolution also provided:

"That letters [of the Secretary] to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national objects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted."<sup>8</sup>

In short, under the Continental Congress, the Department of Foreign Affairs and its Secretary were almost completely subject to the directions of the Continental Congress. Every Member of the Continental Congress was entitled to see anything in the records of the Department of Foreign Affairs, including secret matters. Indeed, he could make a copy of anything, except secret matters.

Much has been written of the inadequacies of that prototype of our National Government. I do not propose to review those writings or to comment on those inadequacies.

Suffice it to say that it came increasingly to be recognized by the leaders of our country then that the design of that pilot plant had grave and serious defects which made it incapable of serving adequately as the engine of the National Government. The designers so discovered by practical experience with its shortcomings.

Finally, at the Constitutional Convention in Philadelphia in 1787 that prototype was redesigned as the engine of government which is still operating today. As we all know, it was designed on the principle that our Federal Government is divided into three equal departments or branches, a political innovation not included in the older Articles of Confederation.

Now let us see what action the opening session of the first Congress of the United States took when it came to create the Department of Foreign Affairs under the Constitution. Section 4 of the act of July 27, 1789, establishing an executive department, to be denominated the Department of Foreign Affairs, provides:

"\* \* \* That the Secretary \* \* \* shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled." 1 Stat. 29.

Compare this language with the resolution creating the old Department of Foreign Affairs under the Articles of Confederation. Here is no language which makes the books and records of the Department of Foreign Affairs virtually the books and records of Congress; here is no language which requires that the

Secretary of this department shall submit his correspondence to Congress before transmittal. The difference is obvious and fundamental. Under the Constitution the first Congress was creating a Foreign Affairs Department of the executive branch, pursuant to the grand design of the new Constitution based on the political principle of separation of powers.

The difference in the language of the old resolution and the new statute under the Constitution is no matter of legislative oversight. Many of the men who sat in that first Congress had served earlier in the Continental Congress where they had the right of access to the papers of various departments, because those departments were in legal effect merely creatures of the Congress. In the light of their knowledge of the earlier practice, it can only be concluded that they deliberately recognized that the continuance of that former privilege was incompatible with the grand design of the Constitution for the separation of powers between the three branches.

The question of the production of documents before Congress arose in George Washington's first term as President. The first investigation by the legislative branch of the administration of governmental affairs by the executive branch was an investigation of a military expedition led by General St. Clair under the direction of the Secretary of War. When the congressional committee called for the papers pertaining to this campaign, President Washington convened his Cabinet, because it was the first instance of a demand on the executive branch for papers, and so far as it should become a precedent he wished it to be right.

Washington did not question the propriety of the investigation, but said that he could conceive that there might be papers of so secret a nature, that they should not be given up. He and his Cabinet came to a 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."

Having formulated these principles, the Cabinet agreed, however, that "There was not a paper which might not be properly produced."<sup>4</sup> It is, of course, well known that acting on the same principles Washington later refused to lay before the House a copy which it had requested of instructions to the United States Minister who negotiated a treaty with the British Crown. In declining to do so, because of the secrecy required in negotiations with foreign governments, Washington referred to his constitutional oath to "preserve, protect, and defend the Constitution," and to his belief that "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 requests."<sup>5</sup>

Thus there was established four principles:

1. That the Constitution fixes boundaries between the three branches of the Government: legislative, executive, and judicial.
2. That the documents of the executive branch are within the control of that branch, not of all branches.
3. That the legislative branch can make inquiry of the executive for its documents, but in response to congressional requests for documents, the Executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest.
4. That the authority of the President for the conduct of foreign affairs does not oblige him to produce the instructions which had been given to his representatives in negotiating a treaty. It seems clear that they constituted advice within the executive branch on official matters. The official action of the Executive was embodied in the treaty which was submitted to the Senate for its advice and consent.

So were the basic principles fixed in the administration of our first President when both the executive and legislative branches were comprised of many men who had served in the Continental Congress, who had participated in the Constitutional Convention, and who successfully assisted in achieving the ratification of the Constitution.

<sup>4</sup> Writings of Thomas Jefferson, pp. 303-305.

<sup>5</sup> 1 Richardson, Messages and Papers of the Presidents, p. 196 (1896).

Jefferson, who had participated in the formulation of these principles as Secretary of State, was also confronted with the same question during his Presidency, when the Burr conspiracy was stirring the country. By resolution the House asked for any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching certain matters related to the Burr conspiracy, although it was not so identified. Jefferson gave certain information, but declined to give certain other information as being ex parte and uncorroborated and delivered in some instances under the restriction of private confidence.

Thus two additional principles were established:

1. That documents containing information of uncertain reliability apparently reflecting adversely on individuals should not be disclosed.
2. That documents containing information given in confidence to the executive branch should not be disclosed by that branch.

Some 40 years later, the House of Representatives was conducting an investigation of the administration of Cherokee Indian affairs. In a special message dated January 31, 1843, President Tyler vigorously asserted that the House of Representatives could not 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 President.<sup>6</sup>

President Tyler's refusal established additional principles:

1. That it would be contrary to the public interest for the executive branch to produce documents which might affect its settlement of pending claims against the United States.
2. That it would be contrary to the public interest for the executive branch to produce documents on official matters before they had been embodied in official actions.

In addition, it reaffirmed the principle that it would be contrary to the public interest to produce ex parte documents which apparently reflect adversely on individuals.

Again, some 40 years later, in challenging the attitude that, because the executive departments were created by Congress, the latter had any supervisory powers over them, President Cleveland declared:

"I do not suppose that the public offices of the United States are regulated or controlled in their relation 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."<sup>7</sup>

Thus was emphasized the fact that the separation of powers applies to all agencies of the Government, whether created by the Constitution or by Congress. To hold otherwise would be to destroy the entire basic principle of separation itself.

In 1909 the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against United States Steel Corp., and, if not, the reasons for nonaction. President Theodore Roosevelt replied, refusing to honor this request upon the grounds that "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 direction whatever."<sup>8</sup>

This refusal reiterated the principle that the executive branch will maintain the inviolability of documents in official files containing information from private sources which has been communicated to it in confidence.

Incidents in more recent times are relatively well known and need not be detailed here. However, let me turn your attention for illustrative purposes to two such incidents in the Truman administration. One incident involved the request of a congressional committee for the loyalty-security file with respect to Dr. Condon, then the Director of the National Bureau of Standards of the Department of Commerce. On March 3, 1948, the committee adopted the extraordinary course of issuing a subpoena to Secretary of Commerce Harriman to produce the file, which, by order of President Truman, Mr. Harriman refused to do.<sup>9</sup>

<sup>6</sup> 3 Hinds' Precedents of the House of Representatives, p. 181 (1907).

<sup>7</sup> 8 Richardson, op. cit. supra, note 5, at 377.

<sup>8</sup> 43 Congressional Record 527-528.

<sup>9</sup> Corwin, *The President: Office and Powers*, p. 142 (1948 edition). Professor Corwin is also the editor of the most recent edition of *The Constitution, Annotated*, S. Doc. No. 170, 82d Cong., 2d sess. (1952).

On March 13, President Truman issued a directive to all officers and employees in the executive branch, forbidding the disclosure of loyalty files and directing that any demand or subpoena for such files from sources outside the executive branch should be declined and the demand or subpoena referred to the Office of the President.<sup>10</sup> On April 22, the House of Representatives adopted a resolution peremptorily ordering Secretary Harriman to surrender the desired data respecting Dr. Condon.<sup>11</sup> Citing the President's directive, the Acting Secretary wrote the Clerk of the House that he respectfully declined to transmit the requested document and that in accordance with the directive, he was referring the matter to the President.<sup>12</sup> President Truman had earlier stated he would not accede to the House Resolution.<sup>13</sup>

In connection with the Condon incident there was introduced on March 5, 1948, a resolution which would have directed all executive departments and agencies to make available to any and all congressional committees information which may be deemed necessary to enable them to properly perform the duties delegated to them by Congress.<sup>14</sup> With respect to this bill, the St. Louis Post-Dispatch on May 10, 1948, made the following observations:

"Even without the penalties for disclosure, Congress should not assert absolute rights to presidential information. It should have full access to records needed for forming policy, but the executive branch also possesses administrative records in which Congress has no valid interest. The Presidency is an equal branch of Government, with constitutional rights and mandates separate from those of Congress. Its right to withhold certain kinds of information from Congress, and the public interest in having such information withheld, has been successfully defended since the time of President Jefferson.

"No Congressman would think of demanding conference transcripts, personnel records or any other private papers from the Supreme Court, the third equal branch of Government. The President cannot demand the records of private congressional committee sessions. The Supreme Court makes no such demand on either Congress or the President. No more should Congress try to destroy the President's right to a reasonable and necessary privacy in his department.

"The Founding Fathers expected Congress and Presidents to minimize their rivalries by the exercise of reasonable confidence and give-and-take. It needs that spirit to make the American system of government succeed \* \* \*."

The resolution passed the House on May 13, 1948, and was referred to the Senate. On May 16, 1948, the St. Louis Post-Dispatch published another editorial on the bill. The second editorial said:

"Congress is entitled to any record it needs to formulate public policy. Other records, however, such as personnel files, are the property of the executive branch. To reveal them to Congress might seriously endanger governmental administration.

"For example, sound executive decisions are usually reached through an exchange of views among various officials. Naturally, these views differ, and some of them are rejected before the official decision. But the \* \* \* bill would empower Congress to drag out and harp on the rejections. With such a threat over their heads, officials would fear to commit their views to writing; and the quality of decisions would suffer accordingly."

The joint resolution was referred to the Senate Committee on Expenditures where it died.

So we see that from the beginning of our Government the position of the President and the executive branch has been that while no one could question the constitutional right of Congress to inform itself on subjects falling within its legislative competence, yet, as Professor Corwin puts it:

"This prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself."<sup>15</sup>

The constitutional authority of the Chief Executive over the executive branch is illuminated by the ultimate fate of a proposed amendment to the Atomic Energy Act of 1946. It provided that where the appointment of members or personnel

<sup>10</sup> 3 C. F. R. 1081 (1943-48 Comp.). For the explanatory memorandum which was issued by the Office of the President on March 15, 1948, see H. Rept. No. 1595, 80th Cong., 2d sess., pp. 8-10 (1948).

<sup>11</sup> H. Res. 522, 80th Cong., 2d sess., 94 Congressional Record 4777 (1948).

<sup>12</sup> New York Times, April 25, 1948, p. 50, col. 3.

<sup>13</sup> New York Times, April 23, 1948, p. 1, col. 1.

<sup>14</sup> H. J. Res. 342, 80th Cong., 2d sess.

<sup>15</sup> Corwin, *The President: Office and Powers*, 116 (1957 edition).

of the Atomic Energy Commission to subject to Senate confirmation the Senate members of the Joint Committee on Atomic Energy may direct the FBI to investigate the character, associations, and loyalty of any such appointee, and that the Director of the FBI should file a written report of any such investigation and thereafter should furnish such amplification or supplementation as the Senate committee may direct.<sup>16</sup>

Senator Morse opposed the bill as "clearly unconstitutional" as an infringement on the appointive power of the President. A proponent of the bill argued that it did not attack the appointive power and that it dealt only—

"\* \* \* with the right of Congress to have the Federal Bureau of Investigation, which is a creature of Congress, perform a function for Congress; and it provides that Congress may use the FBI report as a basis of consideration as to whether or not the nomination of a particular person should be confirmed by the United States Senate."<sup>17</sup>

The late Senator McMahon, of Connecticut, who had served earlier as Assistant Attorney General in charge of the Criminal Division, answered this contention. He declared that the best statement in the cases on the point at issue was to be found in *Kilbourn v. Thompson*, to which I shall refer later. There then ensued the crux of the argument as to the power of Congress to provide by statute for its utilization of the services, facilities, investigative files, and reports of a unit of the executive branch. Because of the wide power conferred upon the Atomic Energy Commission, it was urged that—

"We should not have an iron curtain lowered so that we may not have all the facts which we need in discharging our responsibilities."<sup>18</sup>

Senator McMahon answered :

"I do not believe that the Congress can say to the President of the United States, 'we are bypassing you. We are not going to talk to you. We are not going to talk to the Attorney General, who is one of your Cabinet officers and who is responsible to you. We are going to reach over both of you and tell a bureau chief that he shall do this, that, and the other thing, and report to us.' It is my contention that the Constitution will not permit the Congress legally to do such a thing."

With reference to a contention that the Senate and House are policymaking bodies with a right to obtain the facts in order that they may legislate properly, and in the case of the Senate to advise and consent to nominations, Senator McMahon replied that this contention was "directly in the face of the law." He added :

"I say to the Senator that much as he might desire to obtain an investigatory report on the work of the FBI, if the Attorney General refused to give it, it is my prediction that the Senator would find that the Supreme Court would uphold the right of the Attorney General to decline to produce the report. The cases are too clear to admit of any question. The Senator may not like the proposition. He may not like it because he is in the Senate. If he were connected with the executive department, he might take another view. But that happens to be the law. What I contend is, when we know it is the law, we ought not to pass a bill which flies directly in the face of the constitutional provision."<sup>19</sup>

\* \* \* \* \*

"To assert, as the Senator \* \* \* did, that it would be possible to call upon the director of the subsidiary bureau to produce a report in the face of the constitutional argument that is made in *Marbury v. Madison*, in the later *Kilbourn* case, in the recent *Meyers* case, the *Humphrey* case, and also a Federal Trade Commission case, the title of which escapes me at the moment, is to deny plain English in the reports of those cases."<sup>20</sup>

"If perchance there should be a change in the Executive at 1600 Pennsylvania Avenue at any time while I sit as a Member of this body, the position I take today will be exactly the position I shall take then upon any attempt to destroy what I regard as a very essential provision of the Constitution. Let me say to Senators who are present that there is no provision of the Constitution the religious observance of which is better calculated to insure justice and liberty to the people of

<sup>16</sup> S. 1004, 80th Cong., 2d sess.

<sup>17</sup> 94 Congressional Record 4303.

<sup>18</sup> Id.

<sup>19</sup> Id., 4305.

<sup>20</sup> Id., 4307.

the United States than the provision that judges shall judge, legislators shall legislate, and Executives shall execute."<sup>21</sup>

The bill was passed by the Congress, but was vetoed by the President.<sup>22</sup> In the Senate debate as to whether the veto should be overridden or sustained, Senator McMahon observed that the Senate appeared to be proceeding on the theory—

"\* \* \* that the legislative branch of the Government is supreme over the executive branch of the Government. The executive and legislative branches of the Government are coequal and coordinate. Of course this contest we are talking about now has been going on for 150 years. It has been tested time and time again. If the Executive were to give up any of the power he legally has under the Constitution, he would be betraying the people of the United States whom he also serves in his constitutional capacity."<sup>23</sup>

A Senator who was in favor of overriding the veto argued that it was wrong to say—

"\* \* \* that whenever Congress creates an executive agency it cannot modify, change, or direct its actions when it is acting for the Congress or the people."

Senator Barkley answered :

"\* \* \* We are authorizing a committee to command that Executive appointees shall be the servants of a committee, and if we can do that with respect to the Atomic Energy Commission, we can do it with respect to postmasters, district attorneys, United States judges, and even members of the Cabinet, because they are creatures of the Congress."<sup>24</sup>

Senator McMahon concluded the debate against the motion to override by saying

"\* \* \* that man cannot have two masters. He cannot serve both the President of the United States and the Senate members of the Joint Committee on Atomic Energy."<sup>25</sup>

In the end the Senate failed to override the veto.<sup>26</sup>

Congressional efforts to obtain loyalty-security files respecting various individuals continued into President Eisenhower's administration. An editorial in the Washington Post and Times Herald for March 10, 1953, made the following observations:

"So far as executive files are concerned, President Eisenhower would do well, we believe, to follow the example of almost every earlier occupant of the White House. 'Full cooperation' [a phrase used by the State Department officer in charge of such investigations] means, among other things, that no congressional committee should claim what it has no right to receive."

A year later at the height of the McCarthy-Army controversy the President issued his letter of May 17, 1954, to the Secretary of Defense stating:

"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

<sup>21</sup> Id., 4311.

<sup>22</sup> S. Doc. No. 157, 80th Cong., 2d sess. (1948).

<sup>23</sup> 94 Congressional Record 6199.

<sup>24</sup> Id.

<sup>25</sup> Id., 6263.

<sup>26</sup> Id., 6264.

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."<sup>27</sup>

This letter met with favorable public response. Let me quote from editorials which appeared in papers which have been very sensitive to any improper withholding of information. The next day, an editorial in The New York Times made this comment on the President's letter:

"The committee seems to feel that it has the right to pry farther into the conversations and discussions among members of the executive branch while they were considering a serious problem and, perhaps, reaching important decisions. The committee has no more right to know the details of what went on in these inner administration councils than the administration would have the right to know what went on in an executive session of a committee of Congress."

An editorial in the Washington Post and Times Herald for May 20, 1954, made the following observations:

"The question is simply whether the executive departments are to be administered by the properly constituted executive officials, or whether there is to be a sort of government-by-McCarthy. President Eisenhower was abundantly right in protecting the confidential nature of executive conversations in this instance."

### III. SEPARATION OF POWERS

Much has been written respecting the doctrine of separation of powers under the Constitution. In such a statement as this it is obviously impracticable to discuss its full application. I shall, however, make these comments.

The Supreme Court's classic statement of this doctrine arose in connection with a congressional investigation. In the 1870's the firm of Jay Cooke & Sons went into bankruptcy, and the appropriate judicial proceedings were instituted. As Navy funds were deposited with the firm, the United States was a creditor. Upon that basis a House committee instituted an investigation of a real-estate pool in which the Cooke firm had participated.

The committee issued a subpoena duces tecum to one Kilbourn. When he refused to produce certain documents, the House held him to be in contempt, and ordered him confined to the District of Columbia jail until he purged himself of his purported contempt. Thereafter Kilbourn instituted an action for false imprisonment: In reviewing the congressional proceedings the Supreme Court said:

"It is believed to be one of the chief points of the American system of written constitutional law, that all powers intrusted to government, whether State or National, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

\* \* \* \* \*

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the Government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century [in 1880] has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made \* \* \*"*(Kilbourn v. Thompson, 103 U. S. 190-191 (1880)).*

The Court held that the subject matter of this congressional investigation was judicial, and not legislative, that it was then pending before the proper court, and that the House lacked power to compel Kilbourn to testify on the subject.

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<sup>27</sup> The letter and the memorandum are reproduced in 100 Congressional Record 6263 (daily edition, May 17, 1954).

The proposition in the *Kilbourn* case is that 1 of the 3 grand departments should not encroach upon the other. Thus what is true of the relationship between the legislative branch and the judicial branch is likewise applicable to attempted encroachment by the legislative branch with respect to the executive branch.

At an earlier day in our national history, the Supreme Court summarized the responsibility of the President for the administration of the executive branch in the celebrated case of *Marbury v. Madison*. There Chief Justice Marshall said:

"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 orders. 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" (1 Cranch (5 U. S.) 137, 164 (1803)).

This extract from Chief Justice Marshall's opinion in *Marbury v. Madison* certainly indicates a measure of the extent to which the President's discretion may be exercised by his subordinates, subject, of course, to conformity with his orders.

I recognize, of course, that Congress has broad powers of inquiry and investigation as an "attribute of the power to legislate."<sup>28</sup> I have had some years of personal experience as counsel to legislative investigations. I recognized then, and do now, that the power to legislate is, itself, subject to constitutional limitations. So, too, is the power to investigate. It is limited by the fourth amendment prohibition against unreasonable searches and seizures<sup>29</sup> and the privilege against self-incrimination protected by the fifth amendment.<sup>30</sup> Although the exact scope of the limitations is unclear, the protections of the freedoms of religion, speech, and the press contained in the first amendment also operate to limit congressional investigative power.<sup>31</sup>

The limitations on the investigative power are not confined to those expressly set forth in the Constitution. The classic expression of this principle is contained in *Kilbourne v. Thompson*, previously mentioned:<sup>32</sup>

"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 by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." \* \* \*

This is not mere doctrine. It was regarded by the founders as necessary to prevent the tyranny and dictatorships that result from the undue concentration of governmental powers in the same hands. Mr. Justice Brandeis has observed:

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."<sup>33</sup>

Nor is there any question that protection against legislative autocracy was one of the principal aims of the founders. From their knowledge of English history, the early settlers knew of the tyranny of the Long Parliament and others that followed it. What was particularly vivid in their minds were the harsh measures which colonial legislatures adopted for the early settlers. Those who dared criticize legislative proceedings or to reflect upon their integ-

<sup>28</sup> *McGrain v. Daugherty*, 273 U. S. 135, 175 (1927).

<sup>29</sup> In *Hearst v. Black*, 87 F. (2d) 68 (D. C. Cir. 1936), a legislative subpoena was held to be too broad contrary to the fourth amendment. Cf. *Federal Trade Commission v. American Tobacco Co.*, 284 U. S. 299, 307 (1924). "We cannot attribute to Congress an intent to defy the fourth amendment or even to come so near to doing so as to raise a serious question of constitutional law." But see *In re Chapman*, 166 U. S. 661, 668 (1897).

<sup>30</sup> *McGrain v. Daugherty*, *supra*, note 28, at 173-174; *Kilbourn v. Thompson*, *supra*; *Quinn v. United States*, 349 U. S. 155 (1955).

<sup>31</sup> See *Rumely v. United States* (App. D. C.), 197 F. (2d) 166, 173; affirmed, *United States v. Rumely*, 347 U. S. 41 (1953). The Supreme Court declined to decide the issue on constitutional grounds. It held that the questions asked were outside the scope of the House resolution authorizing an inquiry into lobbying; that only direct pressures were intended to be investigated, and not attempts to influence public opinion by books and other writings.

<sup>32</sup> 103 U. S. 191.

<sup>33</sup> *Myers v. United States*, 272 U. S. 52, 293 (dissent) (1926).

rity were punished directly and without the intervention of courts or the authority of statutes, and the punishments were frequently severe and degrading.<sup>24</sup> The Supreme Court has said:

"When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned."<sup>25</sup>

It was probably based upon experiences such as these that Jefferson concluded: "One hundred and seventy-three despots would surely be as oppressive as one."<sup>26</sup> So, too Alexander Hamilton out of his experience declared: "The tendency of the legislative authority to absorb every other has been fully displayed and illustrated."<sup>27</sup> Therefore, it is not surprising that when the Federal Convention met in 1787 to adopt a new Constitution, its members were determined to enhance the powers of the executive and to restrict the powers of the legislative branch.<sup>28</sup>

The doctrine of the separation of powers was thus the very foundation stone of the Federal Government as established by the Constitution. It was regarded as the basic guaranty of the liberties of the people against tyranny. In view of this background, it is not remarkable that it has retained vitality and been given practical application throughout our history. Each branch has acted upon it and been protected by it. It has been held that the legislative branch in the exercise of its investigatory powers may not exercise basically judicial functions. *Kilbourn v. Thompson, supra*; *United States v. Icardi* (140 F. Supp. 383 (D. C. D. C. 1956)). Similarly the courts may not properly intrude on the exercise of legislative functions, *Methodist Federation For Social Action v. Eastlund* (141 F. Supp. 729 (D. C. D. C. 1956)), or on the Executive, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Co.*, 333 U. S. 103 (1948). And the President may not exercise legislative functions (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952)).

A wise exercise of restraint has operated to prevent a test of all the possible situations in which one branch might invade the functions of another. However, there is little doubt that the investigative power of Congress could not constitutionally support an investigation into the discussions of the members of a Federal court relating to the decision in a specific case because this would be utterly destructive of a free judiciary. This certainly was the view of the House of Representatives in the converse situation, involving attempts to require the disclosure of certain information to courts. It resolved that:

"No evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission."<sup>29</sup>

The same considerations may be said to operate with respect to an investigation of confidential advice within the executive branch. It has long been believed that the President may in his own discretion withhold documents from a court. In the trial of Aaron Burr, Chief Justice Marshall said:

"In no case of this kind would a court be required to proceed against the President as against an ordinary individual. \* \* \* In this case, \* \* \* the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others which must be respected by the court."<sup>30</sup>

Under the doctrine of *Marbury v. Madison, supra*, this power may be exercised on his behalf and with his approbation by those whose acts "are his acts." This finds support in the judicial recognition, without reference to statute, of the fact that the privilege against revealing military secrets "is a privilege which is well established in the law of evidence." *United States v. Reynolds* (345 U. S. 1, 7), and cases there cited. The Reynolds case also indicates that the privilege "which protects \* \* \* state secrets" stands on a parallel footing with the military secrets privilege, *id.*

To conclude that a constitutional privilege exists in the President and in those acting on his behalf and pursuant to his direction to withhold documents

<sup>24</sup> Potts, Power of Legislative Bodies To Punish for Contempt, 74 U. Pa. L. Rev. 691, 697-712 (1926).

<sup>25</sup> *United States v. Lovett*, 328 U. S. 303, 318 (1946).

<sup>26</sup> Jefferson, Notes on the State of Virginia, 120 ((1954 edition)).

<sup>27</sup> The Federalist, No. 71.

<sup>28</sup> Warren, Presidential Declarations of Independence, 10 Boston U. L. Rev. 1, 2 (1980).

<sup>29</sup> H. Res. 427, 81st Cong., 2d sess. See vol. 96, Congressional Record, pp. 565-566.

<sup>30</sup> 2 Burr Trials 536 (1808).

and information as against a congressional demand for production or testimony does not wholly dispose of the problem. A further question arises. Is the Executive or the Congress to determine whether the privilege is appropriately asserted in a given case? There is no judicial precedent governing this question.

As a practical matter only the President can make the determination as to disclosure. A House Judiciary Committee took this view in deciding who is the best judge in a close case, of the propriety of divulging to any committee of the House "state secrets." It first noted 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." Then it recognized what is so plainly implicit in the doctrine of separation of powers:

"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."

Finally, it came to the question as to whose decision must be accepted in this matter. Its report stated:

"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. \* \* \*"<sup>41</sup>

One of our great legal scholars, William Howard Taft, following his term as President and prior to his appointment as Chief Justice, summarized the situation succinctly and accurately when he said:

"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."<sup>42</sup>

We are dealing in this field with one of the most difficult, delicate, and significant problems arising under our system. The doctrine of separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no 1 of the 3 elements could become preeminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry.

The dangers which follow from the failure of one branch of the Government to respect the powers of any of the others is as great today as when Washington, in his Farewell Address, felt impelled to caution that:

"It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted 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 encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. \* \* \*

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation, for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."<sup>43</sup>

The principle of separation of powers indicates the relationship of the independent regulatory agencies to this question of the extent of the inquiry which can be made by Congress of another branch. I refer to such regulatory agencies, sometimes styled independent commissions, as the Federal Communications Commission, Interstate Commerce, Federal Trade, Federal Power, and Securities and

<sup>41</sup> H. Rept. No. 141, 45th Cong., 3d sess. 3-4 (1879).

<sup>42</sup> Taft, Our Chief Magistrate and His Powers, 129.

<sup>43</sup> Richardson, op. cit., supra note 5, at p. 219.

**Exchange Commissions.** They have been frequently described as exercising quasi-judicial, quasi-executive, and quasi-legislative functions.

No categorical statement as to the extent of the inquiry which can be made by Congress will be applicable equally to each of the independent agencies. Statutes created these agencies at different times in our history and contain varying mixtures of judicial, executive, and legislative functions. Some statutes create agencies which are predominantly legislative in character, others subject the agency to a strong proportion of executive control, in others the judicial function predominates. It is clear then that no answer to the question of the extent of permissible congressional inquiry of the independent agencies, or of permissible executive direction of independent agencies, can be given without considering the specific agency concerned, the statute creating it, the fact situation involved, and the particular function which the agency is exercising.

Not only by the original statutes creating the agencies, but by other legislation Congress has itself subjected the independent regulatory agencies to executive control. For example, the President has been authorized to apply the Federal employees security program to all departments and agencies of the Government.<sup>64</sup> This includes the regulatory commissions. Hence the regulatory commissions are also subject to the requirements of secrecy governing employee security matters. The President's power to remove commission members for inefficiency, neglect of duty, or malfeasance (as specified in the Federal Trade, Interstate Commerce, Atomic Energy Commissions, and the Civil Aeronautics Board) imply that he may exercise a certain amount of managerial authority over the commissions.

Thus in many respects the functions and operations of the so-called independent regulatory agencies are subject to executive control. Referring to my discussion of the fundamental principle of separation of powers above, the extent of the inquiry which can be made by Congress of one of the independent agencies should be determined on this principle. To the extent that the agency exercises executive functions it would have the right and duty to furnish or withhold information from congressional inquiry to the same extent as would other executive departments and officers of the Federal Government.

On July 12, 1955, Attorney General Brownell had occasion to advise the Chairman of the Securities and Exchange Commission as to limits of congressional inquiry into executive functions of the SEC. Attorney General Brownell stated:

"With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within the executive branch of the Government on the principles as set forth in the President's letter of May 17, 1954 to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and the employees is privileged and need not be disclosed outside of the agency. Likewise any communication from others in the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954."<sup>65</sup>

Attorney General Brownell's letter thus advised that the executive privilege applied to the independent agencies as to "communications within the executive branch" and "with respect to administrative matters." The executive privilege of course does not apply where the independent agencies are exercising judicial functions.

However, by analogous reasoning the doctrine of separation of powers provides a guide to the limits of congressional inquiry, not only in relation to executive functions of the independent agencies, but also to judicial functions. Let me make this clear. In my view, whatever the practice has been in the treatment of these independent regulatory agencies, whenever an agency is exercising its judicial function by deciding an adversary proceeding before it, it should be just as free of any demand from Congress or the executive branch as a court would be.

Nor does the executive privilege apply to the independent agencies where they are exercising legislative functions. Congressional inquiry is thus not so limited as in regard to executive or judicial functions. But I would caution

<sup>64</sup> 64 Stat. 477, 5 U. S. C., sec. 22-3. See Executive Order No. 10450, 3 C. F. R. 72 (Supp. 1953); *Cole v. Young*, 351 U. S. 536 (1956).

<sup>65</sup> Reproduced in hearings on power policy, Dixon-Yates contract, before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st sess., pp. 378-379 (1955).

that other considerations might cause Congress itself to limit its inquiries on even legislative functions. Information of importance to competitors gathered in confidence from private businesses, for example, should not be publicized.

It should not be forgotten that the more frequent and the more extensive the congressional inquiries made of the independent agencies, the less free and truly independent those regulatory agencies will become.

In summary:

(1) The executive privilege applies to the executive functions of the independent agencies;

(2) The executive privilege obviously does not apply to judicial functions; similarly,

(3) Legislative inquiry into the legislative functions of the independent agencies is not limited by any executive privilege, but there are other restraining considerations, some of which I have noted above.

#### IV. PROPOSED LEGISLATION

Finally, I come to two bills which have been referred to the committee. The first is S. 921, 85th Congress, which would amend section 161 of the Revised Statutes. That section is a codification for the 10 executive departments of today of that provision of the 1789 act respecting the Department of Foreign Affairs. You will recall that I discussed that act in the second part of my statement.

Section 161 now provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."<sup>44</sup>

S. 921 would amend section 161 by adding a last sentence:

"This action does not authorize withholding information from the public or limiting the availability of records to the public."

As deputy attorney general, I expressed my views on this bill in letter dated June 13, 1957, to Senator Eastland, chairman of the Senate Committee on the Judiciary. Let me summarize those views.

Insofar as the purpose of S. 921 is to assure the full and free flow of information to the public where not inconsistent with the national interest, the Department of Justice is in full accord. We believe that within limits the executive and legislative branches should keep the public informed of their activities, and should make available information, papers, and records. Without doubt both branches are in accord with this fundamental principle.

We do believe that S. 921 would not clarify section 161 of the Revised Statutes. In the absence of legislative history or more specific language we cannot determine with any degree of certainty the effect of S. 921.

A recent example of the current application of this principle to the legislative branch is illustrated by an article in the Washington Evening Star on September 12, 1956. The article reads in part as follows:

"Congress barred the public from 1,131 of its 3,121 committee meetings in 1956, or more than one third of them.

"Spokesmen for several of those committees listed such things as national security, Government efficiency, and preserving the private rights of witnesses as reasons for closing meetings."

Such a statement is, of course, equally applicable to the proper functioning of the executive branch. Obviously it is equally applicable to the functioning of the judicial branch. Each of the three separate, coequal, and coordinate branches have recognized its force and significance in their relations with each other.

We in the Department of Justice cannot determine whether S. 921 would purport to override the principle that the disclosure of certain information would be inconsistent with the national interest. If Congress believes that any amendment to section 161 of the Revised Statutes is advisable, it is equally advisable that any such amendment make it much clearer than S. 921 now would that Congress does not ignore that principle. As S. 921 now stands, it is impossible to determine with any certainty that it would give just recognition to that principle.

The second bill is S. 2148, 85th Congress, a bill to amend section 3 of the Administrative Procedure Act of 1946.<sup>47</sup>

When Congress passed the Administrative Procedure Act it clearly recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively.<sup>48</sup> These considerations, which Congress recognized then, I have discussed above, and because of these considerations I am opposed to the passage of S. 2148.

Certainly in the time available it is not possible for me to discuss in detail the amendments to section 3 of the Administrative Procedure Act which S. 2148 would make and my reasons for opposing them. Those will be discussed in the necessary detail in the Department's report on the bill.

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<sup>47</sup> 60 Stat. 238, 5 U. S. C. 1002.

<sup>48</sup> See for example, S. Rept. 752, 79th Cong., 1st sess. (1945).

# APPENDIX

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## DETAILED TABLE OF CONTENTS

	<b>Page</b>
1. Letter to Senator Thomas C. Hennings, Jr., from Attorney General William P. Rogers, March 13, 1958-----	52
2. Letter to Attorney General William P. Rogers from Senator Thomas C. Hennings, Jr., March 25, 1958-----	54
3. Letter to Attorney General William P. Rogers from Senator Thomas C. Hennings, Jr., April 3, 1958-----	55
4. Letter to Senator Thomas C. Hennings, Jr., from Attorney General William P. Rogers, April 4, 1958-----	56
5. Letter to Representative George Meader from Attorney General William P. Rogers, March 14, 1958-----	56
6. Letter to Attorney General William P. Rogers from Representative George Meader, March 28, 1958-----	58
7. Letter to Representative George Meader from Attorney General William P. Rogers, April 4, 1958-----	61
8. Letter to Attorney General Herbert Brownell, Jr., from Senator Thomas C. Hennings, Jr., March 13, 1957-----	61
9. Letter to Senator Thomas C. Hennings, Jr., from Deputy Attorney General William P. Rogers, April 10, 1957-----	62
10. Department of Justice study, Is a Congressional Committee Entitled To Demand and Receive Information and Papers from the President and the Heads of the Departments Which They Deem Confidential, in the Public Interest?-----	63-146
11. Letter from Andrew P. Murphy, editor in chief, Federal Bar Journal, to Charles H. Slayman, Jr., March 5, 1958-----	146
12. Article, "Demands of Congressional Committees for Executive Papers" (in three installments), by Herman Wolkinson, Federal Bar Journal, April, July, and October, 1949-----	147-270
13. Letter from President Dwight D. Eisenhower to the Secretary of Defense, May 17, 1954, including a memorandum from the Attorney General to the President-----	271
14. Letter to Clark R. Mollenhoff from Gerald D. Morgan, special counsel to the President, October 26, 1956-----	278
15. Letter to Senator Thomas C. Hennings, Jr., from Acting Attorney General Lawrence E. Walsh, May 9, 1958, containing the views of the Department of Justice concerning S. 2148, 85th Congress-----	278-287
16. Subcommittee on Constitutional Rights Survey of Withholding of Information from Congress:	
(a) Summary analysis-----	287-292
(b) Letter to committee chairmen from Senator Thomas C. Hennings, Jr., May 29, 1956-----	292
(c) Replies from committees-----	293
Agriculture and Forestry Committee-----	293
Appropriations Committee-----	294
Subcommittee on Department of Commerce and Related Agencies-----	294
Subcommittee on Department of Defense-----	294
Subcommittee on Department of the Interior-----	294
Subcommittee on Departments of Treasury and Post Office-----	294
Armed Services Committee-----	293
Subcommittee on Military Construction-----	293
Subcommittee on the National Stockpile and Naval Petroleum Reserves-----	293
Subcommittee on Officer Grade Limitations-----	293

## 16. Subcommittee on Constitutional Rights, etc.—Continued

	Page
(c) Replies from committees—Continued	
Banking and Currency Committee-----	295
Subcommittee on Banking-----	295
Subcommittee on Housing-----	295
Subcommittee on International Finance-----	295
Subcommittee on Production and Stabilization-----	297
Subcommittee on Securities-----	297
Subcommittee on Small Business-----	298
District of Columbia Committee-----	298
Subcommittee on the Judiciary-----	298
Finance Committee-----	299
Foreign Relations Committee-----	299
Subcommittee on American Republics Affairs-----	299
Subcommittee on Economic and Social Affairs-----	300
Subcommittee on European Affairs-----	300
Subcommittee on Far Eastern Affairs-----	300
Subcommittee on Near Eastern and African Affairs-----	300
Subcommittee on United Nations Affairs-----	301
Government Operations Committee-----	301-339
Subcommittee on Reorganization-----	339
Permanent Subcommittee on Investigations-----	301-339
Interior and Insular Affairs Committee-----	340-350
Subcommittee on Indian Affairs-----	350
Subcommittee on Irrigation and Reclamation-----	350
Interstate and Foreign Commerce Committee-----	350
Joint Atomic Energy Committee-----	356
Joint Committee on the Economic Report-----	357-361
Judiciary Committee-----	351
Subcommittee on Antitrust and Monopoly-----	351, 352
Subcommittee on Constitutional Amendments-----	351
Subcommittee on Federal Charters, Holidays, and Celebrations-----	353
Subcommittee on Improvements in Judicial Machinery-----	354
Subcommittee on National Penitentiaries-----	354
Subcommittee on Patents, Trademarks and Copyrights-----	355
Subcommittee To Investigate Juvenile Delinquency-----	354
Subcommittee on Trading With the Enemy Act-----	355
Labor and Public Welfare Committee-----	362
Subcommittee on Education-----	362
Subcommittee on Retirement-----	339
Post Office and Civil Service Committee-----	362
Subcommittee on Government Employees' Security Program-----	362
Subcommittee on Retirement-----	372
Public Works Committee-----	372
Subcommittee on Flood Control, Rivers, and Harbors-----	372
Subcommittee on Public Buildings and Grounds-----	293
Subcommittee on Public Roads-----	372
Rules and Administration Committee-----	373
Subcommittee on Privileges and Elections-----	372
Select Committee on Small Business-----	373
(d) Letter to heads of departments and agencies from Senator Thomas C. Hennings, Jr., April 2, 1957-----	374
(e) Replies from departments and agencies-----	374
American Battle Monuments Commission-----	374
Atomic Energy Commission-----	374
Central Intelligence Agency-----	376
Civil Service Commission-----	378
Council of Economic Advisers-----	379
Department of Agriculture-----	379-384
Department of Commerce-----	385
Civil Aeronautics Administration-----	385
Bureau of Public Roads-----	385
Department of Defense-----	385-387

<b>16. Subcommittee on Constitutional Rights, etc.—Continued</b>	
(e) Replies from departments and agencies—Continued	<b>Page</b>
Department of Health, Education, and Welfare-----	387
Department of the Interior-----	387-391
Bureau of Indian Affairs-----	391
Bureau of Mines-----	392
Department of Justice-----	392
Board of Immigration Appeals-----	392
Bureau of Prisons-----	393
Immigration and Naturalization Service-----	392
United States Board of Parole-----	393
Department of Labor-----	393
Department of State-----	394
District of Columbia Redevelopment Land Agency-----	395
Executive Office of the President-----	395-398
Bureau of the Budget-----	395-397
Office of Defense Mobilization-----	397
President's Advisory Committee on Government Organization-----	398
Export-Import Bank of Washington-----	398
Farm Credit Administration-----	398
Federal Civil Defense Administration-----	399
Federal Coal Mine Safety Board of Review-----	399
Federal Communications Commission-----	399
Federal Deposit Insurance Corporation-----	400
Federal Home Loan Bank Board-----	401
Federal Mediation and Conciliation Service-----	401
Federal Power Commission-----	401
Federal Reserve System Board of Governors-----	402
Federal Trade Commission-----	402
Foreign Claims Settlement Commission-----	403
General Services Administration-----	403
Housing and Home Finance Agency-----	403
Indian Claims Commission-----	404
International Cooperation Administration-----	404-407
Advisory Committee on Voluntary Foreign Aid-----	407
International Development Advisory Board-----	408
Interstate Commerce Commission-----	408
National Advisory Committee for Aeronautics-----	408
National Capital Housing Authority-----	409
National Committee for the Development of Scientists and Engineers-----	409
National Labor Relations Board-----	412
National Mediation Board-----	412
National Science Foundation-----	413
National Security Training Commission-----	413
Panama Canal Company-----	413
Post Office Department-----	413
Railroad Retirement Board-----	414
Renegotiation Board-----	414
Securities and Exchange Commission-----	415
Small Business Administration-----	417
Smithsonian Institution-----	417
Subversive Activities Control Board-----	417
Tariff Commission-----	418
Treasury Department-----	418
Tennessee Valley Authority-----	419
Veterans' Administration-----	419-428
Veterans' Education Appeals Board-----	428
<b>17. Library of Congress study, "Selected Cases in Which Information Has Been Withheld From Congress By the Executive Department," by Mary Louise Ramsey and Michael Daniels, American Law Division, Legislative Reference Service-----</b>	<b>428-446</b>
<b>18. Senate Document No. 99, 83d Congress, 2d session, "Congressional Power of Investigation, A Study Prepared at the Request of Senator William Langer, by the Legislative Reference Service of the Library of Congress"</b>	<b>447-513</b>

## APPENDIX EXHIBIT NO. 1

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D. C., March 13, 1958.

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

DEAR SENATOR: You will recall that in my testimony on March 6 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee I emphasized that executive privilege, in regard to documents and the decision-making process, like similar judicial and legislative privileges, stems from the constitutional principle of separation of powers. In response to questions by you I stated that section 161 of the Revised Statutes (5 U. S. C. 22) was not itself the fundamental basis for executive privilege. I desire to make clear the relationship which in my opinion section 161 bears to the fundamental basis of executive privilege, the constitutional separation of powers. I would be pleased if you would append this letter together with footnotes as an extension of my testimony before your committee.

Section 161 is a legislative expression and recognition of the executive privilege. Thus reliance on this statute by an executive department is in effect reliance on the constitutional executive privilege as recognized by Congress since 1789.

Section 161 of the Revised Statutes is essentially a codification of section 2 of the 1789 act creating a Department of Foreign Affairs and its counterparts for the other early executive departments (1. Stat. 28, 49, 65, 68, 553).<sup>49</sup> The historical refusals of the executive branch to acquiesce in congressional demands for executive documents have been based, not on any statute alone, but on the Constitution itself, for Revised Statutes 161 itself reflects the independence of Congress and the executive branch of each other. The historical antecedents of Revised Statutes 161, going back to the First Congress and the legislative decision of 1789, show that it was intended to be a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers. The statute carries out the constitutional plan by authorizing the head of each department to prescribe appropriate regulations for the custody of documents.

To show that this custody of documents is a matter placed within the executive branch, and intended to be subject only to regulation by the executive branch, one need only refer to the important distinction between the first statute setting up the Department of Foreign Affairs (the historical antecedent of Revised Statutes 161), and its complete dissimilarity with the statute establishing the Department of Foreign Affairs under the Continental Congress, as discussed on pages 7 and 8 of my prepared statement. In the majority opinion in the Myers case,<sup>50</sup> Chief Justice Taft set forth in some detail the controversy in the House of Representatives in the First Congress, respecting the provisions of the bill to establish the Department of Foreign Affairs, which I discussed, pages 8 and 9 of my prepared statement. Even in the condensed form in which that debate can be viewed in reading the annals of Congress, that bill raised the basic question respecting the separation of powers under the Constitution.

This basic question was crystallized in two provisions of the bill. The first would have provided that at the head of the Department there should be a Secretary, to be appointed by the President, by and with the advice and consent of the Senate, and "to be removable from office by the President \* \* \*." In regard to the reference in the bill to the power of removal by the President, there was objection on the ground that any such reference might suggest that the President's power to remove stemmed from a legislative grant and was thus subject to revocation.<sup>51</sup>

The second provision of the bill would have provided that there should be a chief clerk to be appointed by the Secretary who in case of vacancy in the office of the Secretary, should have the charge and custody of all records, books, and papers appertaining to the Department. Congressman Benson of New York, proposed to amend that second provision in order to provide that the chief clerk, "whenever the said principal officer (the Secretary) shall be removed from office by the President of the United States or in any other case of vacancy,"

<sup>49</sup> See Historical note to 5 U. S. C. 22; *Touhy v. Ragen*, 340 U. S. 462, 468.

<sup>50</sup> *Myers v. United States*, 272 U. S. 52, 111-137.

<sup>51</sup> *Id.*, 112.

should during such vacancy have the charge and custody of the departmental books and records. Congressman Benson maintained that his amendment thus avoided the point as to whether the words "to be removable by the President" in the first provision might be construed to be a legislative grant. He further stated that if his amendment were adopted, he would then move to strike the words "to be removable by the President" in the first provision, and that there would thus be established a legislative construction of the Constitution that the President had the power of removal.<sup>62</sup>

Both proposals were adopted. The words "to be removable by the President" in the first provision were stricken from the bill, and Congressman Benson's amendment inserting the words in regard to the removal of the Secretary by the President was also adopted in the second provision. Mr. Madison, who had been a member of the Constitutional Convention and one of the authors of the Federalist, was then a Congressman in the First Congress and took a leading role in effecting this constitutional construction. Chief Justice Taft's opinion in the Myers case declares that Mr. Madison's "arguments in support of the President's constitutional power of removal independently of congressional provision, and without the consent of the Senate, were masterly, and he carried the House."<sup>63</sup>

This is the legislative decision of 1789. It established the principle that the reasonable construction of the Constitution must be that the three branches of the Federal Government should be kept separate in all cases in which they were not expressly blended, and that no legislation should be enacted by the Congress which would tend to obscure the dividing lines between the three great branches or cast doubt upon the prerogatives properly belonging by the Constitution to anyone.

Therefore, I consider S. 921 and H. R. 2767 as proposals which, if they have any meaning or vitality at all, can serve only to do what was emphatically rejected by Mr. Madison and others in the First Congress under the new Constitution, i. e., confuse the constitutional lines of demarcation and responsibility among the three separate branches. The proposed statute can no more restrict executive privileges and responsibilities, which stem from the Constitution, than could the legislation proposed in 1789. Moreover, it could have a very mischievous effect by confusing and clouding those executive privileges and responsibilities. This was in part the basis of the objection which was successfully sustained in 1789.

Legislative proposals similar to S. 921 and H. R. 2767 have arisen from time to time. Joint Resolution 342 of the 80th Congress was perhaps a more ambitious attempt in the same general field. When the measure was considered by the House on May 12 and 13, 1948, Mr. Rayburn, then a Member of Congress though not Speaker, had these pertinent remarks to make:

"I do not know what you think the powers of Congress are. Are they limitless? Is there no limit under the Constitution to which any Congress, much less a very partisan one would go? Back in the formative period of this Government there was a great jurist. \* \* \* In 1803 he gave forth this language in a very familiar case (and at this point Mr. Rayburn quoted the language of Chief Justice Marshall in *Marbury v. Madison*, dealing with the principle of the separation of powers, which I cited on p. 25 of my prepared statement).

"Pass this resolution. The President says to his Cabinet officer, 'No, you are my agent, you are my alter ego; do not give that information to the Congress.'

"What are you going to do about it? You might have an unseemly session, an unseemly row upon the floor of the House of Representatives. What are you going to do about it? Are you going to impeach the President of the United States because he says the giving up of certain information is not in the public interest? \* \* \*"

"Who is better prepared? Who knows more about our foreign affairs? He knows better than any other man in the Government—not you; not me. Who knows better what is necessary to bring an army and navy and an air force together to defend the country than the President of the United States? And in his wise discretion he makes recommendations to Congress."<sup>64</sup>

And in the same debate Mr. McCormack, of Massachusetts, now majority leader in the House of Representatives, argued:

<sup>62</sup> Id., 113; 1 Annals of Congress 578 (1789).

<sup>63</sup> Id., 115.

<sup>64</sup> Congressional Record, May 12, 1948, p. 5740.

<sup>65</sup> Id.

"I must recognize that there must be an independence of the other branches which must be preserved the same as the independence of the legislative branch must be preserved, and I say that under our form of government, consisting of the three coordinate branches, the President of the United States is the one to judge, and not the Congress. And, in turn, the judge of the President of the United States is the people."<sup>56</sup>

Congressman McCormack then took up the argument that since Congress may appropriate money for the agencies and may destroy all of them, it is entitled to the papers in the possession of the agencies against the decision of the President.

"We could not administer the executive branches of Government, because under the Constitution we cannot. Never mind the practical difficulties, we simply cannot. So with the argument that we have the power to appropriate, then it becomes a higher political question of us with the people, just the same as in the case of the President who says that 'these papers are papers that in the exercise of my duty as President of the United States and under the Constitution I should not transmit,' then he has to answer to the people. \* \* \*"<sup>57</sup>

These arguments of Congressmen Rayburn and McCormack in 1948 are expressions completely consistent with the constitutional and practical arguments which I have advanced to your committee.

Similar independence as against the judiciary was also asserted by the Congress when attempts were made to compel it to disclose certain information to the Court. It was resolved that "no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission."<sup>58</sup>

Here, too, where records of the executive branch are involved, reasons of public policy in the interest of efficient and effective government, require that access to certain documents and other information shall not be permitted, if the President in his sound discretion determines that it would be contrary to the public's best interests to make them available.

For the reasons stated, I am opposed to the enactment of S. 921 and S. 2148.

Sincerely,

WILLIAM P. ROGERS,  
Attorney General.

## APPENDIX EXHIBIT NO. 2

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
Washington, D. C., March 25, 1958.

Hon. WILLIAM P. ROGERS,  
Attorney General of the United States,  
Department of Justice, Washington, D. C.

DEAR MR. ATTORNEY GENERAL: In accordance with your request, I have directed that your letter to me dated March 13, 1958, dealing with section 161 of the Revised Statutes (5 U. S. C. 22) and its relationship to what you call the executive privilege, be appended as an extension of your testimony before the Subcommittee on Constitutional Rights on March 6. When the record of your original testimony is printed, your letter of March 13 will be included.

At the time you concluded your oral testimony before the subcommittee on March 6, it was my understanding that you agreed with me that section 161 was merely a housekeeping statute which had been cited incorrectly by various executive department officials as authority to withhold information. In fact, you yourself used the terms "housekeeping" and "bookkeeping" to describe the statute (see the transcript of your testimony, p. 52), and you stated (transcript, p. 54), "I think when they have cited the statute, it has been incorrectly cited because I don't believe the statute is the basis for not giving information."

It was my understanding also that you agreed with me that this housekeeping statute had no relation whatsoever to any constitutional executive privilege to

<sup>56</sup> Congressional Record, May 12, 1948, p. 5712.

<sup>57</sup> Id.

<sup>58</sup> H. Res. 427, 81st Cong., 2d sess., see vol. 96 Congressional Record pp. 565-566; vol. 96 Congressional Record, p. 1400; H. Res. 465, vol. 96 Congressional Record, p. 1695; H. Res. 469, vol. 96 Congressional Record, p. 1765.

withhold information. You not only stated that "the executive privilege is not related to any statute" (transcript, p. 51), but you added, "Now I don't recall any instances when Washington, Jefferson, or Truman, or anyone else, ever relied upon this statute as a basis of executive privilege. It is something entirely different. This is a bookkeeping statute which says they keep the records; they hold them physically. It doesn't relate at all to executive privilege" (transcript, p. 52).

In view of your specific testimony on March 6, your letter of March 13 is not only surprising but shocking.

You state in your letter that "section 161 is a legislative expression and recognition of the executive privilege. Thus reliance on this statute by an executive department is in effect reliance on the constitutional executive privilege as recognized by Congress since 1789." Clearly this language directly repudiates your original testimony before the subcommittee, especially where you said that the statute "doesn't relate at all to executive privilege." Not only do you seem to have completely reversed your previous position, but you now seem to be arguing that since 1789 Congress has recognized a relationship between section 161 and the so-called executive privilege which just 2 weeks ago you said did not even exist.

Another of the many points that is surprising about both your testimony on March 6 and your letter of March 13, is your comment on S. 921, the freedom of information bill now pending before the Constitutional Rights Subcommittee. In your original testimony you said that this bill, which I introduced in the Senate for the specific purpose of preventing executive department officials from further incorrectly citing section 161, is "meaningless" and that—I am still quoting you—"the people that are sponsoring it are kidding themselves that it means anything" (transcript, p. 52). You stated that if it were made clear that the bill in no way impaired the executive privilege, "all it would do is prevent people from citing the statute incorrectly" (transcript, p. 54).

Frankly, Mr. Attorney General, it is shocking to hear such a view expressed by the chief legal officer of the Government. So that there can be no misunderstanding, let me make my own position as sponsor of this bill abundantly clear. Precisely what I want to do is "prevent people from citing the statute incorrectly." While perhaps to some persons it is "meaningless" to attempt to prevent self-appointed, would-be censors in the executive departments from citing this statute incorrectly, to me it is vitally important that this be done. I assure you I intend to continue to do everything in my power to see that neither this nor any other statute on the books is misused in such fashion.

In my opinion, your letter of March 13, when compared to your original testimony, raises many more questions than it answers. Some of these I have indicated to you in this letter.

I would appreciate it, and I feel certain it would be of great help to all of the members of the subcommittee, if you would agree to return on a mutually convenient date and more fully explain your views on the housekeeping statute and its exact relationship, if any, to the so-called executive privilege in our continuing study of secrecy in government and the unwarranted withholding of information to which the American people are entitled.

Sincerely yours,

THOMAS C. HENNINGS, Jr., Chairman.

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### APPENDIX EXHIBIT NO. 3

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
Washington, D. C., April 3, 1958.

Hon. WILLIAM P. ROGERS,

*Attorney General of the United States,  
Department of Justice, Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: On March 25, 1958, I wrote you concerning your testimony before the Senate Constitutional Rights Subcommittee on March 6 and your subsequent letter dated March 13, regarding the subject of freedom of information and a pending bill, S. 921, to amend section 161 of the Revised Statutes (5 U. S. C. 22). I invited you to appear at some mutually convenient time and more fully explain your views which I think are contradictory, considering your testimony in person and the contents of your letter.

I have received no reply to date from you in response to my invitation.

Therefore, this is to invite you to appear at a specific time and date: At 10 a. m., Wednesday morning, April 16, 1958, in room 357 of the Senate Office Building, Washington, D. C.

You might like to know that the subcommittee met in executive session today; considerable interest was expressed by members of the subcommittee in your position on freedom of information; it is clear that we want you to return and clarify your position.

Trusting that the date and time selected will be convenient for you, I am

Sincerely yours,

THOMAS C. HENNINGS, Jr.,  
*Chairman.*

## APPENDIX EXHIBIT NO. 4

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D. C., April 4, 1958.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR SENATOR: I have received your 2 letters and noted your 3 press releases.

The material discussed in my supplementary letter was originally prepared for inclusion in my original statement, but was eliminated in the interest of brevity. After my testimony I thought this material and its detailed discussion of historical precedents should be placed at the committee's disposal. It illuminates the matters covered only briefly in my testimony, and along with my original statement presents as a whole a consistent historical analysis of the executive, legislative, and judicial privileges.

My position is perfectly clear. In response to your questions I stated, and reiterate, that I have no objection to the passage of S. 921 if it is amended so as to recognize explicitly the constitutional executive privilege. I adhere to the interpretation of the Constitution which was placed upon it in the first session of the First Congress by James Madison and the other drafters of the Constitution. It has been followed by George Washington and his Attorney General and by every President and every Attorney General since.

My reasons are set forth in full in my statement and supplementary letter. I have nothing else to add.

Sincerely,

WILLIAM P. ROGERS, *Attorney General.*

## APPENDIX EXHIBIT NO. 5

DEPARTMENT OF JUSTICE,  
Washington, D. C., March 14, 1958.

Hon. GEORGE MEADER,

*House of Representatives, Washington, D. C.*

DEAR GEORGE: I am enclosing herewith a copy of the prepared statement which I made before the Senate Subcommittee on Constitutional Rights on March 6. I assume from reading your remarks in the House on March 10 that you may not have read it. Your remarks evidence a serious misunderstanding of my position on inquiry by the legislative branch concerning the decision making process and documents of the executive branch.

You assert that in my testimony before the Senate subcommittee I championed a policy and privilege which would deny to Congress and the public access to all executive documents and papers. This is simply not so. I emphasized the necessity of furnishing all possible information to Congress and the public, only withholding that which in the public interest it is necessary to withhold. I reiterate now that this administration, and particularly the Department of Justice of which I have been a part for the past 5 years, has furnished more information to Congress and the public than ever before.

In your remarks you stated "There are countless instances where congressional requests for information from the executive branch of the Government have been fulfilled." Certainly there have been "countless instances." It is my hope and full expectation that there will continue to be. To imply as you

have that it is my view that under the Legislative Reorganization Act "committees should study the operations of Government but only have access to information outside the possession of the executive branch of the Government" is to distort completely my testimony. I fully agree with the view stated in your very next sentence: "The great bulk of information on which any such study must be based naturally would be in the possession of the executive branch of the Government"—and it is my intent and I believe the intent of this administration that congressional committees shall have access to that great bulk of information.

Nor have I made any "denial of the existence of the investigative power of the Congress." The position which I have cited and upheld by precedent, law and logic is the position which every Attorney General and every President beginning with George Washington has taken when the issue arose. As I read your remarks, you appear to place no limit on the legislative right to inquire and investigate into the documents and actions of persons in the executive branch. Are there any limits? If so, where? In my opinion the limits are dictated by the fundamental doctrine of separation of powers. Unless you are prepared to recognize limits to the right of legislative inquiry based on the separation of powers, you are asserting a theory of legislative supremacy embodied in the unworkable Articles of Confederation but rejected in our Constitution.

Speaker Rayburn, then House minority leader, in 1948 put it pretty bluntly:

"I do not know what you think the powers of Congress are. Are they limitless? Is there no limit under the Constitution to which any Congress, much less a very partisan one would go? Back in the formative period of this Government there was a great jurist. \* \* \* In 1803 he gave forth this language in a very familiar case," (and at this point Mr. Rayburn quoted the language of Chief Justice Marshall in *Marbury v. Madison*, dealing with the principle of the separation of powers, which I cited on page 25 of my prepared statement) (Congressional Record May 12, 1948, p. 5740).

You will notice in my statement that I gave full recognition to the existence of like legislative and judicial privileges based fundamentally on the constitutional separation of powers as is the executive privilege.

The historical precedents cited in my statements define the principles and circumstances calling for the exercise of executive discretion in furnishing papers and information to Congress. The 81st Congress defined its own legislative privilege in these words, that "no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission."

You might consider the consequences if such executive, legislative, or judicial privileges did not exist, if the executive could not assert under the Constitution a privilege against unrestricted legislative and public inquiry. For example, how much information would the Antitrust Division of the Department of Justice receive from aggrieved small-business men if the executive did not have a right and duty to keep confidential the names of those who make complaint of violations of the antitrust laws? How much information would the Federal Bureau of Investigation continue to receive from its confidential informants if the FBI files could not be protected by the executive from the demands of any curious congressional committee? Most people agree that the executive has a right and duty to keep such information confidential, and that of course is merely the exercise of the executive privilege.

This has been clearly put by the present House majority leader, Mr. McCormack:

"I must recognize that there must be an independence of the other branches which must be preserved the same as the independence of the legislative branch must be preserved, and I say that under our form of government, consisting of the three coordinate branches, the President of the United States is the one to judge, and not the Congress. And, in turn, the judge of the President of the United States is the people" (Congressional Record May 12, 1948, p. 5712).

Your fears of an unwarranted withholding of information by the executive are unfounded. The true guard and judge of the reasonableness with which the executive exercises its privilege is the people, the force of public opinion, as Congressman McCormack recognized. The Founding Fathers foresaw this when they created the three branches with coequal privileges, leaving it to public opinion to sustain or condemn the exercise of those privileges as their reasonableness might appear.

In my opinion there is no question but that the executive branch of the Government of the United States makes available to Congress and the public vastly

more information than does the executive of any other government in the world. This is an asset of great value under our republican form of government, and its real worth should not be obscured by a misplaced emphasis on the relatively few instances where the executive has deemed it necessary to withhold information.

In the past the executive has acquiesced in the great majority of requests for information from Congress. It no doubt will continue to do so. If in any particular case the executive under this administration exercises its privilege and declines a request of Congress, it will first make very sure that its declination is truly on the ground of overall public interest. And it will rely on a public opinion informed by a free and conscientious press to support its decision, for this administration indeed considers itself accountable to the people for all its decisions.

With best personal regards, I remain  
Yours cordially,

WILLIAM P. ROGERS,  
*Attorney General.*

## APPENDIX EXHIBIT NO. 6

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, D. C., March 28, 1958.*

Hon. WILLIAM P. ROGERS,  
*The Attorney General, Department of Justice,*  
*Washington, D. C.*

DEAR BILL: This is in reply to your letter of March 14, 1958, commenting on my speech on the floor of the House March 10, 1958, during which I discussed the investigative power of the Congress and your testimony before the Senate Judiciary Committee on alleged "executive privilege" to withhold information from the Congress.

I am glad to reply to your letter because I believe arguing the constitutional principle involved will be useful providing we confine our debate to legal principles, using skill in legal reasoning and avoiding irrelevancies.

Your high position as the chief legal officer of the United States renders your views significant because they are likely to be given great weight by officials in the executive branch of the Government from whom the Congress from time to time may desire information. They are important, too, because the Department of Justice and United States district attorneys have responsibilities under section 102 of the Revised Statutes for the enforcement of the investigative powers of the Congress.

Although your letter does not clearly say so, the central point of difference between us seems to be whether, in the event of disagreement as to the production of information Congress has requested from the executive branch of the Government, the power to decide resides in the Congress or in the President. I hold that the power resides in the Congress and you apparently contend that the power resides in the executive branch of the Government. We both concede that historically a constitutional showdown on this question has been avoided, and I have expressed the hope that such a showdown will never be necessary.

You have conceded that included within the legislative power vested in the Congress is the power of inquiry. Apparently you also concede that the legislative power cannot be exercised intelligently in our modern, complex society without adequate means for ascertaining facts and considerations which are a necessary foundation for an enlightened declaration of public policy. Yet you assert that this power is unavailing in the event the executive branch decides it is in the public interest to withhold information from the Congress.

I do not concede the existence of an executive privilege to withhold information from Congress. Nevertheless, we might narrow the area of disagreement between us if you would be willing to describe the nature and characteristics of this executive privilege with greater exactitudes. Such a description should include answers to the following questions:

1. Is then the executive privilege one which may be exercised solely by the President personally with respect to each congressional request for information limited only to that request?
2. May the President validly issue a blanket order to all officials and employees in the executive branch of the Government instructing them to deny Congress: (a) all requests for information; (b) all requests for a certain type of document or testimony; (c) all information in certain areas of governmental activities?

3. May this Presidential executive privilege and the power to exercise it be delegated to inferior officials in the executive branch of the Government? If so to (a) Cabinet members? (b) division heads? (c) economists and clerks? (d) any and all of the personnel in the executive branch of the Government?

4. Is the decision to withhold information from the Congress on the basis of executive privilege subject to any review whatever?

5. With respect to information properly classified, can the executive privilege be invoked where satisfactory arrangements are made to preserve the classified character of the information?

You have been unable to cite any express language in the Constitution authorizing executive privilege or any recognition of executive privilege by the Congress in statutes or by the courts in decisions.

You seem to rely rather vaguely upon the doctrine of separation of powers which I discussed at some length in my remarks on the floor of the House on March 10, 1958. I failed to find any refutation or other reference to this discussion in your letter of March 14, 1958.

I stated in my speech, and I again affirm, that I disapprove as vigorously as you of attempts Congress has made in the past to inject itself into the execution and administration of the laws and to assume the right to make executive decisions. I shall continue to follow that policy.

There is a considerable gap in logic, however, between stating the doctrine of separation of powers and concluding that congressional access to the facts about the conduct of the public business is an attempted usurpation of executive authority. To say that Congress has no right to know fully about the public business but must depend only upon the information the Executive is willing to give it, in such color and completeness as the Executive elects, it seems to me, is to assert untouchability in public servants totally out of line with our democratic concept that executive agencies are the servants, not the masters, of the sovereign people.

If the doctrine of separation of powers has any application to the question in controversy between us, it seems to me it supports the position I have taken. If, as the Court decisions clearly hold, the power of inquiry is an essential ingredient of the power to legislate, then the interference with that investigative power and the obstruction of its exercise by the Executive is an invasion of legislative authority and an unconstitutional assumption by the Executive of legislative power vested by the Constitution in the Congress.

As I have pointed out, the Supreme Court has time and again upheld the power of inquiry of the Congress because of its necessity to sound and intelligent legislation. This view was excellently expressed in *McGrain v. Dougherty* (273 U. S. 135) :

"A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."

Of course, a great deal of information needed by Congress to determine public policy is in the possession of individual citizens, corporations and various types of nongovernmental organizations, but probably by far the great bulk of information needed by Congress to legislate intelligently is in the possession of the executive branch of the Government which in the last 2½ decades has grown to mammoth proportions, not only in dollar expenditures and personnel, but in control and regulation of our national life. It is unthinkable to me that a court would hold that information in the possession of nongovernmental persons and agencies is more readily accessible to Congress than information in the possession of a public official.

The information possessed by a public official is not his private property, and the right of "privacy" conceived to exist in individual citizens by reason of the Bill of Rights and otherwise would not seem to apply to public officials who act as agents of the people in a position of trust. After all, the records and files of the Department of Justice are not the personal property of Bill Rogers or any subordinate official in the Department of Justice. They are Government property. If a private citizen may not withhold from congressional inquiry his private papers, is there not much more reason to hold that Government information needed in the formulation of public policy should be available to that part of the Government to whom it is most useful in determining how we should be governed?

The principle that public officials in their official capacity act as agents of the Government and exercise their powers and possess Government property and

records as trustees is well established. Thus it would appear that the decisions of the Court in upholding the power of congressional inquiry with respect to private citizens are precedents establishing the power of Congress to obtain information in the possession of Government officials.

Another passage in *McGrain v. Daugherty* is relevant to that portion of your contention that it is sufficient for Congress to have such information as the executive branch of the Government voluntarily supplies it:

"Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."

You suggest that my view of the investigative authority of the Congress asserts "a theory of legislative supremacy embodied in the unworkable Articles of Confederation but rejected in our Constitution." You are correct that I do assert the supremacy of Congress in the field of legislation, but I base this upon the Constitution, not the Articles of Confederation. I find nothing in the Constitution which indicates any intent to strip from the legislative power it vests in Congress the power of inquiry which has always been considered to inhere in the legislative power. In this view I am confirmed by repeated decisions of the Supreme Court.

I refer you again to the brilliant law review article of Gerald Morgan, the President's special counsel, who criticized penetratingly, it seems to me, an attempt by the courts to review legislative judgments by undertaking to decide whether the subject matter of the congressional inquiry was relevant to a subject on which Congress could legislate. This, of course, was the holding of *Kilbourn v. Thompson* (103 U. S. 190). Mr. Morgan expressed this idea as follows:

"Now if, as indicated in Oklahoma Press case, the congressional power of investigation extends to investigating for the purpose of determining if the facts show whether or not Congress can legislate at all, if an investigation does not have to be preceded by the adoption of a resolution defining its scope and purpose, and if the congressional power of investigation is like the inquisitorial power of a grand jury, then it becomes impossible for a court to exercise a power of review with respect to the lawfulness of such investigations, unless the court presumes bad faith on the part of a coordinate branch of the Government. And moreover, questions of pertinency in legislative inquiries become questions that by their very nature cannot be determined judicially—they become questions that courts cannot determine at all without in effect rendering advisory opinions as to what facts it would be appropriate for Congress to consider, for the Senate or House to consider, in forming a legislative judgment first as to whether it may legislate, next as to whether it should legislate, and finally as to how it should legislate. The exercise of that judgment is made through the collective action of the Members, upon their oath of office—substantially the same oath that judges take. And their decision as to what is or is not relevant to the exercise of that judgment should be binding and conclusive upon the world."

Yet it must be said that even in *Kilbourn v. Thompson*, the Supreme Court did not go nearly as far in invading legislative prerogatives as you do in asserting an executive privilege since the Court recognized the power of Congress to inquire but held only that its inquiry must be limited to matters on which it validly could legislate. Your assertion of executive privilege has no such limitation but only the very broad one that whenever the executive thinks it is in the public interest to withhold information, Congress may not obtain it. What is or is not in the public interest, of course, is a concept so broad as not to have any limitations whatever. Therefore I have said, and repeat, that the asserted executive privilege is equivalent to saying that the President need not give any information at all to Congress since he may always say, and no one can review or disagree with his statement, that it would not be in the public interest to give Congress the information.

I would appreciate your directing your attention to the questions I have asked above and particularly to an explanation of the steps of logic in your thinking by which you arrive at the conclusion that knowledge by Congress of facts about the public business is an attempt to exercise executive powers. It seems clear to me that knowledge in and of itself does not amount to an attempt to make executive or administrative decisions.

It is of course, true that a complete knowledge of the facts about an executive decision might reveal its fallacy, but this would be a matter which would appeal only to the minds of the people and would not serve to overrule an administrative decision within executive discretion which is valid and binding

regardless of its soundness or unsoundness. The only possibility I can see that knowledge of the conduct of the public business could be regarded as invading executive authority is the assumption that executive decisions, good or bad, are the sole and exclusive business of officials in the executive branch of the Government and that neither the Congress nor the people have any right to be concerned about them. This asserts a doctrine of executive power which I believe is wholly out of keeping with our concept of democracy and self-government. It smacks of totalitarianism, and I hope it will never prevail in this country.

President Truman wrote a letter March 13, 1948, intended to deny to the Senate Committee for which you were then counsel certain files concerning the loyalty of executive personnel.

President Eisenhower May 17, 1954, wrote a similar letter growing out of an effort of that same Senate committee to obtain certain information relating to the Army-McCarthy hearings.

Though the matters which gave rise to those two letters have long since passed from the scene, the letters still are being relied upon by personnel in the executive branch to deny information to the Congress.

Regardless of the constitutional controversy between us, the sincerity of the desire you express to make available the maximum amount of information to the Congress would seem to call for sweeping away those cobwebs either by a declaration that those letters no longer have any validity or that at the least they are confined to the subjects then in controversy.

Sincerely,

GEORGE MEADER.

## APPENDIX EXHIBIT NO. 7

DEPARTMENT OF JUSTICE,  
Washington, D. C., April 4, 1958.

Hon. GEORGE MEADER,  
*House of Representatives,*  
*Washington, D. C.*

DEAR GEORGE: Your letter narrows the issue simply to whether the legislative branch has unlimited power to compel the Executive to disclose all information in its possession on any subject at any time. There is not such power in the legislative branch, there has not been since 1789, and there never should be unless we want unlimited legislative supremacy instead of our constitutional separation of powers.

Congress itself has of course a legislative privilege which it has not hesitated to assert. (H. Res. 427, 81st Cong., 2d sess.) The executive branch and the courts have quite properly recognized this. It is a constitutional right based on the separation of powers doctrine just as are the executive and judicial privileges to which I have referred, and all three privileges are necessary to any effective functioning of Government.

I believe your specific questions are fully answered in my testimony before the Senate subcommittee. I want you to know that I appreciate your recognition of the policy of all of us in the executive branch to make available to Congress the maximum amount of information consistent with the orderly functioning of our Government.

Sincerely yours,

WILLIAM P. ROGERS,  
*Attorney General.*

## APPENDIX EXHIBIT NO. 8

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.*

## APPENDIX EXHIBIT NO. 9

DEPARTMENT OF JUSTICE,  
OFFICE OF 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,

WILLIAM P. ROGERS,  
*Deputy Attorney General.*

(The study follows:)

## APPENDIX EXHIBIT NO. 10

### **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?**

### INDEX

	Page
Introductory statement-----	75-76
Summary of the refusals by the Presidents, from 1792 to date-----	76
Summary of the court decisions-----	76-77
Summary of the Constitution and the statutes-----	77-78

#### PART I

Illustrations of refusals by our Presidents, and their heads of departments, to furnish information and papers-----	78-104
Résumé and conclusions-----	104

#### PART 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-----	106-120
Opinions of the Attorneys General-----	114-115
The views of a House Judiciary Committee-----	115-116
The views of text writers-----	116-120

#### PART III

The Constitution and the statutes creating the executive departments-----	120-128
The 10 executive departments-----	121-125
The Civil Service Commission records-----	126-128
Concluding statement-----	128-129

#### PART IV

Statutes designed to compel testimony and the production of records in congressional investigations-----	130-140
Legislative Reorganization Act of 1946-----	132-135
Departmental regulations concerning use of records-----	135-136
Some leading decisions-----	136-140
How is the Supreme Court likely to decide the issue?-----	136-140
Limitations upon the power of Congress to inquire-----	138-142
President Truman's directive to officers and employees in the executive branch-----	140-141

#### PART V

Conclusions-----	143
------------------	-----

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

William Howard Taft: Congress may not elicit confidential information from the President-----	78
---	----

	Page
President Washington's administration	78-80
Washington's Cabinet unanimously decided that executive ought to communicate only such papers as the public good would permit	79
Washington refused House of Representatives request for instructions to United States Minister relating to Jay Treaty	79
In Farewell Address Washington cautioned against encroachment of one department upon another	79-80
President Jefferson's administration: Jefferson refused to furnish to House of Representatives investigative data relating to a criminal conspiracy against the Government on the ground that the Government ought not to reveal the names of those who gave the information in confidence	80
President Jackson's administration	80-82
Jackson declines to furnish Senate with copy of a paper read by him to the heads of the executive departments	80
Jackson refused to communicate to Senate copies of charges against a removed public official	81
Jackson termed continued requests for information from executive departments, relating to exclusively executive functions, unconstitutional demands	81
Jackson cautions Senate against insinuations or accusations, in secret session by Senate committee, against a removed executive official	81
Resolution of House to investigate integrity and efficiency of executive departments called on the President and heads of departments for a list of all appointments from 1829 to 1837	81
Jackson states that heads of departments might answer requests, provided they did not injure the public service by consuming their own time and that of subordinates	82
President Tyler's administration	82-85
House resolution calls upon heads of departments for names of Members of Congress who had applied for office	82
Tyler refused to permit heads of departments to comply—applications for office are confidential	82
Civil Service Commission records, containing confidential information furnished by applicants, would seem to be covered by the precedent first established by Tyler	82
House resolution calls upon Secretary of War for information concerning affairs of Cherokee Indians and frauds practiced upon them	83
Secretary of War, with President's direction, refuses to furnish report of Lieutenant Colonel Hitchcock who had investigated the frauds	83
Hitchcock's report dealt with ex parte inquiries from persons whose statements lacked an oath; the persons implicated had no opportunity to contradict report; gross injustice would result and objects of inquiry defeated by report's publication	83
Resolution called on President Tyler for same information—Tyler vigorously asserted independence of executive branch under the Constitution	83
Tyler sends part of information requested; refuses to communicate Colonel Hitchcock's views of the personal characters of Indian delegates because of the unfairness which publication would cause to Hitchcock	83
Tyler states principles requiring an unimpaired Executive discretion to keep results of inquiries conducted by Executive confidential	83-84
Tyler lists occasions when papers must be kept secret, despite their relevancy to subjects legitimately deliberated by House	84
An officer charged with a confidential inquiry ought not to be exposed to resentment and scorn, nor should the Government be deprived of important means of investigating conduct of its agents	84
Tyler's statement of the principle which justified failure to produce papers, whether to a court or to a legislature	84
Committee on Indian Affairs strongly dissents from Tyler's message, but takes no action	84
Refusal by the Secretary of War and by President Tyler to publicize results of Government investigations is a reiteration of the principle first established by President Jefferson	85

	Page
President Polk's administration	85-86
House resolution requested Polk to furnish an account of payments made on President's certificates, with copies of confidential memoranda regarding such payments, during the previous administration	85
Polk's message to House pointed to the law which authorized the President and the State Department to keep certain certificates of expenditure confidential	85
May a President at the request of one branch of Congress, without violating the spirit of the law, expose to public view that which his predecessor kept secret?	85
It is a safe general rule that this should not be done	85
A President making a confidential expenditure may keep the evidence in his own possession. By leaving the evidence on which he acted in the confidential files of an executive department, they do not become public records	85
Polk feared consequences of establishing a precedent of revealing confidential expenditures of prior administrations	85
When a President leaves his office, that is an end to the things he did. His successor cannot be called upon to explain his acts	86
Right of the public to an accounting of all expenditures was not a justification for violating a secrecy when measured against the consequences of establishing a precedent	86
An executed transaction furnishes no greater justification for revealing confidential information than one which is executory	86
President Buchanan's administration	86-87
House resolution appointed committee to investigate whether the President, or any other officer of the Government, had by money or other improper means sought to influence action of Congress respecting the passage of any law	86
Buchanan's message of protest to the House	87
Such proceedings violate the rights of the executive branch and are subversive of its constitutional independence	87
A band of parasites and informers would swear ex parte concerning pretended private conversations between the President and themselves	87
Such investigations, if unresisted, would establish dangerous precedents to his successors, of whatever political party	87
President Grant's administration	87-88
House of Representatives, by resolution, requested information concerning executive acts performed by Grant away from seat of Government	87
Grant fails to find in the Constitution authority of the House to require of the Executive an account of his discharge of purely executive acts	87
Inquiry aimed to find out concerning executive acts over a 7-year period. It had nothing to do with legislation	87
If the inquiry was aimed at impeachment, it was in derogation of even an ordinary citizen's constitutional right not to testify against himself	87
The President's civil powers are neither limited nor capable of limitation; were Congress to pass an act limiting the Executive in the exercise of an executive function, Grant would recognize the superior authority of the Constitution	87
Illustration of principle that Congress may not exceed its constitutional powers in calling for information, and a law compelling the Executive to furnish information in limitation or restriction of a purely executive function, would run counter to the Constitution	88
President Cleveland's administration	88-90
The relations between the Senate and the executive departments—debated by 25 Senators in the greatest debate of its kind in the annals of Congress	88
The removal of 650 persons by the newly elected Democratic President brought an onslaught of demands by a Republican Senate upon the heads of departments to furnish documents	88
By direction of the President, department heads refused Senate demands	88

## President Cleveland's administration—Continued

	Page
Attorney General replied to demand for papers that President directed him, in the public interest, not to comply with Senate resolution—Senate by resolution denounced the Attorney General for failure to furnish information and papers—	88
Senate adopted resolution condemning Attorney General's refusal as violation of official duty and subversive of fundamental principles of government—	88
Majority report of Judiciary Committee thus stated the question: Whether it was within the constitutional competence of either House to have access to official papers in the public offices—	89
Majority of Judiciary Committee admitted that no statute compelled department heads to transmit information to either House—	89
Minority of committee questioned right of either House to know anything, wherever it existed, about removals of Federal officers—	89
Cleveland's famous message: Executive departments are unencumbered by lien in favor of either House as the price of their creation—	89
Cleveland discusses official papers, and private or confidential papers addressed to heads of department—	89
Cleveland asserts that the filing of papers with departments does not make them official—	89
Cleveland summarizes reasons for refusal by heads of departments to comply with demands which came in by the score—	89
The long and bitter controversy ended with a victory for Cleveland—	90
Papers relating to purely executive acts and duties lodged in the President alone remain private and unofficial—	90
The real question is who determines the character of the papers. Cleveland established that the President does—	90
President Theodore Roosevelt's administration—	90-93
Roosevelt proclaimed the principle that heads of the executive departments are subject to the Constitution, to the laws passed by Congress pursuant to the Constitution, and to the President's directions—	90
Roosevelt's vigorous assertion of the principle produced another historic debate on the relationship between Congress and the Executive—	90
Senate resolution directs Attorney General to inform Senate of reasons for not prosecuting United States Steel Corp.—	90
Roosevelt's special message informs Senate of his instructions to Attorney General not to furnish reasons for failure to prosecute—	91
Senate attempts to obtain the same information, by serving subpoena on head of Bureau of Corporations—	91
Committee threatened head of Bureau with imprisonment if he did not at once transmit papers and documents—	91
Head of Bureau of Corporations reports to President who orders him in writing to turn all papers over to the President—	91
Roosevelt informs chairman of Senate committee that he had the papers and the only way the Senate could get them was through his impeachment—	91
"I will see to it that the word of this Government to the individual is kept sacred," Roosevelt—	91
Roosevelt's position was fortified by decision of the Attorney General that the papers should not be made public—	91
Following both refusals to Senate committee, a resolution was introduced making every public document on the files of any department subject to inspection by the Senate—	92
The arguments of the proponents and opponents of the resolution summarized—	92
Where does Congress get authority under the Constitution and the laws "to order an executive department about like a servant?"—	93
Two striking points of agreement between proponents and opponents of resolution: (1) There was no law compelling heads of departments to give information, (2) if a department had refused there was no effective punishment which Congress could impose—	93
The same question of punishment for refusal was raised in the famous 1886 debate; it was conceded that there was no present or immediate remedy in case of refusal by the head of a department or the President—	93

<b>President Theodore Roosevelt's administration—Continued</b>	
Of what use therefore was a resolution of either House when the President may choose to ignore it?-----	Page 93
Resolution did not come to final vote-----	93
Professor Willoughby discusses the debates in Cleveland's and Roosevelt's administrations and concludes that the constitutionality of their positions was clear-----	93
<b>President Coolidge's administration-----</b>	<b>93-94</b>
Senate resolution to investigate Bureau of Internal Revenue-----	93
Coolidge's message to Senate: Duty of Executive to resist unwarranted intrusions by the Senate-----	94
<b>President Hoover's administration-----</b>	<b>94-95</b>
Secretary of State Stimson refuses documents relating to London Naval Treaty-----	94
Foreign Relations Committee adopts resolution dissenting from President's direction to Stimson and asserting right to information requested-----	94
Hoover's message to Senate: Compliance with resolution incompatible with public interest-----	94
House of Representatives' resolution requests Secretary of Treasury for testimony and documents concerning investigation conducted by Treasury Department-----	95
Secretary of Treasury writes Speaker of House that information was furnished Treasury in confidence. Incompatible with public interest to release it-----	95
<b>President Franklin D. Roosevelt's administration-----</b>	<b>95-101</b>
House resolution requested President for full transcript of press conference relating to United States Chamber of Commerce resolutions which criticized President's legislative program-----	95
Roosevelt wrote Speaker concerning inadvisability of creating precedent of sending to Congress text of biweekly conferences with newspapers-----	96
Chairman of House Naval Affairs Committee requests FBI for reports of investigations relating to strikes and subversive activities in labor disputes-----	96
Attorney General Jackson replied: The Department's position, restated with President's approval, is not to furnish investigative reports, in the public interest-----	96
Jackson points to four types of injurious results which would accompany disclosure-----	96
Cox committee, which investigated Federal Communications Commission, subpoenaed J. Edgar Hoover, Director, FBI-----	97
Hoover appeared and refused to produce directive from the President although he had a copy with him-----	97
Hoover's refusal based on President's direction not to testify and on advice of Attorney General-----	97
Communications between the President and the Attorney General are confidential-----	97
Although committee counsel urged that the questions to Hoover did not relate to national security, the Attorney General and Mr. Hoover, in their own judgment, decided that the questions did come within the President's directive-----	98
Director of the Bureau of the Budget, although subpoenaed by Cox committee, refused to produce files and correspondence-----	98
Director Smith stated that he felt compelled to carry out the orders of the Chief Executive-----	99
Director of Budget refused also to produce the documents at an executive session because of President's directions and for reasons given in Attorney General Jackson's opinion-----	99
Chairman of FCC, who was also Chairman of the Board of War Communications, appeared before Cox committee, pursuant to subpoena, but refused to produce records described in subpoena-----	99
General Counsel of FCC, also subpoenaed, refused to produce records although he had them in his possession-----	99
The Acting Secretaries of War and Navy received invitations by letter to furnish documents to Cox committee and to permit Army and Navy personnel, respectively, to testify-----	99

**President Franklin D. Roosevelt's administration—Continued**

	Page
Patterson and Forrestal replied to committee's request that the documents would not be delivered, as contrary to public interest.	100
Both also declined permission for Army officers and naval officers, active or inactive, to appear.	100
Chairman of Committee Cox, while critical of the Chief Executive for refusing heads of departments and members of Cabinet to furnish information and papers, thought it wise not to press the issue.	100
The precedent established by Theodore Roosevelt, to order subpenaed papers brought to the White House, followed by Budget Director Smith, whose papers were delivered to the White House.	100
Chairman of committee conceded a certain exemption "which had been granted to the executive departments for over 140 years".	99
Summary of precedents furnished by Franklin D. Roosevelt's administration.	100
<b>President Truman's administration</b>	101-104
Joint congressional committee established to investigate Pearl Harbor attack and authorized to require attendance of witnesses and production of books and papers.	101
Committee's investigation extended to files of executive departments.	101
President Truman advised chairman of committee concerning his instructions to furnish complete access to the files of the President.	101
President Truman by memorandum to four heads of departments excepted from an earlier memorandum requiring secrecy of information relating to Cryptanalytic Unit.	102
However, President qualified his memorandum, authorizing release of information which was "material to the investigation".	102
President addressed additional memorandum to chief executives of all departments requiring assistance to the committee and authorizing department heads to permit persons in their departments to give information relating to the investigation.	102
The final memorandum issued by the President for the chief executives of all executive departments authorized the heads of departments to permit persons to disclose to any of the members of the committee any information relating to the subject of the inquiry.	102
The memorandum of President Truman closed with the words: "This does not include any files or written material".	102
State Department advised committee that papers relating to "Tyler Kent case" were not pertinent to committee's inquiry.	103
Although the highest officers in the War and Navy Departments and the highest officials of the State Department were among the witnesses, the President's directives to department heads made those appearances possible.	103
President's directives did not strip the executive branch of a discretion, in a doubtful case, to withhold written files.	103
The joint committee report acknowledged fullest measure of cooperation from executive branch: Two Senators filed minority report severely critical of "Presidential restraint on their committee".	103
The tacit understanding of the majority of the joint committee, and the criticism of the minority, assumed the propriety of the President's instructions to the heads of departments.	103
Conclusions derived from activities of Pearl Harbor Joint Committee:	103
The President, in an investigation involving the Nation's security and its future safety from attack, assumed responsibility for guarding and directing heads of executive departments concerning oral testimony and written material to be furnished to committee.	104
In so doing President Truman merely exercised executive prerogative handed down by prior administrations.	104
Résumé and conclusions.	104, 105, 106
Bird's-eye view of actions of 17 Presidents, 1796 to date.	104, 105
Conclusions.	105, 106

**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 theory which justifies an uncontrolled discretion in the Executive:	Page
Woodrow Wilson, and Chief Justice Taft, quoted-----	106
<i>Marbury v. Madison</i> -----	106-108
Attorney General Lincoln points to delicate situation between his duty to court and duty to Executive-----	107
Court rules that Attorney General need not answer confidential com- munication-----	107
The rule of law stated: Court cannot control political discretion of Executive-----	107
The intimate political relation between the President and heads of departments-----	107
Where head of department performs an act requiring executive discre- tion, courts will not interfere-----	108
Marshall's statement of the principle decided by <i>Marbury v. Madison</i> -----	108
Trial of Thomas Cooper-----	108
Judge Chase of United States Supreme Court and Judge Peters refused to issue subpoena on President Adams for production of a letter-----	108
First recorded instance of an effort to issue process on President-----	108
Aaron Burr's trials-----	108-112
Judge Marshall orders President Jefferson by subpoena duces tecum to produce a letter-----	108
Judge Marshall also ruled that President may keep confidential, in the public interest, portions of letter-----	109
Court considers for the first time official and private papers-----	109
Jefferson's view that the judicial branch had no authority to issue process to Chief Executive-----	109
Jefferson made available portions of the letter for the Burr trial and instructed United States attorney to keep parts of it confidential-----	109
Jefferson's readiness to resist by force trespass by judiciary upon independence of Executive-----	109
The immunity claimed for himself, Jefferson also claimed for heads of departments-----	109
Jefferson's Secretaries of War and Navy did not attend trial, with correspondence covering many months with a variety of officers, although required by court to do so-----	109
Congressional committees, in citing the Burr case as a precedent for issuance of subpoena to Cabinet officer, overlook limitations of Marshall's rulings-----	110
A letter to the President in his private character might take on official stamp, with the right to keep it from public view-----	110
Marshall's decision concerning the propriety of issuance of subpoena against President attacked by constitutional law writers-----	110
Jefferson's legal position: President the sole judge of whether public interests will permit publication-----	110
Public and private side of the office of President-----	111
Jefferson's searching question: Would the Executive be independent of the judiciary if subject to its commands-----	111
Jefferson's precautions and steps to resist, by force, any efforts of Judge Marshall to enforce issuance of subpoena to himself and heads of departments-----	111
<i>United States v. Smith</i> -----	112
Jefferson directs Secretaries of State, War, and Navy not to appear at a trial nor to produce papers pursuant to subpoenas served upon them-----	112
Letter from three Cabinet members to the Court, explaining failure to honor subpoenas-----	112
<i>State of Mississippi v. Johnson</i> -----	112-113
Court illustrates executive and political duties of President. It will not enforce the performance of such duties-----	113
<i>Totten v. United States</i> -----	113
Court refused recovery for secret services rendered to Government, during Civil War, on ground that public policy forbade disclosure of the very existence of the contract-----	113

	Page
<i>Appeal of Hartranft.</i>	114
President and Cabinet officers not bound to disclose information when, in their own judgment, the disclosure would be inexpedient-----	114
Opinions of the Attorney General-----	114, 115 114
Attorney General Speed to President Lincoln----- Every author on the law of evidence treats transactions between heads of departments and their subordinate officers as privileged communications; the President and heads of departments are not bound to produce confidential information and papers-----	114 114
Attorney General Olney to President Cleveland----- The records of civil-service examiners may not be produced pursuant to subpoena issued by court-----	114 114
Attorney General Moody to Secretary of Commerce and Labor----- Commissioner General of Immigration not bound to appear and testify in obedience to subpoena issued by court-----	114, 115 115
A practical suggestion: To appear and arrange for testimony by deposition in his own office-----	115 115
Attorney General Bonaparte to head of Bureau of Corporations, Department of Commerce----- Department head not obliged to deliver papers, pursuant to subp <sup>e</sup> na of Senate committee. Papers should be delivered to President, for his decision-----	115 115
Attorney General Jackson to chairman of House Committee on Naval Affairs----- Federal Bureau of Investigation records are confidential records in the executive branch, and will not be made public by release to committee-----	115 115
Senator Jackson's summary----- Summary of the reasons which prevent disclosure of confidential information by the executive branch, both to the judiciary and the legislature, Senator Jackson's statement in the famous 1886 debate-----	115 115
The famous Seward case----- A practical application of the principle cited by Jackson. The House Judiciary Committee absolved Seward from contempt for failure to testify and to produce papers-----	115, 116 115
Judiciary Committee report stated: "The Executive is as independent of either House of Congress as either House of Congress is inde- pendent of him"-----	116
The head of the executive department must be the judge, in a doubtful case, upon his own responsibility to the people and to the House-----	116

#### THE VIEWS OF TEXT WRITERS

Dean Wigmore: A privilege of secrecy in general exists for official doc- uments, and for communications between officials-----	116
Edward S. Corwin, The President, Office and Powers: Neither the President nor the Secretary of State is ever directed by the House to furnish information and papers, but only requested to do so, if public interest will permit-----	117, 118
Presidents have intervened in behalf of heads of departments and lesser officials-----	117
Criticism of Professor Corwin's opinion that failure by Cabinet officer to appear pursuant to subpoena issued by congressional committee might lead to contempt-----	117
Edward Campbell Mason, Congressional Demands Upon the Executive for Information----- 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-----	118
John Philip Hill, The Federal Executive----- Courts cannot usually call upon heads of departments to answer in relation to official acts-----	118 118
Willoughby, The Constitutional Law of the United States, and John H. Finley and John F. Sanderson, The American Executive and Execu- tive Methods, said: The President has always exercised a discretion as to giving or withholding information upon request of either House, and heads of departments may decline to furnish papers-----	119
	119

	Page
Herman Finer, joint committee print on The Organization of Congress--	119
The President could protect any departmental chief who asked him for protection, and the President himself is immune from compulsion respecting delivery of information and papers-----	119
Ernest J. Eberling, Congressional Investigations-----	119
The decision of the Executive in case of a dispute with Congress must necessarily be final-----	119
Conclusion-----	120

### III. THE CONSTITUTION AND THE STATUTES CREATING THE EXECUTIVE DEPARTMENTS

Constitutional provisions concerning the Executive power, the execution of the laws, and heads of departments-----	120-121
Attorney General Cushing's opinion on the organization of the departments-----	121
Departments of Foreign Affairs, War, Treasury, and Office of the Attorney General, established by First Congress, in 1789-----	121
None of the departments, except Treasury, was required to give information to the two Houses of Congress-----	121
The establishment of the Department of Interior and the Office of Postmaster General-----	121
Cushing's opinion on relation of the President to the executive de- partments-----	122
Heads of departments are executors of the will of the President; they are subject to his direction-----	122
May Congress pass law compelling heads of departments to give information against President's wishes-----	122
The establishment of the Departments of Agriculture, Labor, and Commerce-----	123
Summary of acts creating the 10 executive departments—their function to aid the President, as Chief Executive Officer of the Nation-----	124
Despite wording of acts creating Treasury Department and Agri- culture, Labor, and Commerce Departments, requiring them to furnish information to Congress, they are executive departments, with paramount obligations to the President-----	124
Illustrations of refusals by Treasury Department, in administrations of Coolidge, Hoover, and Hayes, to give information to Senate-----	124-125
Heads of departments may refuse blanket calls for information by Congress: Alexander Hamilton's view-----	125
Attorney General Cushing's view-----	125
To coerce the head of a department is to coerce the President-----	125
Only a law, constitutional in its nature, can coerce the President or head of a department-----	125
Illustration: Secretary of Agriculture Anderson refused to reveal to congressional committee names of persons dealing in com- modities, unless authorized by a resolution passed by both Houses and signed by the President-----	125-226
The Civil Service Commission records:	
Creation of the Civil Service Commission in 1883-----	126
The Commission is a "Department" within meaning of Constitu- tion-----	127
The records of the Civil Service Commission are confidential, and like all investigative records of the Government cannot be revealed to congressional committees-----	127
Joint resolution introduced in House, January 7, 1948, designed to furnish to House committee records of the Commission-----	128
The joint resolution violates precedent, and is of doubtful con- stitutional validity-----	128

**The Civil Service Commission records—Continued**

Concluding statement: *In re Neagle, Myers v. United States* and *Humphrey's Executor v. United States* hold that Chief Executive has an exclusive and illimitable power to control his subordinates... 128-129  
 The fundamental necessity of keeping each of the three departments of Government entirely free from the control or coercive influence of either of the others... 129

The President's discretion in the national public interest, in directing his executive subordinates to withhold confidential information... 129

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

Title 2, United States Code, sections 102, 103, 104, derived from sections 102, 103, 104 of Revised Statutes	130
Every person summoned to appear before either House must give testimony and produce papers	130
The foregoing sections apply to private individuals, not to the executive departments	131
Title 5, United States Code, section 105a: Information furnished committees of Congress on request	131
The legislative history of section 105a shows that the Committee on Expenditures in the Executive Departments may demand from heads of departments information previously available to them in the reports of the executive departments	131
Section 105a effects no change in the discretionary right of heads of departments to keep information and records confidential	132
Sections 134 (a) and 136 of the Legislative Reorganization Act of 1946	132
Section 134 (a) gives each standing committee of the Senate authority to subp <sup>e</sup> na witnesses to produce papers	132
Section 136 provides for each standing committee of the Senate and the House to exercise continuous watchfulness of the execution of all laws by the administrative agencies	133
Following debate in Senate, Senator LaFollette yielded to Senator Donnell's persuasive argument: Under our type of government the legislative branch could not make the executive departments subservient to it; the word "surveillance" which was originally in section 136 was striken out and the word "watchfulness" substituted therefor	134
Senator McClellan's amendment, which would have enabled a joint committee of the two Houses to subp <sup>e</sup> na any employee of the Federal Government, and to compel production of papers by Government agencies, was rejected	134
Conclusion: The legislative history of sections 134 (a) and 136 point to no fundamental change in the laws and the right of the executive departments to withhold confidential papers	135
Department regulations concerning the use of records—Title 5, United States Code, section 22	135
The head of each department is authorized to provide regulations for the custody and use of the records and papers of his department	135
Attorney General Moody's statement on the broad discretion possessed by each head of department concerning records	135
Section construed in <i>Boske v. Comingore</i> and <i>Ex Parte Sacket</i> :	
The United States Supreme Court sustained a rule of the Treasury Department which took from a collector all discretion concerning use of records for any purpose other than collection of revenues	135
Attorney General's power to make rules concerning papers in his department upheld, agent of Federal Bureau of Investigation refused to produce records under subp <sup>e</sup> na in court proceeding	135
Section 1076, Revised Statutes: Court of Claims may call upon departments for information or papers, but head of any department may refuse to comply, in the public interest	136
Title 5, United States Code, section 488: Secretary of the Interior, when not prejudicial to Government's interest, may furnish copies of official papers	136

	Page
Some leading decisions: <i>Anderson v. Dunn</i> , <i>Kilbourn v. Thompson</i> , <i>In re Chapman</i> , <i>McGrain v. Daugherty</i> , <i>Sinclair v. United States</i> -----	136
The foregoing cases involve the powers of the House or the Senate to punish a private individual for contempt because of a refusal to obey a subpoena-----	136
Since the Senate and House eventually retreated upon the flat refusal of the executive departments to answer questions, the legal problems have not been presented to the courts-----	136.
How is the Supreme Court likely to decide the issue concerning the withholding of confidential papers by the executive branch?-----	136
<i>McGrain v. Daugherty</i> discussed: Case involved the right of private individual to refuse to obey subpoena of Senate committee. The Court's holding was predicated on a practice by the legislative branch, long continued, to summon private persons before the Houses of Congress-----	136-138
Court points to admissible measures of relief, if Congress oversteps proper bounds, as in <i>Kilbourn v. Thompson</i> , and <i>Marshall v. Gordon</i> -----	138
Kilbourn case holds that Congress may not punish a private person for contempt, if matter concerning which inquiry is sought by Congress was then pending in court-----	138
Marshall case holds that Federal district attorney could not be punished for contempt of House, because he sent an ill-tempered letter calculated to arouse the indignation of the House-----	138-139
Conclusions to be drawn from the Daugherty case:	
(1) Supreme Court has not hesitated to reject improper assertions of congressional power against private persons-----	139
(2) Since 1796, executive branch has asserted right to say "no" to Houses of Congress-----	139
(3) Since 1800, decisions have held that the President or head of department need not give testimony or produce papers which required secrecy-----	139
(4) Never in our history has either House taken steps to enforce requests for production of testimony or documents-----	139
The foregoing point to a practical construction, long continued, of the constitutional provisions respecting their powers by the executive and legislative branches-----	139
United States Supreme Court could not lightly pass over 150 years of legislative acquiescence in a power asserted by the Executive-----	139
Daugherty and Sinclair cases prescribed bounds of power which Congress and its committees may not exceed. The rights of private persons guarded "by fundamental law"-----	140
Rights of executive branch guarded by same fundamental law, the Constitution, which declares the executive branch to be independent of the other two branches, and gives it right to resist unbounded assertions of inquiry-----	140
Supreme Court's ruling that private witnesses may rightfully refuse to answer applies to President and heads of departments who have their rights, not to answer improper inquiries-----	140
President Truman's directive to officers and employees in the executive branch-----	140
President Truman, by memorandum of March 13, 1948, directs officers and employees in the executive branch to send subpoena requests to President-----	140
The Federal employees loyalty program: policy of administration to carry out that program on confidential basis-----	141
The Condon episode primary reason for issuance of President's memorandum-----	141
House Committee on Un-American Activities released report charging disloyalty by Condon-----	141
Secretary of Commerce refused to make available confidential files relating to loyalty investigation with regard to Dr. Condon-----	141

	Page
Resolution directing all executive departments to furnish information to House and Senate committees (H. J. Res. 342)-----	141
Resolution aims at coercion of executive departments-----	142
Tested by Supreme Court decisions, resolution constitutes unconstitutional encroachment by legislative branch upon executive branch-----	142
Concluding statement: Statutes designed to compel testimony and production of records affect only private individuals—not the executive departments or their officials-----	142
Clear import of Daugherty and Sinclair cases—United States Supreme Court will not sanction unrestrained inquiry of the executive branch by Houses of Congress-----	142
Conclusions-----	143-146

## 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*,<sup>1</sup> and has been reaffirmed in *Cunningham v. Neagle*<sup>2</sup> and *Meyers v. United States*.<sup>3</sup> 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

<sup>1</sup> 1 Cranch, 137, 143-144.

<sup>2</sup> 135 U. S. 1, 63.

<sup>3</sup> 272 U. S. 132-135.

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.<sup>4</sup>

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

\* 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.<sup>5</sup> 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.

<sup>5</sup> 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, and 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

<sup>6</sup> Richardson, Messages and Papers of the President, vol. VII, p. 362.

<sup>7</sup> Ibid., p. 363.

<sup>8</sup> Our Chief Magistrate and His Powers, William Howard Taft, 1916, p. 130.

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.<sup>9</sup>

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.<sup>10</sup>

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

<sup>9</sup> Congressional Record, vol. 17, pp. 2211-2814, March 9 through March 26, 1886.

<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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

<sup>11</sup> For 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.

<sup>12</sup> Ibid., p. 62, Grover Cleveland, Presidential Problems.

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.<sup>13</sup>

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

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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."<sup>17</sup> 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

<sup>14</sup> Ibid., pp. 839, 1762 (1909).

<sup>15</sup> 43 Congressional Record 849.

<sup>16</sup> 43 Congressional Record 842.

<sup>17</sup> 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.* (Italic 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 cases<sup>18</sup> in support. Senator Dolliver replied that those cases involved *private* citizens who had refused to appear and give testimony before committees of the Senate,<sup>19</sup> 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 849 (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.<sup>20</sup>

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.<sup>21</sup>

#### 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

<sup>18</sup> See footnote 17 on p. 92.

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

<sup>20</sup> 43 Congressional Record 3730 (1909).

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

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.<sup>21</sup>

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 treaty-making 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

<sup>21</sup> 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, McGeary, 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.<sup>22</sup> 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 26, 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, 1935, 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

<sup>22</sup> 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."<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup>

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.

<sup>23</sup> 79 Congressional Record 7002 (1935).

<sup>24</sup> Ibid., p. 7186.

<sup>25</sup> 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 subpoena. Mr. Hoover was not required by the subpoena 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.<sup>26</sup> 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.

\* \* \* \* \*

<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

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.<sup>31</sup>

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

<sup>27</sup> Vol. 40, Opinions, A. G., No. 8.

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

<sup>29</sup> Ibid., 39.

<sup>30</sup> Vol. 40, Opinions, A. G., No. 8, April 30, 1941.

<sup>31</sup> 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.<sup>ss</sup>

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.<sup>ss</sup>

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

<sup>ss</sup> 90 Congressional Record 2111.

<sup>ss</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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."

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

<sup>35</sup> 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.<sup>28</sup>

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.<sup>29</sup>

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."<sup>30</sup>

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

<sup>28</sup> Ibid., joint committee report, p. 286.

<sup>29</sup> Ibid., joint committee report, p. 287.

<sup>30</sup> P. xi, foreword, joint committee report, supra.

were made available to the committee, following instructions from the President.<sup>40</sup>

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.<sup>40</sup>

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.<sup>41</sup>

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.<sup>42</sup>

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.*"<sup>42</sup> 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.<sup>42</sup>

The foregoing criticism of the minority, that "the joint committee was hedged about with troublesome qualifications and restraints"<sup>42</sup> 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

<sup>40</sup> Ibid.. xiv, introductory statement of the joint committee report.

<sup>40</sup> Ibid., p. xv, introductory statement of the joint committee report.

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

<sup>42</sup> 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.<sup>43</sup> 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:<sup>44</sup>

<sup>43</sup> For the Senate debate which accompanied the President's directions to the Cabinet officers and heads of departments, see 91 Congressional Record 10588-10594 (1945).

<sup>44</sup> 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.
	1842	List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler-----	1843	Names of Members of 26th and 27th Congresses who applied for office. Report to War Department dealing with alleged frauds practiced on Indians, and Colonel Hitchcock's views of personal characters of Indian delegates.
James K. Polk-----	1846	Evidence of payments made through State Department, on President's certificates, 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. Documents of Bureau of Corporations, Department of Commerce.
Calvin Coolidge-----	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover-----	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	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.<sup>45</sup> Historical precedents detailed by

<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

## 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*,<sup>48</sup> 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*,<sup>49</sup> defines the limits at which a court must stop when the head of a department invokes the privilege that the informa-

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

<sup>47</sup> "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 alined themselves with the Executive" (W. E. Binkley, President and Congress, p. 167).

<sup>48</sup> 272 U. S. 52, 132-135.

<sup>49</sup> 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?"<sup>50</sup>

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 SUBPENA 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

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<sup>50</sup> 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 subpena. 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 subpena, 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.<sup>61</sup>

The subpena 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

<sup>61</sup> 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.<sup>52</sup>

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<sup>ea</sup>na 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.<sup>53</sup>

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<sup>ea</sup>na 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<sup>ea</sup>na 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.<sup>54</sup> It is curious that Judge Marshall stated, in his opinion, that he was not familiar with any case which held that a subp<sup>ea</sup>na cannot issue to the President.<sup>55</sup> Marshall apparently ignored or was not familiar with the decision which had been

<sup>52</sup> Ibid., pp. 56-57, letter, Jefferson to Hay, June 17, 1807.

<sup>53</sup> Ibid., *Burr's Trials*, vol. 1, p. 187.

<sup>54</sup> 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. 328; 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. I, *Introduction XXXVII*; vol. 3, U. M. Rose, pp. 132-133.

<sup>55</sup> *Burr's Trials*, vol. I (Robertson), p. 181.

made by the court in the trial of Thomas Cooper,<sup>56</sup> 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; \* \* \*<sup>57</sup>

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.<sup>58</sup>

The President was prepared to resist, by force if necessary, the execution of the process of the court.<sup>59</sup> 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 preeminence, & every individual also from judiciary vengeance, and the marshal may be assured of it's effective exercise to cover him.<sup>60</sup>

<sup>56</sup> See p. 122 of this memorandum.

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

<sup>58</sup> Ibid., p. 60.

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

<sup>60</sup> 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. \* \* \*<sup>6</sup>

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).

<sup>6</sup> 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 HARTRANFT (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 outstart 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. \* \* \*<sup>22</sup>

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, it 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-

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<sup>22</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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

<sup>63</sup> See pp. 91 and 92 of this memorandum, and 27 Op. A. G. 150 (1909).

<sup>64</sup> Vol. 40, Op. 8 A. G. (1941). See also p. 96 of this memorandum.

<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup>

The report appears to have been adopted by the House.<sup>68</sup> 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

<sup>66</sup> Ibid., Rept. No. 141, p. 3, 45th Cong., 3d sess.

<sup>67</sup> Ibid., pp. 3-4.

<sup>68</sup> 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 subpena; 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.<sup>60</sup> 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).

<sup>60</sup> "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*,<sup>70</sup> 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.<sup>71</sup>

Herman Finer<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup>

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

<sup>70</sup> Vol. 3, sec. 968.

<sup>71</sup> Finley and Sanderson, pp. 199, 264.

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

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

<sup>74</sup> *Ibid.*, p. 56.

<sup>75</sup> *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:<sup>76</sup> 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,<sup>77</sup> that the restraints imposed by the Constitution and the courts, as voiced by Judge Marshall in *Marbury v. Madison*,<sup>78</sup> 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."<sup>79</sup>

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—<sup>80</sup>

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

<sup>76</sup> See p. 111 of this memorandum.

<sup>77</sup> See p. 115 of this memorandum.

<sup>78</sup> See p. 106 of this memorandum.

<sup>79</sup> Art. II, sec. 1, clause 1.

<sup>80</sup> Art. II, sec. 1, clause 7.

<sup>81</sup> 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.<sup>82</sup>

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."<sup>83</sup>

Attorney General Cushing, in an opinion to the President, dealt at length upon the organization of the various departments of the executive branch.<sup>84</sup>

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-

<sup>82</sup> Art. II, sec. 2, clause 2.

<sup>83</sup> Art. II, sec. 2, clause 2.

<sup>84</sup> 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."<sup>85</sup> 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.

<sup>85</sup> 7 Ops. A. G. 453.

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 Cushing 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.<sup>86</sup>

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.<sup>87</sup>

In 1903, a Department of Commerce and Labor was established as an executive department.<sup>88</sup> 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.<sup>89</sup>

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 subp<sup>e</sup>na, and he defied the Senate committee to do its worst.<sup>90</sup>

<sup>86</sup> May 29, 1928, 45 Stat. 993.

<sup>87</sup> 25 Stat. 183, sec. 8.

<sup>88</sup> 32 Stat. 825.

<sup>89</sup> 32 Stat. 828.

<sup>90</sup> See pp. 104-106 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,<sup>91</sup> 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.<sup>92</sup> 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,<sup>93</sup> 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.<sup>94</sup> Both of those conflicts were resolved in favor of the Executive. Papers demanded of heads of departments by resolutions, by committees, and by subp<sup>ea</sup>na were not produced. It was admitted during those 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,<sup>95</sup> 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-

<sup>91</sup> March 4, 1913, 37 Stat. pp. 736 and 738.

<sup>92</sup> Secs. 512, 591, 611 of title 5 of U. S. C.

<sup>93</sup> Attorney General Cushing to the President, on the Relation of the President to the Executive Departments, 7 Op. A. G. 453, 460.

<sup>94</sup> For summaries of the arguments during those debates, see pp. 88-90 and 92 of pt. I of this memorandum.

<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup>

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. 682-88).

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

<sup>96</sup> See pp. 93-95 of this memorandum.

<sup>97</sup> 17 Congressional Record 2332 (1886), 2618.

<sup>98</sup> 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.<sup>99</sup> 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,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

In view of the public statements by both President Truman and Secretary of Agriculture Anderson on the subject of speculation in commodities,<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

<sup>99</sup> Public Law 392, ch. 523, 80th Cong., 1st sess.

<sup>1</sup> 7 U. S. C. 12; 42 Stat., sec. 8, p. 1003.

<sup>2</sup> 93 Congressional Record 11738, 11739, Dec. 18, 1947.

<sup>3</sup> 93 Congressional Record 11735-11743, Dec. 18, 1947.

<sup>4</sup> 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 10704.

<sup>5</sup> January 16, 1883, 22 Stat. 403; 5 U. S. C. 632.

<sup>6</sup> 5 U. S. C. 631, 633 (1).

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> and of sound public administration, to keep the word of the Government to the individual sacred.<sup>11</sup> Hence, the case would have to be an extraordinary

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

<sup>9</sup> 22 Op. A. G. 62.

<sup>10</sup> 40 Op. A. G. No. 8, April 30, 1941, p. 2.

<sup>11</sup> See President Theodore Roosevelt's classic statement, p. 91 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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

<sup>12</sup> H. J. Res. 289, 80th Cong., 2d sess.

<sup>13</sup> See Tyler's Message to the House of Representatives, p. 82 of this memorandum.

<sup>14</sup> See the quotations from William Howard Taft and Attorney General Jackson, pp. 78, 96 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.<sup>15</sup> 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.<sup>16</sup>

*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,<sup>17</sup> it was freely admitted that there

<sup>15</sup> 52 Stat. 942-3.

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

<sup>17</sup> See pp. 88, 92 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.<sup>18</sup> 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-

<sup>18</sup> See p. 93 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:<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup> 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 1946<sup>22</sup> defines the duties of the Committee on Expenditures in the Executive Departments in both the House and the Senate.<sup>23</sup> 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 subpoena or otherwise the attend-

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

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

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

<sup>22</sup> Ch. 753, Public Law 601, approved August 2, 1946, 79th Cong.

<sup>23</sup> 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.<sup>24</sup> 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 subpoena, 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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

<sup>25</sup> Ibid., p. 6.

<sup>26</sup> 92 Congressional Record, 6441-6447.

<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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

<sup>28</sup> Ibid., p. 6446.

<sup>29</sup> 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.<sup>30</sup>

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

<sup>30</sup> *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)
- Kilbourne 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.<sup>31</sup> 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.<sup>32</sup>

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,<sup>33</sup> to withhold confidential papers from the legislative branch, and the latter's acquiescence in that practice?

<sup>31</sup> 273 U. S. 135, 177.

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

<sup>33</sup> See p. 105 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,<sup>34</sup> the statutes relating to the compulsion of the testimony of private persons<sup>35</sup> and the court decisions,<sup>36</sup> 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].

<sup>34</sup> See p. 78 of this memorandum.

<sup>35</sup> Rev. Stats. 102, 103, 104. See p. 130 of this memorandum.

<sup>36</sup> *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. 136 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* case<sup>37</sup> 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*,<sup>38</sup> 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

<sup>37</sup> See p. 136 of this memorandum.  
<sup>38</sup> 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.<sup>39</sup>

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,<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

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.<sup>43</sup> 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

<sup>39</sup> See résumé and conclusions, p. 118.

<sup>40</sup> See p. 122 of this memorandum.

<sup>41</sup> See pp. 106-114 of this memorandum.

<sup>42</sup> See p. 93 of this memorandum.

<sup>43</sup> 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."

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

"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,<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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,<sup>48</sup> 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)<sup>49</sup>**

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.

<sup>45</sup> Executive Order No. 9835 of March 21, 1947.

<sup>46</sup> See résumé and conclusions, p. 118.

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

<sup>48</sup> Executive Order No. 9835, pt. I, sec. 1.

<sup>49</sup> 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."<sup>50</sup> 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,<sup>51</sup> and by the action of both Houses of Congress,<sup>52</sup> 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.

<sup>50</sup> 92 Congressional Record 6344 (1946).

<sup>51</sup> See pp. 128, 129 of this memorandum.

<sup>52</sup> See the action of the Judiciary Committee of the House, in the Seward case, pp. 115-116 of this memorandum.

## V. CONCLUSIONS

We stated in the introduction<sup>53</sup> 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.<sup>54</sup> President Jackson had to deal with a militant and powerful Whig Senate minority, very persuasive in debate, headed by Senators Webster, Clay, and Calhoun.<sup>55</sup> President Grant faced a swarm of committees from the Democratic House of Representatives who were investigating the executive departments.<sup>56</sup> President Hayes had difficulty with a Democratic House of Representatives, President Cleveland with a Republican Senate, and President Hoover with a Democratic House.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> 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-

<sup>53</sup> See pp. 75-76 of this memorandum.

<sup>54</sup> Binkley, *President and Congress* (1947), p. 38.

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

<sup>56</sup> Allan Nevins, *Hamilton Fish*, 812-813; see also p. 87 of this memorandum.

<sup>57</sup> 17 *Congressional Record* 2331, 2445; Charles and Mary Beard, *Basic History of the United States*, p. 454; see also p. 88 of this memorandum.

<sup>58</sup> 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.

<sup>59</sup> Richardson, *Messages and Papers of the President*, vol. 1, p. 195.

<sup>60</sup> 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, \* \* \*.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup>

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.<sup>66</sup>

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

<sup>61</sup> See p. 80 of this memorandum, Richardson, *Messages and Papers of the President*, vol. 1, pp. 213, 219.

<sup>62</sup> Robert Luce, *Legislative Problems* (1935), p. 587.

<sup>63</sup> See pp. 78-104 of this memorandum, and résumé of pt. I at p. 118.

<sup>64</sup> See pp. 121 and 125 of this memorandum.

<sup>65</sup> *Ibid.*, p. 90.

<sup>66</sup> *Ibid.*, pp. 76, 106-107.

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.<sup>67</sup>

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*<sup>68</sup> 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.<sup>69</sup>

(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 country<sup>70</sup> and the debates in Congress<sup>71</sup> 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-

<sup>67</sup> See *Myers v. U. S.* discussed at p. 129 of this memorandum.

<sup>68</sup> Discussed at pp. 188-140 of this memorandum.

<sup>69</sup> See *Kilbourn v. Thompson* and *Marshall v. Gordon*, discussed at pp. 138-139 of this memorandum.

<sup>70</sup> See résumé and conclusions, pp. 118 ff. of this memorandum.

<sup>71</sup> See pp. 92, 93 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.<sup>72</sup>

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.<sup>73</sup>

10. Paraphrasing President Jefferson's crucial question:<sup>74</sup> 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.

## APPENDIX EXHIBIT NO. 11

THE FEDERAL BAR ASSOCIATION,  
Washington, D. C., March 5, 1958.

MR. CHARLES H. SLAYMAN, JR.,

*Chief Counsel and Staff Director, United States Senate, Subcommittee on Constitutional Rights, Washington, D. C.*

DEAR MR. SLAYMAN: This is in reply to your letter of March 5 in which you state that the Subcommittee on Constitutional Rights would like to publish an article which appeared in the April, July, and October, 1949, issues of the Federal Bar Journal, written by Herman Wolkinson and entitled, "Demands of Congressional Committees for Executive Papers."

This will confirm my conversation with Mr. William D. Patton, Assistant Counsel of the subcommittee, in which I indicated to him that the editors of the Journal would give such approval.

The editors of the Journal hereby grant full approval for the publication of this article by the subcommittee.

Sincerely,

ANDREW P. MURPHY,  
*Editor in Chief.*

<sup>72</sup> Ibid., pp. 132-135.

<sup>73</sup> Pp. 88-89 of this memorandum.

<sup>74</sup> "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. 111 of this memorandum.

# The FEDERAL BAR JOURNAL

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Due to circumstances beyond our control, the January number of The Federal Bar Journal will not be printed. Subscriptions will be extended to include the October 1949 number as No. 4 of Volume X.

## CONTENTS

### ARTICLES

<i>Demands of Congressional Committees for Executive Papers</i> , Herman Wolkinson .....	103
<i>State Censorship of Television</i> , Philip Bergson.....	151
<i>Elimination of Trade Barriers Based Upon Trade-Marks</i> , John C. Stedman .....	162
<i>Procedures in the United States for the Admission, Exclusion and Expulsion of Aliens</i> , Albert E. Reitzel.....	174
<i>CURRENT DECISIONS OF THE COMPTROLLER GENERAL CONCERNING FEDERAL EMPLOYEES</i> , Ralph E. Casey.....	190

### BOOK REVIEWS

<i>Cutler: Successful Trial Tactics</i> , Malcolm A. Hoffmann.....	213
<i>Atkinson and Chadbourne: Cases and Material on Civil Procedure</i> , John Guandolo.....	215
<i>Michael: The Elements of Legal Controversy</i> , Hubert H. Margolies .....	216
<i>Guandolo and Kennedy: Federal Procedure Forms</i> , Isidor Lazarus .....	217

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# DEMANDS OF CONGRESSIONAL COMMITTEES FOR EXECUTIVE PAPERS

HERMAN WOLKINSON\*

## Part I\*\*

### INTRODUCTION

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 one of the three great branches of the Government, to subject either of the other two 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

\* Of the New York and Supreme Court Bars, Attorney, Department of Justice. The views expressed herein are those of the author and do not necessarily represent the position of the Department of Justice.

\*\* Part I of the article discusses Presidential Action following Congressional demands for information and papers. Part II, which will be printed subsequently, will discuss the Court Decisions and Constitutional Provisions and Statutes relating to the subject.

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 either House 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 House or the Senate 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 in a spirit of good sense and harmony each of the branches normally stays within its proper jurisdiction, and does not seek to dominate the others. This is not to say that there are instances lacking where demands for information, deemed unreasonable 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 relatively few. Generally, the great conflicts have 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. Where demands for information or papers have become the subject of court decisions, we have those cases 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.

Our study of Presidential action shows that 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. William Howard Taft thus expressed himself on this subject, following his retirement from the presidency and prior to his appointment as Chief Justice:

"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."<sup>1</sup>

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 President 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.

A study of court decisions, opinions of the Attorneys General and authoritative text writers 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.

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<sup>1</sup> Wm. Howard Taft "Our Chief Magistrate and His Powers", p. 129.

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*,<sup>2</sup> and has been reaffirmed in *Cunningham v. Neagle*<sup>3</sup> and *Meyers v. United States*.<sup>4</sup> 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.

Finally, 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 de-

<sup>2</sup> 1 Cranch, 137, 164, 168-70.

<sup>3</sup> 135 U. S. 1, 63.

<sup>4</sup> 272 U. S. 132-135.

partment, 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 the 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 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

#### *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."<sup>4</sup>

This was the first time that a committee of Congress was appointed to look into a matter which involved the executive

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<sup>4</sup> 3 Annals of Congress, p. 493.

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.<sup>6</sup>

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:

"1. that the House was an inquest, & therefore might institute inquiries. 2. that they might call for papers generally. 3. 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. 4. 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."

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

<sup>6</sup> Binkley, "President and Congress" pp. 40-41.

<sup>7</sup> Writings of Thomas Jefferson, (Ford), 1892, Vol. 1, pp. 189-90.

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.<sup>8</sup>

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.<sup>9</sup>

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 monies 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.<sup>10</sup>

<sup>8</sup> "President and Congress", Wilfred E. Binkley (1947), p. 44.

<sup>9</sup> Richardson's "Messages and Papers of the Presidents", Vol. 1, p. 194.

<sup>10</sup> *Ibid.* 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 encroachment 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.<sup>11</sup>

### *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."<sup>12</sup>

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

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<sup>11</sup> Richardson's "Messages and Papers of the Presidents", Vol. 1, p. 219.

<sup>12</sup> 16 Annals of Congress (1806-1807), p. 336.

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."<sup>13</sup>

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.<sup>14</sup>

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

<sup>13</sup> Richardson's "Messages and Papers of the Presidents", Vol. 1, p. 412, dated January 22, 1807.

<sup>14</sup> Richardson's "Messages and Papers of the Presidents", Vol. 3, p. 36.

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."<sup>15</sup>

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; \* \* \*"<sup>16</sup>

<sup>15</sup> *Ibid.*, p. 133.

<sup>16</sup> *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 by 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.

On January 17, 1837, the House of Representatives adopted a resolution to investigate the condition of the executive departments concerning their integrity and efficiency. The chairman of a select committee of the House appointed to inquire into the condition of the executive departments requested the President and heads of departments

to furnish this committee with a list or lists of all officers, or agents, or deputies, who have been appointed, or employed and paid, since the 4th of March, 1829, to the 1st of December last \* \* \* by the President, or either of the said heads of departments, respectively, and without nomination to or the advice and consent of the Senate of the United States; showing the names of such officers, or agents, or deputies; the sum paid to each; the services rendered; and by what authority appointed and paid; and what reasons for such appointments.<sup>17</sup>

Letters were addressed to the Committee by the Secretary of State, by the Postmaster General, by the Secretary of the Treasury and by the Secretary of the Navy, in which they refused to give the information requested of their respective departments. The Secretary of State wrote:

Department of State  
January 28, 1837

\* \* \* It is proper that I should remind the committee that the Secretary of State is not and cannot be put officially under the direction of any committee of Congress. As a witness, he is, like any other citizen, subject to be called upon questions touching the actual or contemplated impeachment of the Chief Magistrate, or other officer of Government, for violations of constitutional obligations. In calls for information even, it is the duty of the head of this department to withhold it, if any should be asked for concerning portions of its

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<sup>17</sup> 13 Cong. Debates, Pt. 2 (1837), App., p. 201.

business, until directed to furnish it by the President of the United States. \* \* \*<sup>18</sup>

JOHN FORSYTH

President Jackson wrote the Chairman of the committee that no specific charges or specifications were made against the heads of the departments nor against the way in which they conducted the public business. He added that if the Chairman of the committee was able "to point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be open to you and every proper facility furnished for this purpose." However, he vigorously asserted the right of the department heads to withhold the lists requested:

"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." \* \* \*

"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."<sup>19</sup>

#### *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 twenty-sixth and twenty-seventh 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:

<sup>18</sup> *Ibid.*, p. 208.

<sup>19</sup> *Ibid.*, p. 202.

"\* \* \* 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."<sup>20</sup>

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 practised 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

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<sup>20</sup> Richardson—Messages and Papers of the Presidents, Vol. 4, pp. 105-106.

the Department of War by Lieutenant Colonel Hitchcock on 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 that the report sought by the House 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; that the Department had not been given sufficient opportunity to pursue the investigation, to call the parties affected for explanations, or to determine on the proper measures 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 this subject, stated that the negotiations with the Cherokee Indians had terminated since the Secretary of War had written 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 Colonel Hitchcock's suggestions and projects respecting 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 as to 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."<sup>21</sup>

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 can not 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. Imperitiveness 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?

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<sup>21</sup> Hinds' Precedents of the House of Representatives, v. 3 (1907), p. 181.

"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."<sup>22</sup>

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 can not 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."<sup>23</sup>

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

<sup>22</sup> *Ibid.*, pp. 181-182.

<sup>23</sup> *Ibid.*, p. 182.

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.

### *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."<sup>24</sup>

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<sup>24</sup> 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.<sup>25</sup>

The foregoing illustrates the principle that what a past President has done dies with him.<sup>26</sup> 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

\* *Ibid.*, pp. 433-434.

\*\* 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.)

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.

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."<sup>27</sup>

### *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,

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<sup>27</sup> Richardson—Messages and Papers of the Presidents, Vol. 5, pp. 618-619.

by resolution, requested the President to inform the House whether any executive offices, acts, or duties, and, if any, what acts had 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 seven 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.<sup>29</sup>

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.<sup>30</sup>

It appears that the House request was a political move to embarrass President Grant by reason of his having spent some of the hot months at Long Branch.<sup>31</sup>

<sup>29</sup> Richardson—Messages and Papers of the Presidents, Vol. VII, p. 362.

<sup>30</sup> *Ibid.*, p. 363.

<sup>31</sup> Our Chief Magistrate and His Powers, William Howard Taft, 1916, p. 130.

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 two 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.<sup>31</sup>

For approximately twenty-five 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 office holders 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.<sup>32</sup>

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 suspension of officers whose places

<sup>31</sup> Congressional Record, Vol. 17, pp. 2211-2814, March 9 through March 26, 1886.

<sup>32</sup> Grover Cleveland, *Presidential Problems—"The Independence of the Executive,"* pp. 43 ff.

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 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 promoted by compliance with the resolution." The great debate to which we have referred then took place in the Senate.<sup>58</sup>

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

<sup>58</sup> For 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, 52nd Cong. 2nd 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.

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 at the price of their creation.<sup>34</sup> 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 asserted:

"The request 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 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."<sup>35</sup>

<sup>34</sup> *Ibid.*, p. 62—Grover Cleveland, "Presidential Problems."

<sup>35</sup> *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.<sup>36</sup>

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 the President need not wait for the Senate to be satisfied with the President's choice or selection.<sup>37</sup>

### *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

<sup>36</sup> Richardson, *Messages and Papers of the Presidents*, Vol. 8, pp. 378-379, 381.

<sup>37</sup> *Ibid.*, p. 378—For complete text of President Cleveland's message, see pp. 375-383.

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 Corporation on account of the absorption by it of the Tennessee Valley Coal and Iron Company; if no proceedings had been instituted the Attorney General was required to state the reasons for such non-action. 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 were 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 Corporation. 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 non-action. 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.<sup>88</sup>

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 Judiciary. When Mr. Smith appeared, the committee

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<sup>88</sup> Cong. Rec. v. 43, part 1, 60th Cong., 2d sess., pp. 527-528.

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 afterwards 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 Culbertson [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.* [Italics supplied.]<sup>29</sup>

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 either violate both the law and the practices of his prede-

<sup>29</sup> 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.

cessors 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.<sup>40</sup>

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."*<sup>41</sup>

An exciting and prolonged debate followed.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

<sup>40</sup> 27 Op. A.G. 150. See also 32 Stat. 825, 828 (Feb. 14, 1903).

<sup>41</sup> 43 Cong. Rec. 839 (1909).

<sup>42</sup> *Ibid.*, pp. 839, 1762.

<sup>43</sup> *Ibid.*, p. 849.

<sup>44</sup> 43 Cong. Rec. 842.

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."<sup>45</sup> 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 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."<sup>46</sup>

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 the *Kilbourn* and the *Chapman* cases<sup>47</sup> in support. Senator Dolliver replied that those cases involved *private citizens* who had refused to appear and give testimony before committees of the Senate<sup>48</sup> 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?

<sup>45</sup> *Ibid.*, p. 3732 (1909).

<sup>46</sup> *Ibid.*, p. 3732.

<sup>47</sup> *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661, discussed *infra*, in Part II.  
<sup>48</sup> 43 Cong. Rec. 3732.

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."<sup>48a</sup> 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.<sup>49</sup>

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.<sup>50</sup>

### *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 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 recog-

<sup>a</sup> 43 Cong. Rec. 849 (1909).

<sup>b</sup> *Ibid.*, p. 3730.

<sup>c</sup> W. W. Willoughby, "The Constitutional Law of the United States," 2nd Ed. (1929), pp. 1488-1491.

nized 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."<sup>51</sup>

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.<sup>52</sup>

#### *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.<sup>53</sup>

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

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<sup>51</sup> 65 Cong. Rec., 68th Cong., 1st sess., p. 6087.

<sup>52</sup> *Ibid.*, p. 6108.

<sup>53</sup> 72 Cong. Rec., p. 12029 (1930).

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 treaty-making 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 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."<sup>54</sup>

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.<sup>55</sup>

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

<sup>54</sup> S. Doc. No. 216, 71st Cong., Special sess., p. 2.

<sup>55</sup> 73 Cong. Rec. 378 (1930); The Developments of Congressional Investigative Power, McGahey, p. 103, footnote 20.

sulphate. 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 were to be disclosed to the world.<sup>56</sup> 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 26, 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."<sup>57</sup>

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, 1935, 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 Commerce at Washington, "which constituted the first major offensive by the representatives of big business on his program as a whole."<sup>58</sup>

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 bi-weekly conferences with the newspaper representatives here in Washington."<sup>59</sup>

<sup>56</sup> 75 Cong. Rec., 72nd Cong., 1st sess., p. 10207 (1932).

<sup>57</sup> *Ibid.*, 11669.

<sup>58</sup> 79 Cong. Rec. 7002 (1935).

<sup>59</sup> *Ibid.* 7186.

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."<sup>60</sup>

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 gross-

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\* 40 Opinions, A. G., No. 8, April 30, 1941.

est 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.

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 subpoena. Mr. Hoover was not required by the subpoena 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."<sup>61</sup>

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

<sup>61</sup> Hearings, Vol. 2, House, 78th Cong., Select Committee to Investigate the Federal Communications Commission (1944), p. 2337.

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 finger print 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 finger print 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 directions 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. The letter read in part as follows:<sup>62</sup>

"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.

\* \* \*

"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 dis-

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<sup>62</sup> Letter dated January 22, 1944, signed Francis Biddle, Attorney General.

closed. Even in the absence of instructions from the President, therefore, I should have directed Mr. Hoover to refuse to answer these questions."\*\*

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."\*\*

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 by 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

\* *Ibid.*, 2338-9, Hearings, Select Committee to investigate Federal Communications Com.

\*\* *Ibid.*, 2305.

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.<sup>66</sup>

The opinion of Attorney General Jackson, previously referred to<sup>66</sup> 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."<sup>67</sup>

The chairman of the committee then stated that the issue presented was going to be fought out. In order to make the record clear on the responses which had been given to the subpoena, the chairman directed the witness to produce the docu-

<sup>66</sup> Committee Hearings, Vol. 1, p. 34.

<sup>67</sup> Vol. 40, Opinions, A. G. No. 8.

<sup>68</sup> Hearings, Select committee to investigate the Federal Communications Commission, Vol. 1, p. 36.

ments 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.<sup>68</sup>

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.<sup>69</sup>

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.<sup>70</sup>

Acting Secretary of War Robert P. Patterson received an invitation by letter to appear before the committee and to produce certain documents. 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."<sup>71</sup>

<sup>68</sup> *Ibid.*, 39.

<sup>69</sup> Vol. 40, Opinions, A. G. No. 8, April 30, 1941.

<sup>70</sup> Hearings, Select committee to investigate the Federal Communications Commission, Vol. 1, pp. 46, 48 through 67.

<sup>71</sup> *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."<sup>72</sup>

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 ten army officers, twenty naval officers, and the production of documents in twenty categories of the army and twenty-five categories of the navy were requested by the committee. By direction of the President, the production of the testimony and documents requested were refused.<sup>73</sup>

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.<sup>74</sup>

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.

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<sup>72</sup> *Ibid.*, 68.

<sup>73</sup> 90 Congressional Record, 2111.

<sup>74</sup> 90 Congressional Record, Appendix, 1034, 1066 (1944).

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 served upon him, because the President had instructed him not to make public the records of the bureau.

5. A precedent which President Theodore Roosevelt had established, to order the records of a department brought to the White House, 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, who were 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 one member out of five. 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 nor 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 subpoena, or otherwise, the attendance of witnesses and the production of books and papers. There had been seven prior investigations concerning the Pearl Harbor attack.<sup>76</sup> 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.<sup>77</sup>

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."

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,

<sup>76</sup> Document No. 244, 79th Cong., 2d Sess., Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, pp. xii and xiv.

<sup>77</sup> *Ibid.*, Appendix C, Communications from the President of the United States Relating to the Pearl Harbor Investigation, pp. 283-287 of the report.

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."<sup>77</sup>

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."<sup>78</sup>

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."<sup>79</sup> 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

<sup>77</sup> Joint Committee Report, p. 286.

<sup>78</sup> *Ibid.*, Joint Committee Report, p. 286.

<sup>79</sup> *Ibid.*, Joint Committee Report, p. 287.

pitfalls in the future," and "to evolve constructive suggestions for the protection of our national security."<sup>80</sup>

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 were made available to the Committee, following instructions from the President.<sup>81</sup>

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.<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup>

The minority complained that the President's memorandum of October 23, 1945, which lifted the prior secrecy of the Crypt-analytic 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.

<sup>80</sup> P. xi, Foreword, Joint Committee Report, *supra*.

<sup>81</sup> *Ibid.*, xiv, Introductory Statement of the Joint Committee Report.

<sup>82</sup> *Ibid.*, p. xv, Introductory Statement of the Joint Committee Report.

<sup>83</sup> See pp. 278 and 279 for a list of the witnesses who appeared before the Joint Committee.

<sup>84</sup> *Ibid.*, p. 498, Joint Committee Report.

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.*"<sup>65</sup> 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 materials.<sup>66</sup>

The foregoing criticism of the minority, that "the joint committee was hedged about with troublesome qualifications and restraints"<sup>67</sup> 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 the heads of departments. Apparently, their chief complaint was that the Truman Committee, during the four 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.<sup>68</sup> In so doing, President Truman merely exercised the executive prerogative which prior administrations had handed down to him.

<sup>65</sup> *Ibid.*, p. 498, Joint Committee Report.

<sup>66</sup> *Ibid.*, p. 498, Joint Committee Report.

<sup>67</sup> *Ibid.*, p. 498, Joint Committee Report.

<sup>68</sup> For the Senate debate which accompanied the President's directions to the Cabinet Officers and heads of departments, see 91 Cong. Rec. 10583-10594 (1945).

*Résumé and Conclusions*

A bird's-eye view of the refusals by seventeen 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<sup>89</sup>:

<i>President</i>	<i>Date</i>	<i>Type of Information Refused</i>
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 between 1829 and 1836, and those receiving salaries, without holding office.
John Tyler	1842	Names of Members of 26th and 27th Congress who had applied for office.
	1843	Colonel Hitchcock's report to War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.

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\* 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 Cong. Rec. 2332 and 2618. References and citations to the refusals of the other Presidents will be found under the heading of each of the Presidents, on pages 107 to 146 of this article.

<i>President</i>	<i>Date</i>	<i>Type of Information Refused</i>
James K. Polk	1846	Evidence of payments made through State Department, on President's certificates, by prior administration.
Millard Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer islands to U. S.
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 650 Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U. S. Steel Corporation. Documents of Bureau of Corporations, Department of Commerce.
Calvin Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover	1930	Telegrams and letters leading up to London Naval Treaty.

<i>President</i>	<i>Date</i>	<i>Type of Information Refused</i>
	1932	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 unsuccessful attempt of the House of Representatives to force President Truman to produce civil service records (H. J. Res. 289, 80th Cong.) will be discussed in Part II of this article under the heading "The Civil Service Commission Records."

The framers of the Constitution had taken pains to insure the independence of the executive branch.<sup>90</sup> Historical precedents detailed by 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.<sup>91</sup> 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, Theodore Roosevelt, and Herbert Hoover, the Executive always prevailed.<sup>92</sup>

<sup>90</sup> 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."

<sup>91</sup> Henry W. Ehrmann, *The Duty of Disclosure in Parliamentary Investigation*: 11 University of Chicago Law Review, 1, 137, 1943-44.

<sup>92</sup> "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 Cong. Rec. 2741.

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

EXHIBIT No. 12 (B)

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## CONTENTS

### ARTICLES

<i>Demands of Congressional Committees for Executive Papers (Part II)</i> , Herman Wolkinson .....	223
<i>Patent and Trade-Mark Relief in Antitrust Judgments</i> , John C. Stedman .....	260
<i>Fundamental Principles Relating to Ascertainment of Nationality</i> , Richard W. Flournoy .....	275
<i>Methods of Inter-American Cooperation in the Control of Monopolies</i> , Dorothy Roth Wilson .....	290

<b>CURRENT DECISIONS OF THE COMPTROLLER GENERAL CONCERNING FEDERAL EMPLOYEES</b> , Ralph E. Casey .....	300
---	-----

### BOOK REVIEWS

<i>Fordham: Local Government Law</i> , Joseph Guandolo .....	309
<i>Schmutz: Condemnation Appraisal Handbook</i> , Ralph J. Luttrell .....	312
<i>United Nations: For Fundamental Human Rights</i> , Franklin S. Pollak .....	315

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# DEMANDS OF CONGRESSIONAL COMMITTEES FOR EXECUTIVE PAPERS

HERMAN WOLKINSON\*

## PART II\*\*

### A.

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*":

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.<sup>1</sup>

Chief Justice Taft, speaking for the majority of the Court in *Myers v. United States*,<sup>2</sup> 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.

\* Of the New York and Supreme Court Bars, Attorney, Department of Justice. The views expressed herein are those of the author and do not necessarily represent the position of the Department of Justice.

\*\* The first installment of this article appeared in the April 1949, issue of the Federal Bar Journal. The present second installment discusses A. Court Decisions and B. Constitutional Provisions and the Statutes creating the Executive Departments. A third installment, to be printed subsequently, will discuss the Statutes designed to Compel Testimony and the Production of Records in Congressional Investigations, and will state our Conclusions.

<sup>1</sup> Page 205.

<sup>2</sup> 272 U. S. 52, 132-133.

The foregoing principles find illustration in the following cases.

*Marbury v. Madison*<sup>1</sup> defines the limits at which a court must stop when the head of a department invokes the privilege that the information 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, in the meantime having 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, and stated his reasons:

On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive.<sup>2</sup> \* \* \*

He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; \* \* \*<sup>3</sup>

He was acting as Secretary of State at the time when the transaction in question occurred. 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".

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;<sup>4</sup>

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<sup>1</sup> 1 Cranch 137, 143, 144, 170 (1803).

<sup>2</sup> *Ibid.* p. 143.

<sup>3</sup> *Ibid.* p. 144.

<sup>4</sup> *Ibid.* 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 orders. 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. \* \* \*<sup>7</sup>.

Chief Justice 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.<sup>8</sup>

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<sup>7</sup> *Ibid*, p. 164.

<sup>8</sup> *Ibid*, pp. 168-170.

The court decided that if the question before it does not involve an intrusion into the secrets of the cabinet; if "it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control;" a citizen may as to such a paper assert the rights given him by an act of Congress. The court would issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress, and the general principles of law.<sup>88</sup>

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.<sup>89</sup>

Chief Justice Marshall's own appraisal of the decision of *Marbury v. Madison*, as it related to the right to compel disclosure of confidential information by a cabinet officer, was given by him during *Aaron Burr's* trial. Referring to that case, Judge Marshall said:

"The principle decided there was that communications from the President to the Secretary of State could not be extorted from him."<sup>90</sup>

#### *Subpoena on President John Adams Refused<sup>91</sup>*

Thomas Cooper was charged in an indictment with having published a false, scandalous and malicious attack on the character of the President of the United States, in his official character, with intent to excite the contempt of the people of this country against the President. Justice Chase, a member of the U. S. Supreme Court, and Judge Peters presided at the trial. While the process of the court was invoked to issue subpoenas against the Speaker of the House and several members of Congress,<sup>92</sup> "The court at the same time refused to permit a subpoena to issue directed to the President of the United States."<sup>93</sup> Cooper had applied for process to be issued on President Adams, in order that he might obtain a letter to aid in his defense.

<sup>88</sup> *Ibid*, p. 170.

<sup>89</sup> *Ibid*, p. 170.

<sup>90</sup> David Robertson, 2 *Burr's Trials*, 1808, p. 527.

<sup>91</sup> Trial of Thomas Cooper, for a Seditious Libel, Circuit Court of the U. S. for Penn. (Phila., 1800), Wharton's State Trials of U. S., p. 659.

<sup>92</sup> The court was willing to continue the case, in order to obtain attendance of members of Congress, until the session of Congress was over. (*Ibid*, p. 662).

<sup>93</sup> *Ibid*, p. 662.

In addressing the court, Cooper, who was without counsel, pleaded 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 those documents, "then are the mouths of the people completely shut up on every question of public conduct or public character."<sup>13</sup>

Justice Chase informed the defendant that he was mistaken, if he thought the public documents were at his service. He went on to say that if the defendant undertook to publish a false libel against the President, without having proper evidence before him to justify his assertions, he did so at his own risk. The court acknowledged that "in a case such as this" greater latitude would be given the defendant. Having failed to procure certain evidence by subpoena, the defendant would be permitted to offer secondary evidence in his defense, such as speeches of the President to the Congress as reported in the press, or the journals of Congress, or he might read any authentic public document.<sup>14</sup>

Cooper was found guilty by a jury, and was sentenced to pay a fine of \$400.00 and to six months' 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<sup>15</sup>*

Aaron Burr's trial took place in the Circuit Court of the United States, at Richmond, Virginia, in 1807. In the course thereof, Burr applied to the Court, which was composed of Chief Justice Marshall and Judge Griffin, for the issuance of a *subpoena duces tecum* upon President Jefferson. Justice 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 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

<sup>13</sup> *Ibid.*, p. 667.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Burr's Trials*, Robertson, 1808.

the public interest. The President alone was the judge of what was confidential.<sup>16</sup>

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 subpoena. What led the Court to its decision, among other things, was that the letter in question was not in the files of the War Department, nor in any other department of the government. The Court appears to have been largely influenced by the argument that the President, who had publicly accused Burr of traitorous conduct, and had been primarily responsible for bringing him to trial, should 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.<sup>17</sup>

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 subpoena, 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.<sup>18</sup>

#### *Jefferson Asserts Immunity from Subpoena by Heads of Departments*

The immunity from giving testimony and producing papers in Court which Jefferson claimed for himself, he also claimed for the heads of departments.<sup>19</sup> 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

<sup>16</sup> Robertson, *Burr's Trials*, Vol. 1, pp. 177, 180, 187-8.

<sup>17</sup> *Ibid.*, 186.

<sup>18</sup> Dillon, "Marshall, Life, Character, Judicial Services", Vol. I, Introduction, p. 49; Ford, *Thos. Jefferson, Writings*, Vol. 9, p. 62.

<sup>19</sup> Beveridge, *The Life of John Marshall*, Vol. 3, p. 436.

many months "with such a variety of officers, civil and military, over all the U. S. as would amount to the laying open the whole executive books."<sup>21</sup>

The subpoena which had been issued from the District Court apparently required both the President and the Secretaries of War and the Navy personally to 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 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.<sup>22</sup>

Congressional committees, intent at times on seeing papers and documents of the executive branch, have urged the *Burr* case as a precedent for the amenability of a Cabinet officer to process, by subpoena issued by a committee of the House or the Senate. That case, however, has certain definite limitations, as laid down by Chief Justice Marshall. In the first place, Marshall made it clear that if a letter in the possession of the President, material to the trial, contained 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."<sup>23</sup> In the second place, the Chief Justice 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,

<sup>21</sup> Letter dated June 12, 1807, Jefferson to Hay, *Thomas Jefferson, Writings* (Ford), Vol. 9, p. 55.

<sup>22</sup> *Ibid.*, pp. 56-7, Letter, Jefferson to Hay, June 17, 1807.

<sup>23</sup> *Ibid.*, *Burr's Trials*, vol. 1, p. 187.

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.<sup>24</sup>

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 subpoena 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, may completely disregard the court's subpoena 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.<sup>25</sup>

It is curious that Judge Marshall stated in his opinion that he was not familiar with any case which held that a subpoena cannot issue to the President.<sup>26</sup> Marshall apparently ignored or was unaware of the decision which had been made by Justice Samuel Chase, a fellow member of the United States Supreme

<sup>24</sup> *Ibid.*, Burr's Trials, vol. 2, pp. 535-536.

<sup>25</sup> "Jefferson, however, neither obeyed the writ nor swore anything on its return, though he forwarded some of the papers required to Hay, the district attorney, to be used as the latter might deem best. \* \* \* The President had the best of the encounter on all scores. Not only had Marshall forgotten for the nonce the doctrine he himself had stated in *Marbury v. Madison* regarding the constitutional discretion of the Executive, but what was worse still, he had forgotten his own discretion on that occasion. He had fully earned his rebuff, but that fact did not appreciably sweeten it. ("John Marshall and the Constitution," E. S. Corwin, pp. 97-98).

For additional 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. 328; 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 ruling may be found in Magruder, *John Marshall*, pp. 199, 221, 226; Dillon, *Marshall, Life*, etc., vol. I, Introduction XXXVII, and vol. 3, U. M. Rose, pp. 132-133.

<sup>26</sup> Burr's Trials, vol. I (Robertson), p. 181.

Court, in the trial of Thomas Cooper.<sup>27</sup> 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 1800, 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; \* \* \*<sup>28</sup>

The leading principle of our Constitution is the independence of the legislative, executive and judiciary. "But 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 others is manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on it by the others. To none has the Constitution given more effectual or diversified means than to the executive.<sup>29</sup>

The President was prepared to resist, by force if necessary, the execution of the process of the court.<sup>30</sup> 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.

<sup>27</sup> *Ante*, pp. 226-7.

<sup>28</sup> Letter of June 17, 1807 to U. S. Attorney Hay, *Thomas Jefferson, Writings*, (Ford), vol. 9, p. 57.

<sup>29</sup> *Ibid*, p. 60.

<sup>30</sup> *Ibid*, p. 62, draft of a letter to U. S. Attorney Hay, which may never have been sent, but which is of utmost importance.

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 Executive by the constitution are sufficient to protect the other branches from Judiciary usurpation of preeminence, and every individual also from judiciary vengeance, and the marshal may be assured of its effective exercise to cover him.<sup>51</sup>

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.

*United States v. Smith, Circuit Ct. D. N. Y.*<sup>52</sup>

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 presi-

<sup>51</sup> *Ibid.*, p. 62. See also Dillon, *John Marshall, Life, Character, and Judicial Services*, vol. 1, Introd., p. 49.

<sup>52</sup> 27 Fed. Cas. No. 16,342 (1806), pp. 1192, 1194. See also Beveridge, *The Life of John Marshall*, vol. 3, p. 436.

dent 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 court, we trust, will be pleased to accept this as a satisfactory explanation of our failure to give the personal attendance required."<sup>32</sup>

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 the scene of their official duties, they suggested the issuance of a Commission for the purpose of taking their respective testimonies, thus reconciling public considerations with the objects of the parties in this case.

A motion for an attachment to bring the Secretaries into court was argued for three days. The Court disagreed and no action was taken.<sup>33</sup>

#### *State of Mississippi v. Johnson<sup>34</sup>*

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. Mr. Stanbery discussed the cases where heads of departments had been ordered by the court to do certain acts. He pointed out that the only instances 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.

<sup>32</sup> 27 Fed. Cas. No. 16,342 (1806), pp. 1192, 1194. See also Beveridge, *The Life of John Marshall*, vol. 3, p. 436.

<sup>33</sup> The case was tried before Circuit Justice Patterson and District Judge Tallmadge. They reached opposite conclusions on the propriety of issuing an attachment.

<sup>34</sup> 71 U. S. 475, 483, 489-90 (1866).

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.<sup>35</sup>

The court cited the cases of *Marbury v. Madison*, *supra*, and *Kendall v. Stockton*,<sup>36</sup> 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'. \* \* \*

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.<sup>37</sup>

#### *Totten, Administrator v. United States*<sup>38</sup>

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

<sup>35</sup> *Ibid.* p. 498.

<sup>36</sup> 12 Peters, 527.

<sup>37</sup> 71 U. S. pp. 499-500.

<sup>38</sup> 92 U. S. 105 (1875).

month for his services. 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 services 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.<sup>39</sup>

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 Hartcraft<sup>40</sup>*

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

<sup>39</sup> *Ibid.*, p. 107.

<sup>40</sup> 85 Penn. State Rep. 433, 445, 447 (1877)

jury and were required to give certain information which they deemed confidential. The court said:

\* \* \* We had better at the outstart 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.

#### *Opinions of the Attorneys General*

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, it 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.<sup>41</sup>

Attorney General Olney advised President Cleveland in response to this question, "Can a court require, on subpoena, 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.<sup>42</sup>

Attorney General Moody upheld the right of the head of an executive department to refuse confidential information in a law suit between 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*, responded to a subpoena, that it would be wise for the officer to appear in court and to make an arrangement whereby such testimony as he deemed proper could be taken at the Department of Commerce and Labor.<sup>43</sup>

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.<sup>44</sup> In-

<sup>41</sup> 11 Op. A.G. 142 (1865).

<sup>42</sup> 20 Op. A.G. pp. 557-558 (1893).

<sup>43</sup> 25 Op. A.G. 326 (1905).

<sup>44</sup> See Part I of this article, pp. 128-9, and 27 Op. A.G. 150 (1909).

stead, he counseled that officer 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 should not be delivered to the chairman of the House Committee on Naval Affairs, has also been referred to.<sup>55</sup> 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.

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 co-ordinate 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.<sup>56</sup>

#### *The Famous Seward Case Before the House Judiciary Committee*

A practical application of the foregoing principle, that Congress has not the power, under the Constitution, to force the

<sup>55</sup> Vol. 40, Op. 8 A.G. (1941). See also pp. 135-6, in Part I of this article.

<sup>56</sup> March 22, 1886, 17 Cong. Rec. p. 2623. The debate in the first administration of President Cleveland is summarized on pp. 123-6, in Part I of this article.

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 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. 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."<sup>67</sup>

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.<sup>68</sup>

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<sup>67</sup> Rep. No. 141, p. 3, March 3, 1879, 45th Cong. 3rd Sess.

<sup>68</sup> *Ibid.*

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.<sup>49</sup>

The report appears to have been adopted by the House.<sup>50</sup> The record of the subsequent proceedings taken in the House show that the recommendations of the Committee on Judiciary, that Seward was not in contempt for failure to obey the subpoena, were followed.

#### *The Views of Text Writers<sup>51</sup>*

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 lodge in the executive branch the power to determine what information to divulge and what to keep secret. Corwin in *The President, Office and Powers* (1941), 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—

<sup>49</sup> *Ibid*, pp. 3-4.

<sup>50</sup> *Congressional Investigations*, Eberling, p. 253. Hinds, *Precedents of the House of Representatives*, vol. 3 (1907), §§ 1699, 1700.

<sup>51</sup> Dean Wigmore's views, *Wigmore on Evidence*, 8, sec. 2378(3) (Third Edition), and his criticism of *Boske v. Comingore*, 177 U. S. 459, will be discussed in connection with Departmental Regulations Concerning Use of Records, 5 U. S. C. Sec. 22, in the third and concluding installment of this article.

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 investigation 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.<sup>52</sup>

We take issue with Professor Corwin's view that either House of Congress, or its committees, may proceed by contempt to enforce demands for papers and information upon the President's subordinates in the executive branch. In the many years which have elapsed since Jefferson's administration, we have had hundreds of Congressional investigations. We have seen that never in our entire 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 and subpoenas of the Senate or the House to furnish papers. Our discussion of the cases, and of the provisions of the Constitution and the statutes creating the executive departments,<sup>53</sup> demonstrates

<sup>52</sup> Pp. 281-282. In his recent revision of the text cited, Professor Corwin writes, apropos of Attorney General Levi Lincoln's refusal to divulge confidential information when he was summoned by Chief Justice Marshall in the case of *Marbury v. Madison*:

"Here, of course, the question at issue was whether the Supreme Court could require an official to answer, but the doctrine stated is equally applicable to the case of an investigation by a congressional committee. This doctrine is that a high executive official is not bound to divulge matters regarding which he is a confidant of the President. At the same time the Court impliedly claims the right to say finally whether such a plea on the part of an official is a valid one. In both these respects subsequent practice has broadened the scope of the immunity which the President can throw about a subordinate member of the executive department from judicial and legislative investigatory processes." (*The President: Office and Powers*, 1948, p. 138).

However, in a footnote to Chapter IV of the revised text, at page 457, he apparently assumes that Congress has the power to "order the incarceration of a cabinet officer until he complied with its subpoena to testify or to produce certain papers."

<sup>53</sup> *Infra*, pp. 246-259.

that Mr. Corwin is probably in error when he states 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.<sup>54</sup>

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?<sup>55</sup>

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.<sup>56</sup>

<sup>54</sup> There are instances where Cabinet officers appeared before congressional committees and testified pursuant to a summons of some kind. The authority of the committees was apparently not questioned in any way. 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. On February 13, Hon. John Forsyth, Secretary of State, appeared and testified before the same committee. For other instances see Hinds' *Precedents of the House of Representatives*, vol. 3 (1907), p. 179.

<sup>55</sup> Papers of the American Historical Association, vol. 5 (1891), p. 33.

<sup>56</sup> *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. \* \* \*<sup>57</sup>

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, pages 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.'<sup>58</sup>

Willoughby, in *The Constitutional Law of the United States*,<sup>59</sup> 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,

<sup>57</sup> p. 55.

<sup>58</sup> *Ibid.* p. 55-6.

<sup>59</sup> Vol. 3, §968.

to furnish communications or papers in their custody in response to legal process.<sup>60</sup>

Herman Finer<sup>61</sup> gave his views to Senator LaFollette, Chairman, Joint Committee on the Organization of Congress, in a paper which was incorporated in a Joint Committee print.<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup>

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.

<sup>60</sup> Finley and Sanderson, pp. 199, 264.

<sup>61</sup> Visiting professor of Political Science at U. of Chicago and Harvard University, and Lecturer and Reader in Public Administration, 1920-42, London School of Economics.

<sup>62</sup> *The Organization of Congress*, Suggestions for Strengthening Congress by Members of Congress and Others, 79th Cong. 2nd Sess., June 1946, p. 49.

<sup>63</sup> *Ibid.*, p. 56.

<sup>64</sup> *Ibid.*, p. 57.

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 co-ordinate branch upon the other would be wholly repugnant to the constitutional 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.<sup>65</sup>

We conclude our discussion of the court decisions by paraphrasing Jefferson's crucial question:<sup>66</sup> 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,<sup>67</sup> that the restraints imposed by the Constitution upon the courts, as voiced by Judge Marshall in *Marbury v. Madison*,<sup>68</sup> 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.

## B.

### THE CONSTITUTION AND THE STATUTES CREATING THE EXECUTIVE DEPARTMENTS

**W**E 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?

<sup>65</sup> p. 282.

<sup>66</sup> See p. 231, *ante*.

<sup>67</sup> See p. 238, *ante*.

<sup>68</sup> p. 225, *ante*. The reasoning of the *Marbury* decision was adopted in *Holzendorff v. Hay*, 20 App. D.C. 576, cert. denied, 194 U. S. 373, where the court affirmed judgment dismissing a petition for a writ of mandamus against the Secretary of State.

The Constitution provides "The Executive Power shall be vested in a President of the United States of America."<sup>68</sup>

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,"<sup>69</sup> and he is also required to "take Care that the Laws be faithfully executed."<sup>70</sup>

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."<sup>71</sup>

The words "Heads of Departments" 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."<sup>72</sup>

Attorney General Cushing, in an opinion to the President, dealt at length upon the organization of the various departments of the executive branch.<sup>73</sup>

### *The Establishment of the First Seven Departments*

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 De-

<sup>68</sup> Art. II, sec. 1, cl. 1.

<sup>69</sup> Art. II, sec. 1, cl. 7.

<sup>70</sup> Art. II, sec. 3.

<sup>71</sup> Art. II, sec. 2, cl. 2.

<sup>72</sup> Art. II, sec. 2, cl. 2.

<sup>73</sup> *Office and Duties of the Attorney General* (6 Op. A.G. 326, March 1854).

partment 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;"<sup>14</sup> \* \* \*.

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 counsellors 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 counsellor 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 general 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

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<sup>14</sup> 1 U. S. Statutes at Large, p. 66; 5 U. S. C. §242; italics are the writer's.

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.<sup>75</sup>

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."<sup>76</sup>

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."<sup>77</sup> 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 lodged the executive power in the President, and which make him the "responsible executive minister of the United States."<sup>78</sup>

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 law-

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<sup>75</sup> 6 Op. A.G. 332-3.

<sup>76</sup> *Ibid.* p. 333.

<sup>77</sup> 7 Ops. A.G. 453.

<sup>78</sup> *Ibid.* p. 463.

fully 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.<sup>79</sup>

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 Cushing, such a law might well be subversive of our form of Government and might render our Chief Executive a President in name, but "utterly powerless."

#### *The Departments of Agriculture, Labor, and Commerce.*

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.<sup>80</sup>

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

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<sup>79</sup> 7 Op. A.G. 469-70.

<sup>80</sup> May 29, 1928, 45 Stat. 993.

or either House of Congress, and he was directed to make a detailed report of his expenditures to Congress.<sup>81</sup>

In 1903, a Department of Commerce and Labor was established as an executive department.<sup>82</sup> 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.<sup>83</sup>

We have referred to the Commissioner of Corporations and his duties, as 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.<sup>84</sup>

The Department of Labor was made an executive department in 1913,<sup>85</sup> 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 Agri-

<sup>81</sup> 25 Stat. 183, sec. 8.

<sup>82</sup> 32 Stat. 825.

<sup>83</sup> 32 Stat. 828.

<sup>84</sup> See pages 126-8, *ante*. An interesting account of the removal of a trunkful of papers by the Commissioner of Corporations to President Theodore Roosevelt is contained in 43 Cong. Rec. 3728 (1909).

<sup>85</sup> March 4, 1913, 37 Stat. pp. 736 and 738.

culture 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.

#### *Summary of the Acts Creating the Ten Executive Departments*

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 three departments just discussed, as they are to the other seven departments created between 1789 and 1849.<sup>86</sup> By definition, the word "department" means one of the ten 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,<sup>87</sup> 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 of the latter to withhold, information and papers.<sup>88</sup> 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 those 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. The 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,<sup>89</sup> which require the Secretary of the Treas-

<sup>86</sup> Sections 512, 591, 611 of Title 5 of U. S. C.

<sup>87</sup> Attorney General Cushing to the President, on the *Relation of the President to the Executive Departments*, 7 Op. A.G. 453, 460.

<sup>88</sup> For Summaries of the Arguments in those debates, see pp. 123-6 and 129-31 of Part I of this article.

<sup>89</sup> 1 Stat. 65, 5 U. S. C. 242.

ury 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 in the acts creating the Departments 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.<sup>90</sup> 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.<sup>91</sup>

The fundamental public interest to be served may always be cited by a head of 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 papers they might call for. They might demand secrets of a very mischievous nature."<sup>92</sup>

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

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<sup>90</sup> See pp. 131, 133-4, *ante*.

<sup>91</sup> 17 Cong. Rec. 2332, 2618 (1886).

<sup>92</sup> *The Writings of Thomas Jefferson*, Ford (1892), Vol. 1, p. 190.

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.<sup>93</sup>

The Attorney General, 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 the head of a department to communicate information, otherwise confidential, is furnished by the Joint Resolution which became law on December 19, 1947.<sup>94</sup> That Resolution authorized the Secretary of Agriculture to publish the names and addresses of persons transacting business on the Boards of Trade and the amount of commodities purchased or sold by them. It also required the Secretary of Agriculture to furnish to committees of Congress, upon request, and to make public, 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,<sup>95</sup> 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.<sup>96</sup> Congress, therefore, by the Joint Resolution aforementioned, amended the Commodity Exchange Act so as to permit the Secre-

<sup>93</sup> 6 Op. A.G. 682-3.

<sup>94</sup> Public Law 392, ch. 523, 80th Cong., 1st sess.

<sup>95</sup> 7 U. S. C. 12; 42 Stat. §8, p. 1003.

<sup>96</sup> 93 Cong. Rec. 11738, 11739, Dec. 18, 1947.

tary of Agriculture, in his discretion, to disclose and make public the information, when requested to do so by a Committee of either House. President Truman signed the Resolution, and thereafter the Secretary of Agriculture released the information to the newspapers and communicated it to the Committee.<sup>97</sup>

In view of the public statements by both President Truman and Secretary of Agriculture Anderson on the subject of speculation in commodities,<sup>98</sup> 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 confidential the information which he had collected.

### *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.<sup>99</sup> 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.<sup>100</sup>

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.<sup>101</sup>

We have shown that a court may not compel the production of applications or examination papers or other records of the Civil

<sup>97</sup> 93 Cong. Rec. 11735-11743, Dec. 18, 1947.

<sup>98</sup> 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, Nov. 17, 1947, wherein he said: "Legislation is required, moreover, to prevent excessive speculation on the commodity exchanges." 93 Cong. Rec. 10704.

<sup>99</sup> January 16, 1883, 22 Stat. 403; 5 U. S. C. 632.

<sup>100</sup> 5 U. S. C. 631; 633(1).

<sup>101</sup> 5 U. S. C. 633(3) and (5).

Service examiners.<sup>102</sup> 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 was it subject to the control of any head of a department. The Commission was subject only to the President's control.<sup>103</sup> 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 ten 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 one of the ten 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.<sup>104</sup>

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

<sup>102</sup> See page 237 *ante*; 20 Op. A.G. 557 (1893).

<sup>103</sup> 22 Op. A.G. 62.

<sup>104</sup> 37 Op. A.G. 227, 231.

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 that 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<sup>105</sup> and of sound public administration—to keep the word of the Government to the individual sacred.<sup>106</sup> The case would have to be an extraordinary one to 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.<sup>107</sup> 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 H. Res. 118, Eightieth 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 "Investigators' 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.<sup>108</sup> He based

<sup>105</sup> 40 Op. A.G. No. 8, April 30, 1941, p. 2.

<sup>106</sup> See President Theodore Roosevelt's classic statement, p. 128, *ante*.

<sup>107</sup> H.J. Res. 289, 80th Cong., 2d Sess., 94 Cong. Rec. 38.

<sup>108</sup> See Tyler's Message to the House of Representatives, p. 115, *ante*.

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 have raised 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 constituted legislative interference with this important executive function.<sup>109</sup>

\* \* \*

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*,<sup>110</sup> 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 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."

In *Myers v. United States*,<sup>111</sup> the majority of the court spoke through Chief Justice Taft. After quoting the foregoing words

<sup>109</sup> See the quotations from William Howard Taft and Attorney General Jackson, pp. 105 and 135, *ante*. The Joint Resolution was neither reported out of Committee, nor put to a vote of the House.

<sup>110</sup> 135 U. S. 1, 63-64.

<sup>111</sup> 272 U. S. 52, 132-3, 134.

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.<sup>112</sup>

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.<sup>113</sup>

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.<sup>114</sup>

In *Humphrey's Executor v. United States*,<sup>115</sup> 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."<sup>116</sup> 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

<sup>112</sup> *Ibid.*, pp. 132-3.

<sup>113</sup> *Ibid.*, p. 134.

<sup>114</sup> *Ibid.*

<sup>115</sup> 295 U. S. 602.

<sup>116</sup> *Ibid.*, p. 627.

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.<sup>117</sup>

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.

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<sup>117</sup> *Ibid*, pp. 629-30.



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## CONTENTS

### ARTICLES

<i>Demands of Congressional Committees for Executive Papers (Part III)</i> , Herman Wolkinson .....	319
<i>Recent Developments in Antitrust Consent Judgments</i> , Sigmund Timberg .....	351
<i>An Analysis of The Federal Lobbying Act</i> , Norman J. Futur.....	366
<i>The Appointment and Compensation of Federal Hearing Examiners</i> , Emery J. Woodall .....	391

### BOOK REVIEWS

Cairns: <i>Legal Philosophy from Plato to Hegel</i> , Carolyn R. Just .....	407
Schwartz: <i>Law and the Executive in Britain</i> , Robert Mandel.. .	411
Government Printing Office: <i>Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30 1948</i> , Matthew A. McKavitt .....	412
Wollett: <i>Labor Relations and Federal Law</i> , Johanna M. D'Amico ..	416
Egbert: <i>Law Dictionary: English—Espanol—Francais—Deutsch</i> , Samuel B. Groner .....	418

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# DEMANDS OF CONGRESSIONAL COMMITTEES FOR EXECUTIVE PAPERS

HERMAN WOLKINSON\*

## PART III\*\*

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

OUR STUDY of the precedents governing Presidential action, of the court decisions, and of the Constitution and the statutes creating the executive departments, has shown the right of the executive to withhold confidential information and papers from Congress and the Courts. We shall now examine the statutes governing disclosure to see if they affect only private individuals or executive officials also.

#### 2 U.S.C. 192, 193, 194

Title 2 of the United States Code deals with *The Congress*; chapter 6 thereof is entitled "Congressional Investigations." Section 192 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 is entitled "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.

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\*\* The first two installments of this article appeared in the April and July issues of the Federal Bar Journal. This is the concluding installment.

The foregoing sections were last amended in 1938.<sup>1</sup> 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.<sup>2</sup> The Act of 1857 was entitled: "An act more effectually to enforce the attendance of witnesses on the summons of either house of Congress, and to compel them to discover testimony."

*In re Chapman*,<sup>3</sup> involved the refusal of Chapman, who was a member of 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 used as the basis for 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:

"It is true that the reference is to "any" matter under inquiry \* \* \* and we think that the word "any," as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon."

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 offence against the United States."<sup>4</sup>

The *Chapman* case was decided in 1897. For forty 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.<sup>5</sup> Nevertheless, in the two famous Senate

<sup>1</sup> 52 Stat. 942-3.

<sup>2</sup> 11 Stat. c. 19, 155, and 12 Stat. c. 11, 333; see also *In re Chapman*, 166 U. S. 661, 665-6 (1897).

<sup>3</sup> *Supra*, note 2.

<sup>4</sup> 166 U. S. 661, 667, 671.

<sup>5</sup> *Supra*, note 2.

debates of 1886 and 1909, in the administrations of Cleveland and Theodore Roosevelt,<sup>6</sup> it was freely admitted by the majority and minority of the Senate Judiciary Committee that there 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.<sup>7</sup>

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 executive officials in the executive departments.

It is also significant that from Jackson's administration, when four department heads refused at his direction to heed a resolution of the House to furnish its committee with a list of officers appointed by the President,<sup>8</sup> and up to the present time, we have not found a single instance of action taken by the Houses of Congress against heads of departments so refusing to comply. During that period of over a hundred years, there have been hundreds of investigations and countless refusals by heads of departments and their subordinates to turn over to the Houses of Congress and their committees confidential documents and information, against the paramount public interest.

### 5 U.S.C. 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.<sup>9</sup>

<sup>6</sup> See first installment of this article, Vol. X Federal Bar Journal, pp. 124-5, 130.

<sup>7</sup> *Ibid.*, p. 131, 43 Cong. Record, 849, 3730 (1909).

<sup>8</sup> X Federal Bar Journal, 103, 113, 114. For other instances of refusals of confidential data by heads of departments see pp. 114 ff. and particularly pp. 147-9.

<sup>9</sup> May 29, 1928, c. 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. A reading of the Congressional Record, and of the House and Senate Reports on the bill which incorporates the section, demonstrates 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.<sup>10</sup> 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 survey 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:<sup>11</sup>

<sup>10</sup> *Ibid.*

<sup>11</sup> H. Rept. No. 1757, 70th Cong., 1st sess., May 18, 1928 (p. 6), to accompany H.R. 12064.

"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.<sup>12</sup>

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 conclusions.<sup>13</sup> 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 have noted 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 1946<sup>14</sup> defines the duties of the Committee on Expenditures in the Executive Departments in the House and Senate.<sup>15</sup> The powers and duties of each committee 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 have interpreted it,<sup>16</sup> 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.

<sup>12</sup> S. Rept. 1320, 70th Cong., 1st sess., May 28, 1928 (p. 4).

<sup>13</sup> 69 Cong. Rec. 9413-17, 10613-14, 10615-16 (1928).

<sup>14</sup> Chapter 753, Public Law 601, approved Aug. 2, 1946, 79th Congress.

<sup>15</sup> Section 102 (g) (1); section 121 (h) (1).

<sup>16</sup> See the second installment of this article, X Fed. Bar Journal, pp. 224-236 and 257-259.

*Sections 134(a) and 136 of the Legislative Reorganization Act of 1946<sup>16a</sup>*

Section 134(a) provides that each standing committee of the Senate is authorized to require by subpoena or otherwise the attendance 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 conclusion that heads of departments may refrain, in their own discretion, from disclosing confidential papers in the public interest.

Our views are supported by the report of the Special Committee on the Organization of Congress.<sup>17</sup> Senator LaFollette, who submitted the report, stated therein that Congress had long lacked adequate facilities for the continuous "inspection and review" of administrative performance. The report went on to say that, armed with the power of subpoena, 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.<sup>18</sup>

The LaFollette report was, of course, submitted before the Senate debate on the Legislative Reorganization Act of 1946. It appears from the debate that, in order to carry out the original recommendations of the Special Committee, section 136 contained the word "surveillance," so that the section originally 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 the debate, on motion of Senator Donnell.

Although Senator LaFollette, co-author of the Legislative Reorganization Act, pressed for incorporation of the words "in-

<sup>16a</sup> Public Law 601, 79th Congress.

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

<sup>18</sup> *Ibid.*, p. 6.

spection and review" which are contained in his report, he finally yielded to Senator Donnell. The word "watchfulness" was substituted for the word "surveillance." The reason for the substitution strikes deeply into the 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.<sup>19</sup> Senator Donnell added that it was very important to observe the line between legislation on the one hand, and executive duties on the other.<sup>20</sup>

"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 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.<sup>21</sup>

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

<sup>19</sup> 92 Cong. Rec. 6441-6447.

<sup>20</sup> *Ibid.*, 6446.

<sup>21</sup> *Ibid.*

136, section 134(a) would seem to empower a standing committee of the Senate to require a head of a department, by subpoena, to disclose information, whether it was deemed by him to be confidential or not. However, since the Senate refused to adopt the view that it was entitled to pass judgment, by inspection and review, upon the work of administrative agencies, it follows that section 134(a) merely empowers the standing committees of the Senate to do what the Senate was obliged to do by resolution, before the passage of the Legislative Reorganization Act. For prior to that Act, a special Senate resolution was required to authorize a select or special committee of the Senate to require by subpoena the testimony of witnesses and the production of records.<sup>22</sup> Now, each standing committee may require, by subpoena, the attendance of witnesses and the production of records. The basic laws, however, remain unchanged. There was absent altogether any intent to change a fundamental practice and precedent which has been acted upon by the Presidents and 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 subpoena any employee in the Federal Government to appear before the committee to give any account and report of his activities. In short, Senator McClellan's proposal was designed to enable the House and Senate to supervise the executive agencies.<sup>23</sup>

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 was to give employees of the joint committee the right to examine books and papers in any department of the Government. Another

<sup>22</sup> M. E. Dimock, *Congressional Investigating Committees*, (1929), p. 18.

<sup>23</sup> 92 Cong. Rec. 6555.

provision gave the joint 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<sup>24</sup> should apply in case of failure by any witness to comply with any subpoena. Senator LaFollette spoke briefly against the amendment, and it was rejected.<sup>25</sup>

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. 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*  
5 U.S.C. 22

Section 22 provides:

"DEPARTMENTAL REGULATIONS. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

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<sup>24</sup> 2 U.S.C. 192-194.

<sup>25</sup> 92 Cong. Rec. 6566.

This section is identical with Section 161 of the Revised Statutes, which, in turn, is based upon the various Acts of the first and subsequent sessions of Congress creating the executive departments, beginning with the Department of Foreign Affairs, later changed to the Department of State.<sup>26</sup>

After the Constitution was adopted in 1788, and shortly after the opening session of the new Congress on March 4, 1789, the Department of Foreign Affairs was created. The Secretary for the Department was to have the custody and charge of all records, books and papers in the office of Secretary for the department of foreign affairs.<sup>27</sup>

It is significant that before the adoption of the Constitution, a Resolution was adopted by the Continental Congress creating the Department of Foreign Affairs, under the direction of the Secretary for the Department of Foreign Affairs. Such officer was to be appointed by Congress, and was to hold office during the pleasure of Congress. The Resolution stated:

"That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."<sup>28</sup>

The Resolution also provided that the Secretary for the department of foreign affairs was to acquire an intimate knowledge of the sentiments of Congress, which were necessary for his direction, and to that end he was given the privilege at all times of attending upon Congress, particularly when summoned or ordered to do so by the President. The Secretary was also to give information to Congress respecting his department, explain and answer objections to his reports when under consideration, if required by a member to do so. The Resolution further provided that letters to the ministers of the United States or to ministers of foreign powers which referred to treaties, or instructions relative thereto, were to be submitted to the inspection and were to receive the approbation of Congress "before they shall be transmitted".<sup>29</sup>

<sup>26</sup> July 27, 1789, 1 Stat. 28; 1 Stat. 49; 1 Stat. 65; 1 Stat. 68; 1 Stat. 553; 9 Stat. 395; 16 Stat. 163; 17 Stat. 283.

<sup>27</sup> 1 Stat. 28, Act of July 27, 1789, Section IV.

<sup>28</sup> Journals of the Continental Congress, Vol. XXII, 1782, pages 87 through 92.

<sup>29</sup> *Ibid.* 88-9.

Thus we see that under the Continental Congress, the Department of Foreign Affairs and its Secretary were completely subject to the directions of the Congress. Every member of that Congress was entitled to see all books, papers and records of the Department, and ask any questions about its administration, providing only that matters of a secret nature had to have the special vote of the Congress, before obliging the Secretary to answer.

There is a striking similarity between the head of the Department of Foreign Affairs under the Continental Congress and a Minister of the Crown in Great Britain. Members of the House of Commons have the right to ask questions of Ministers. "Members of the Government are Members of the House of Commons; elected in the same way, entitled to the same privileges, subject to the same obligations, living while it lives, losing office when it is dissolved. Without a fixed term like the President of the United States or any Cabinet member he likes to keep in office, the position of Ministers is dependent on the credit they have with the Commons and the country, as demonstrated in office under cross-examination. They hold office because they are leading members of their party; they will lose it if they fall out of harmony with the fellow party members. They have obligations to them."<sup>30</sup>

Entirely different was the governmental scheme adopted by the Constitution, "It is evidently the intention of the Constitution, that the first Magistrate should be responsible for the executive department; so far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country \* \* \*. I believe no principle is more clearly laid down in the Constitution than that of responsibility".<sup>31</sup>

Equally striking is the failure of the new Congress to incorporate into the Act which created the Department of Foreign Affairs under the Constitution, either the wording or the substance of the provision contained in the Resolution of the Continental Congress, which gave any member of Congress access to the papers of the Department of Foreign Affairs. Nor have we been able to

\* Herman Finer, Visiting Professor of Political Science at U. of Chicago and Harvard University, and Lecturer and Reader in Public Administration, 1920-42, London School of Economics. *Questions to the Cabinet in the British House of Commons: Their Applicability to the United States Congress*, contained in a Joint Committee Print, 79th Congress, 2d Session, entitled "The Organization of Congress" (June 1946), pages 49, 53.

" James Madison, a member of the House of Representatives of the first Congress, in the debate on the Act of July 27, 1789, creating the department of foreign affairs. *Debates in Congress*, Volume I. Joseph Gales, Sr., page 480.

find any reference to that provision in the debate in the new Congress on the Act creating the Department of Foreign Affairs.<sup>32</sup> Similarly, in the Acts creating the other executive departments, no provision whatever was made entitling the Congress or members thereof to see secret or confidential papers in those departments.<sup>33</sup>

Edmund Randolph, who was Attorney General in President Washington's administration, was a member of a committee of three, which, in 1782, reported the Resolution to the Continental Congress creating the Department of Foreign Affairs. James Madison, who vigorously debated the Act creating the Department of Foreign Affairs, in the first Congress, had also been a member of the Continental Congress in 1780-82.<sup>34</sup> Roger Sherman, who likewise participated in the debate with Madison, had also been a member of the Constitutional Convention of 1787. A comparison of the names of members who sat in the new Congress in 1789,<sup>35</sup> with the names of members of the Continental Congress of 1782,<sup>36</sup> demonstrates that the members of the new Congress who participated in, or listened to, that debate were familiar with the fact that, during the existence of the Continental Congress, information, books, and records of the Department of Foreign Affairs, no matter how secret, were available to a member of Congress, providing the Congress so desired.

The failure of the new Congress to provide in any way for access to confidential information in the executive departments to the Congress or its members may, therefore, be said to have been deliberate, with full knowledge of the contrary practice which prevailed prior to the adoption of the Constitution.

Attorney General Moody, in an opinion rendered to the Secretary of Commerce and Labor<sup>37</sup> construed Section 161 of the Revised Statutes, which, as we observed, is identical with 5 U.S.C. Section 22. He stated:

"It thus appears that the head of a Department has full charge and control of all the records and papers belonging to

<sup>32</sup> See Gales and Seaton's *History of Debates in Congress*, Vol. I, (1789-90), pages 473 through 608.

<sup>33</sup> See footnote 26, and X Federal Bar Journal, pages 245 through 253. The exception in the case of the Secretary of the Treasury is discussed at page 252.

<sup>34</sup> *Journals of the Continental Congress*, Vol. 22 (1782) pp. 94, 454, 460.

<sup>35</sup> I *Debates of Congress*, Joseph Gales, Sr., Mar. 4, 1789, pp. 100, 101, 105.

<sup>36</sup> *Journals of the Continental Congress*, pp. 94, 390, 391, 458, 459.

<sup>37</sup> Twenty-five Opinions of the Attorney General, pp. 326, 329, 331, and see 10 Fed. Bar Journal 237. The opinion is cited with approval in *Bank Line v. U. S.*, 163 F. 2nd 133 (C.C.A. 2nd, 1947), and in *Parsons v. State*, 38 So. 2nd, 209, 216 (Ala. 1948).

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.

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

The foregoing section has received construction in *Boske v. Comingore*,<sup>38</sup> and *Ex Parte Sackett*.<sup>39</sup> 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 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 *Sackett* case, the Attorney General's power to make rules concerning the papers in his Department was involved. 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 proceeding where the agent was barred from so doing by a regulation issued by the Attorney General under Section 22.

In the *Boske* case, the Supreme Court affirmed a judgment of the District Court discharging a United States internal revenue collector from the custody of the sheriff of Kenton County,

<sup>38</sup> 177 U. S. 459.

<sup>39</sup> 74 F. 2nd 922.

Kentucky. The commissioners of internal revenue, with the approval of the Secretary of the Treasury, had issued regulations to the effect that all records in the offices of collectors of internal revenue should not be produced in State courts in answer to a *subpoena duces tecum*, or otherwise. In answer to such subpoenas, collectors were to appear in court and decline to produce the records on the ground that they were prohibited from so doing by the regulations of the Treasury Department. In discussing the right of the head of an executive department, under Section 161 of the Revised Statutes, to prescribe regulations concerning the records and papers of that department, the court held:

"The Constitution gives Congress power to make all laws necessary and proper for carrying into execution the powers vested by that instrument in the Government of the United States or in any Department or officer thereof. Const. Art. I, Section 8. That power was exerted by Congress when it authorized the Secretary of the Treasury to provide by regulation not inconsistent with law for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

\* \* \*

"The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded."<sup>40</sup>

In the *Sackett* case, the court cited Section 22 of the U. S. Code and Section 65 of the Rules and Regulations of the Division of Investigation, Department of Justice, which had been issued and

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<sup>40</sup> *Boske v. Comingore, supra*, pp. 468, 469.

approved by the Attorney General. Those rules provided that the records of the Division of Investigation "were maintained for the purpose of detection and prosecution of crimes against the United States or the preparation of cases in which the United States was a party in interest". Employees were prohibited from presenting the records or information contained therein in a State court or in a *habeas corpus* proceeding in a Federal court. The rules further provided that if a court ruled directing an employee to disclose information contained in the records, the rule was to be referred to the Attorney General. Each case was to be treated individually, and while every possible assistance was to be furnished to the courts, "the question of disclosing privileged information is a matter entirely in the discretion of the Head of the Department".<sup>41</sup> If the court requested reasons for declining to answer questions concerning records which the Attorney General deemed confidential, the person subpoenaed was to state to the court that the matter was privileged and could not be disclosed without specific approval from the Department.

The Circuit Court of Appeals, in construing the statute and the regulation, held:

"The statute of the United States, 5 USCA, Sec. 22, Rev. St. Sec. 161, authorizes the Attorney General to make rules concerning the custody of the papers and documents of the Department. In pursuance of this authority, the Attorney General has promulgated the rule (No. 65) \* \* \*. This regulation has the force of law, and the court had no jurisdiction or power to punish an officer for conforming to that law." [Citing *Boske v. Comingore* and other cases.] \* \* \*

"In view of the fact that under these regulations the documents, although physically in the possession of the witness, are in law in the custody of the Attorney General, and he is prohibited from producing them by the lawful rule of the Department, the court had no power or authority to compel him to do so. Whether or not the Attorney General could be compelled to produce such records in response to a subpoena or to testify concerning them is a matter which is not involved. In that regard, see 25 Op. Atty. Gen. page 326."

The power of heads of departments to control the use of their records in the best interests of the public finds illustration

<sup>41</sup> 74 F. 2d 922, 923.

in Revised Statutes 1076,<sup>41</sup> 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, U.S.C., 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.

### *English Cases and Statutes*

Dean Wigmore is severely critical of the American view, as represented by the *Sackett* and *Boske* cases.<sup>42</sup> The English view supports the American cases cited in Part II of this article, that the executive has complete and sole discretion to withhold papers and information from the courts, in the public interest.<sup>43</sup>

In the leading recent case of *Duncan v. Cammel, Laird & Co.*,<sup>44</sup> Viscount Simon, L.C., took the unusual course of delivering a single judgment of the court in an opinion written by him after "consultation and contribution from" six other members of the House of Lords. The case raised "questions of highest constitutional importance".<sup>45</sup> The court held:

"Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as of right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made. \* \* \* The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld."

<sup>41</sup> In *Robinson v. U. S.*, 50 Court of Claims, 159, 164, the court construed section 164 of the Judicial Code which became effective January 1, 1912. After quoting section 164, the Court of Claims said:

"This section is a verbal reenactment, without change, of section 1076 of the *Revised Statutes*, which in its terms reenacts the provision of the eleventh section of the original organic act of this court, act of February 24, 1855, section 11, 10 Stat. L., 614." See also *Pollen v. U. S.*, 85 Ct. Cl. 673 (1937).

<sup>42</sup> 8 Wigmore on Evidence, Sections 2378a and 2379, pp. 788, 795 ff.

<sup>43</sup> See *Earl v. Vass* (1822) 1 Shaw's Appeals 229. *House v. Bentick*, 2 Common Pleas (B. & B. 1820) 130; Trial of James Watson for High Treason (1817) 32 State Trials, 1, 102; *Attorney General v. Mayor et al.*, (1897) L.R. 2 Q.B.D. 384; compare these decisions with those cited in 10 Fed. Bar Journal 223 ff.

<sup>44</sup> 1 All England Law Reports Ann. (1942), 587, 591, 592; cited with approval in 163 F. 2nd 133, C.C.A. 2nd 1947.

<sup>45</sup> 58 Law Quarterly Review, 436.

The *Duncan* case, which was a civil suit between private parties, was followed in *Lilley v. Pettit*, which was a criminal prosecution.<sup>46</sup> In bastardy proceedings brought by a married woman, which were in the nature of a civil suit to which the Evidence Act of 1938 applied, the court reached a conclusion opposite to that of the *Lilley* case, and admitted an Army record over the Crown objections.<sup>47</sup> The Evidence Act does not apply to criminal cases.

The Crown Proceedings Act, 1947, provides for discovery and inspection of documents in any civil proceeding in which the Crown is a party, provided that the section "shall be without prejudice to any rule or law which authorizes or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest."<sup>48</sup>

Thus we see that Title 5, United States Code, Section 22, and the construction placed upon it in the *Boske* and *Comingore* cases, as to furnishing authority to heads of departments to withhold confidential papers, finds support in the English cases and statutes.

Referring to Professor Wigmore's criticism of the English cases, one writer has said: "But his remarks, we think, are rather a reflection upon the absolutism of the American executive than a valid criticism of our own legal methods."<sup>49</sup>

### *Some Leading Decisions*

We shall now discuss a few of the leading cases which 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.<sup>50</sup>

*McGrain v. Daugherty*,<sup>51</sup> 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 effi-

<sup>46</sup> 1946 K.B. Division, 401, and see note in 62 Law Quarterly Review, 24.

<sup>47</sup> *Andrews v. Cordiner*, 1 Ali Eng. Law Rep. 777 (1947), and see note in 63 Law Quarterly Review, 271.

<sup>48</sup> Section 28, entitled "Discovery", 40 Halsbury's Statutes of England, p. 339.

<sup>49</sup> 58 Law Quarterly Review, 31, 34. For an excellent, critical examination and analysis of Dean Wigmore's view, see the Government brief prepared by Messrs. Clapp, Staley and McGovern at pp. 31-35 in *Alltmont & O'Neill v. United States* (C.C.A. 3rd). Opinion of the Court filed Nov. 23, 1949. An article which apparently supports Wigmore's view, see B. H. Sokol, *Irresistible Forces and Immovable Objects*, 31 Chicago Bar Record (October 1949), 23.

<sup>50</sup> *Anderson v. Dunn*, 6 Wheat. 204, one of the earliest cases, and *Jurney v. MacCracken*, 294 U. S. 125, will not be discussed here. *In re Chapman*, ante, p. 320, is a leading case and has already been discussed.

<sup>51</sup> 273 U. S. 135, 177 (1926).

ciently 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. *Sinclair v. United States*,<sup>52</sup> involved Section 102 of the Revised Statutes, 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."<sup>53</sup>

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,<sup>54</sup> to withhold confidential papers from the legislative branch, and the latter's acquiescence in that practice. *McGrain v. Daugherty* throws some light on this question.

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. Late 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 Anti-

<sup>52</sup> 279 U. S. 263 (1929).

<sup>53</sup> The Developments of Congressional Investigative Power (1940), M. Nelson McGahey, pp. 102-4. H. W. Ehrmann, Duty of Disclosure in Parliamentary Investigation, 11 U. of Chicago Law Rev. 144.

<sup>54</sup> 10 Federal Bar Journal, pp. 147-50.

trust 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,<sup>55</sup> the statutes relating to the compulsion of the testimony of private persons<sup>56</sup> and the court decisions,<sup>57</sup> 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.

<sup>55</sup> 10 Fed. Bar Journal 107.

<sup>56</sup> Rev. Stats. 102, 103, 104, *ante*, p. 320.

<sup>57</sup> *Anderson v. Dunn*, *Kilbourn v. Thompson*, *infra*, p. 338, *In re Chapman*, *ante*, p. 320, and *Marshall v. Gordon*, *infra*, p. 339.

\* \* \* 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."<sup>58</sup>

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 Houses 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."<sup>59</sup>

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* case,<sup>60</sup> 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

<sup>58</sup> 273 U. S. 135, 174.

<sup>59</sup> *Ibid.* p. 176.

<sup>60</sup> 103 U. S. 168 (1880).

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*,<sup>61</sup> the district attorney of the Southern District of New York had sent to the chairman of a subcommittee of the House a letter 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 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."<sup>62</sup> 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 such 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

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<sup>61</sup> 243 U. S. 521, 546 (1917).

<sup>62</sup> *Ibid.*

have requested confidential papers which the President or the heads of departments felt obliged to withhold, in the public interest.<sup>63</sup>

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,<sup>64</sup> 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.<sup>65</sup>
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.<sup>66</sup>

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.<sup>67</sup> 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

<sup>63</sup> 10 Fed. Bar Journal 103-150.

<sup>64</sup> *Ante*, p. 226.

<sup>65</sup> *Ante*, p. 223-236.

<sup>66</sup> 10 Fed. Bar Journal, 124, 130.

<sup>67</sup> 273 U. S. 174.

are not affected in such a way 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.<sup>68</sup>

Referring to the *Daugherty* case, the Supreme Court, in *Sinclair v. United States*,<sup>69</sup> 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.<sup>70</sup>

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

<sup>68</sup> Taft, *Our Chief Magistrate and His Powers* (1916), pp. 1-2.

<sup>69</sup> 279 U. S. 263, 291.

<sup>70</sup> *Ibid.*, 291-2.

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 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.<sup>11</sup>

Simultaneously with the directive, the President issued a statement in which he called attention to the Federal employee loyalty

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<sup>11</sup> *Federal Register*, Mar. 16, 1948, Vol. 13, No. 52, p. 1359.

program and the policy of the Administration to carry out that program on a confidential basis. He called attention to the loyalty order,<sup>72</sup> 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 by a congressional committee or by a court. 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. 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.<sup>73</sup>

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<sup>72</sup> Executive Order No. 9835 of March 21, 1947.

<sup>73</sup> 94 Cong. Rec., p. 2261, March 5, 1948. See also 94 Cong. Rec., p. 2088, (March 2, 1948). It appears that Dr. Edward U. Condon wished to have the FBI report on his loyalty made public. However, the Secretary of Commerce refused to release the report to the House Committee on un-American Activities. The President of the United States forbade the publishing of any reports compiled in the course of the Loyalty Investigation Program. The President's decision was based on general policy considerations. See editorials in the Washington Post, entitled *Condon File*, April 24, 1948, May 11, 1948, and *Confidential Files*, March 13, 1948.

See also report No. 1753, 80th Congress, Second Session, on House Resolution 522, which deals with the effort of the Committee on Interstate and Foreign Commerce to direct the Secretary of Commerce to transmit to the House of Representatives a certain letter with respect to Dr. Condon. That report contains a memorandum of the Federal Law Section of the Legislative Reference Service supporting the right of Congress to require information from the executive department. The report also contains the traditional and opposing view of the executive department. See particularly pages 21 ff. of the report, a letter from the Secretary of Commerce to the Chairman of the Committee on un-American Activities, and a letter by Peyton Ford, the Assistant to the Attorney General, to the Chairman of the Committee on Interstate and Foreign Commerce. A summary of the Constitutional objections to House Resolution 522 is contained on pages 28 through 31 of the report.

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,<sup>74</sup> it is easy to perceive the chaos which would have resulted 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<sup>75</sup>*

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 might be deemed necessary to enable them to properly perform the duties delegated to them by the Congress.

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

The resolution was aimed at the coercion of the executive departments. Its purpose was to compel the heads of those departments, against the wishes of the President, to furnish information, papers and documents to congressional committees. In effect, the resolution proposed to make of the executive departments an adjunct of the legislative branch. Henceforth, said the resolution, heads of the executive departments were to be the servants of the majority of a congressional committee, which would have the power to supervise the executive branch of the Government. In short, to the extent that congressional committees were to direct the executive departments, in violation of, and against the orders of the President, and the heads of those departments, those committees would 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 Com-

<sup>74</sup> Executive Order No. 9835, Part I, sec. 1.

<sup>75</sup> 94 Cong. Rec., p. 2317, March 5, 1948. The resolution passed the House, 94 Cong. Rec. 5821. It was referred to the Senate, but never came to a vote.

mittee on the Reorganization of Congress."<sup>76</sup> 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,<sup>77</sup> and by the action of both Houses of Congress,<sup>78</sup> the resolution constituted 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.

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.

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.

### *Conclusions*

We stated in the introduction<sup>79</sup> 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

<sup>76</sup> 92 Cong. Rec. 6344 (1946).

<sup>77</sup> See 10 Fed. Bar Journal 224, 233-5, 257-9; see majority and minority reports in Report No. 1595 to accompany H. J. Res. 342, 80th Cong., 2nd Session.

<sup>78</sup> See the action of the Judiciary Committee of the House, in the *Seward* case, 10 Fed. Bar Journal 238-40.

<sup>79</sup> 10 Fed. Bar Journal 104.

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.<sup>80</sup> President Jackson had to deal with a militant and powerful Whig Senate minority, very persuasive in debate, headed by Senators Webster, Clay and Calhoun.<sup>81</sup> President Grant faced a swarm of committees from the Democratic House of Representatives who were investigating the executive departments.<sup>82</sup> President Hayes had difficulty with a Democratic House of Representatives, President Cleveland with a Republican Senate, and President Hoover with a Democratic House.<sup>83</sup>

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 of Representatives could serve no purpose, unless impeachment proceedings against Washington were in contemplation.<sup>84</sup> 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.<sup>85</sup>

While it may be difficult for us to properly gauge 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

<sup>80</sup> Binkley, *President and Congress* (1947), p. 38.

<sup>81</sup> Calvin Colton, *Life of Henry Clay* (1846), Ch. 5, pp. 122 ff.

<sup>82</sup> Allan Nevins, *Hamilton Fish*, 812-13; see also 10 Fed. Bar Journal 121.

<sup>83</sup> 17 Cong. Record 2331, 2445; Charles and Mary Beard, *Basic History of the U. S.*, p. 454; see also 10 Fed. Bar Jour. 123.

"Only when the majority of the House and the President belong to different political parties do the latter's agents suffer any scrutiny. This, for example, was the case during Mr. Wilson's last two years. Then fifty-one congressional investigations were in progress. \* \* \* But when a President has a Congress of his own political faith, inquisitions are not so frequent; their institution by the House of Representatives is extremely rare, and Senate majorities are not anxious to act." Lindsay Rogers, *The American Senate* (1926), 202.

<sup>84</sup> Letter Hamilton to Washington, March 7, 1796, *The Works of Alexander Hamilton*, edited by John C. Hamilton, V. 6, p. 90, and Claude Bowers, *Jefferson and Hamilton*, 297-8.

<sup>85</sup> Richardson, *Messages and Papers of the President*, V. 1, p. 195.

Treaty into effect, the country would have faced a crisis.<sup>66</sup> Faced with the refusal of the House of Representatives to appropriate moneys to carry the treaty into effect, unless it was shown all of 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 Farewell 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, \* \* \*. ”<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup>

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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

<sup>66</sup> See *Letters and Writings of James Madison*, V. 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, V. 6, pp. 95-100; Binkley, *President and Congress*, p. 44.

<sup>67</sup> Richardson, *Messages and Papers of the President*, V. 1, pp. 213, 219, and 10 Fed. Bar Journal 110.

<sup>68</sup> Robert Luce, *Legislative Problems* (1935), p. 587.

<sup>69</sup> *Ibid.* pp. 466-67.

covering more than 150 years of presidential action demonstrate that our Presidents have vigorously asserted that independence.<sup>90</sup>

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.<sup>91</sup>

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.<sup>92</sup>

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.

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 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.<sup>93</sup>

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<sup>90</sup> Part I of this article, 10 Fed. Bar Journal 103-146.

<sup>91</sup> Part II of this article, *ibid*, 225, 248, 252.

<sup>92</sup> Part I, *ibid*, p. 127.

<sup>93</sup> See *Myers v. U. S.* discussed at pp. 257-8, in Part II of this article.

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*<sup>94</sup> 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.<sup>95</sup>
- (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.<sup>96</sup>
- (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 had 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 to withhold confidential papers 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. 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 country<sup>97</sup> and the debates in Congress<sup>98</sup> demonstrate conclusively that both the House and the Senate have recognized: (1) That up to the present time no statute has ever

<sup>94</sup> Discussed *ante*, pp. 336-340.

<sup>95</sup> See *Kilbourn v. Thompson* and *Marshall v. Gordon*, discussed *ante* at pp. 338-9.

<sup>96</sup> See Part II of this article, 10 Fed. Bar Journal 226 ff.

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 resolution 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.<sup>99</sup>

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, 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.<sup>100</sup>

10. Paraphrasing President Jefferson's crucial question:<sup>101</sup> 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 actions of our Presidents, by court decisions, by the opinions of the Attorneys General, and by the views of almost every student of this subject.

<sup>99</sup> See "Resume and Conclusions", pp. 147 ff. in Part I of this article.

<sup>100</sup> *Ibid.*, Part I, p. 130.

<sup>101</sup> *Ante*, p. 327.

<sup>102</sup> *Ante*, p. 321.

<sup>103</sup> "But would the Executive be independent of the judiciary if he were subject to the commands of the latter, & to imprisonment for disobedience; . . .?" Letter of Thomas Jefferson to United States Attorney Hay, June 20, 1807, *Thomas Jefferson's Writings*, Ford (V. 9, p. 60); and p. 231 of Part II of this article.

## APPENDIX EXHIBIT NO. 13

## LETTER FROM PRESIDENT 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 controversy 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 powers, as 1 of the 3 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 in-

sisted 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 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 (1806-07), 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 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 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, 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. VII, 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 documents 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 treaty-making 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 sess., 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 committees, 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 information, records, and files were denied to congressional committees were as follows:

<i>Date</i>	<i>Type of document refused</i>
March 4, 1948-----	FBI letter-report on Dr. Condon, Director of National Bureau of Standards, refused by Secretary of Commerce.
March 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.
August 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.
February 22, 1950-----	Senate Resolution 231 directing Senate subcommittee to procure State Department loyalty files was met with President Truman's refusal, following vigorous opposition of J. Edgar Hoover.
March 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.
January 31, 1952-----	President Truman directed Secretary of State to refuse to Senate Internal Security Subcommittee the reports and views of Foreign Service officers.
April 22, 1952-----	Acting Attorney General Perlman laid down procedure for complying with requests for inspection of Department of Justice files by Committee on 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.
April 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 three great branches of our Government clearly defined, no one 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.

## APPENDIX EXHIBIT NO. 14

LETTER FROM GERALD D. MORGAN, SPECIAL COUNSEL TO THE PRESIDENT,  
TO CLARK R. MOLLENHOFF, REPORTER FOR THE DES MOINES REGISTER  
AND TRIBUNE

OCTOBER 26, 1956.

Mr. CLARK R. MOLLENHOFF,  
*Des Moines Register and Tribune,*  
*National Press Building, Washington, D. C.*

DEAR CLARK: At the press conference on September 27, 1956, you asked the President whether "all employees of the Federal Government, at their own discretion, can determine whether they will testify or will not testify before congressional committees when there is no security problem involved."

In the President's letter of May 17, 1954, to Secretary Wilson, the President set forth the general principles that are to govern all employees in the executive branch concerning their testimony, or the production of documents, relating to their conversations or communications with, or their advice to, each other on official matters. In his press conference of July 6, 1955, the President further amplified the principles set forth in this letter as follows:

"If anybody in an official position of this Government does anything which is an official act, and submits it either in the form of recommendation or anything else, that is properly a matter for investigation if Congress so chooses, provided the national security is not involved.

"But when it comes to the conversations that take place between any responsible official and his advisers, or exchange or mere little slips, of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody. And if they are it will wreck the Government."

In so writing to Secretary Wilson, and in further amplifying these principles, the President was exercising a right, which is his, and his alone, to determine what action is necessary to maintain the proper separation of powers between the executive and legislative branches of the Government. In the orderly administration of the Government, the head of each executive agency directs the manner in which these principles are enforced.

The underlying reasons for these principles are set forth in the President's letter of May 17, 1954. It is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising each other on official matters. It is essential, if channels of information are to be kept open, that confidences among employees should not be breached.

It will continue to be this administration's policy to keep the Congress and the people fully informed of what is being done in the executive branch. An employee is not free merely to exercise his own discretion but in the final analysis information will be withheld only when the President or agency heads acting under the President's authority or instruction determine it is contrary to the public interest to disclose it.

All of the above, of course, is subject to the Executive order dealing with the classification of information in the interest of security, and to the various statutes and regulations of the department and agencies relating to information to be held in confidence.

I hope this answers your inquiry.

Sincerely,

GERALD D. MORGAN,  
*Special Counsel to the President.*

## APPENDIX EXHIBIT NO. 15

## DEPARTMENT OF JUSTICE VIEWS ON S. 2148

OFFICE OF THE ATTORNEY GENERAL,  
*Washington, D. C., May 9, 1958.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In response to a request from Senator Eastland, Chairman of the Judiciary Committee, the Department of Justice has prepared and transmitted to him a detailed study of S. 2148.

In accordance with the suggestion made in your letter of April 18 to Attorney General Rogers, I am glad to enclose a copy of the Department's views on S. 2148.

Yours sincerely,

LAWRENCE E. WALSH,  
*Acting Attorney General.*

DEPARTMENT OF JUSTICE,  
Washington, D. C., May 9, 1958.

Hon. JAMES O. EASTLAND,

*Chairman, Committee on the Judiciary,*

*United States Senate, Washington, D. C.*

DEAR SENATOR EASTLAND: This is in response to your request for the views of the Department of Justice concerning the bill (S. 2148, 85th Cong.) to amend section 3 of chapter 324 of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information.

It would amend section 3 of the Administrative Procedure Act, a section which bears the heading "Public Information." It now provides:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of an agency—

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found" (5 U. S. C. 1002).

S. 2148 would delete from the first paragraph of section 3 of the Administrative Procedure Act the existing exceptions, authorizing an agency to withhold from random public inspection information concerning (1) any function of the United States requiring secrecy in the public interest; and (2) any matter related solely to the internal management of the agency. The bill would include in the amendatory subsection (f) exceptions from disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national security, or (3) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy.

Thus, no exemption from random public inspection is retained for matters relating solely to internal management. It is clear that the exemption for "national security" material is too narrow to include all material "requiring secrecy in the public interest."

Such material would include, for example, the investigatory files of the Federal Bureau of Investigation in routine criminal and civil investigations, for which there is no general statute excluding them from random public inspection. Such material would also include, for example, certain files of other agencies which would not come within the exemption for "national security" material and for which there exists no statutory protection against random public inspection.

Under section 2 of the Administrative Procedure Act the term "rule" is defined to mean "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice

requirements of any agency and includes approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing" (5 U. S. C. 1001 (c)).

The amendatory subsection (b) would require publication in the Federal Register of five categories of rules. In the aggregate they appear to include all of the rules that an agency might make, except those falling within 1 of the 3 previously mentioned exceptions from disclosure in the proposed amendatory subsection (f).

Thus, it may be seen that publication of much material of doubtful value to the public may be required. For example, in the administration of the immigration and nationality laws the Immigration and Naturalization Service issues thousands of orders which apply to individual persons. Can it be seriously maintained that provision be made for making all of them available for random public inspection or for publishing all of them in the Federal Register?

Under section 3 (a) of the Administrative Procedure Act, the Immigration and Naturalization Service, again for example, has published those orders and opinions which are worthy of being cited as precedents. As the bill would delete the present limitation in section 3 (a) to certain material adopted by the agency for the guidance of the public, and would delete the exception for rules addressed to and served upon named parties in accordance with law, the bill would thus apparently require the publication of still more material of doubtful value to the public.

Moreover, serious damage to the public interest may result from making available for random public inspection or from providing for publication of instructions to officers and employees in those cases in which the Government must perform maintain some secrecy. For example, it is inconceivable that a contracting officer could negotiate a contract upon terms most favorable to the Government, if those with whom he negotiated knew in advance the maximum price the Government would be willing to pay.

Section 3 (a) of the Administrative Procedure Act now provides:

"Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

The broad sweep of the bill is enhanced by the amendatory subsection (d), which would provide that every agency shall make available to the public "all records, files, papers, and documents submitted to and received by an agency." Under the bill "public records include, but are not limited to, all applications, petitions, pleadings, requests, claims, communications, reports, or other papers \* \* \*." It may be that the term "official record" in section 3 (c) could appropriately be clarified. But expansion of the term so as to require disclosure of all papers submitted to and received by an agency might render impossible a fair, efficient, and just administration of the public business.

Neither does the bill make clear the interrelation between the bill, on the one hand, and existing statutes such as title 18, United States Code, section 1905, and Revised Statutes, section 161, title 5, United States Code, section 22, on the other.

It is true that the amendatory subsection (f) (1) would exempt from disclosure subject matter which is "specifically exempt from disclosure by statute." If, however, each such other statute is left to rest on its own bottom, unnecessary and difficult questions of interpretation may arise.

On March 6, 1958, Attorney General Rogers presented before a subcommittee on constitutional rights of the committee a statement on inquiry by the legislative branch concerning the decision making process and documents of the executive branch. With reference to S. 2148 he expressed his views thus:

"When Congress passed the Administrative Procedure Act it clearly recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively. \* \* \* [B]ecause of these considerations I am opposed to the passage of S. 2148."

When the bill was introduced it was said that it "seeks to restore the original intention of Congress to the pertinent section of the Administrative Procedure Act \* \* \* namely, to insure that the public receives adequate information from administrative agencies concerning their activities and procedures, to the maximum extent consistent with the necessary requirements for protection of the national defense and security" (103 Congressional Record 6683

(daily edition, May 23, 1957)). In the light of the explicit language of section 3 of the act, of the legislative intent which is disclosed in the Senate report on the act, and of the views which were expressed by Attorney General Clark in the initial interpretation of this section, one can readily ascertain how little historical basis there is for any such statement.

The congressional recognition that, in addition to the governmental functions for the protection of the national defense and the national security, there are other governmental functions and certain administrative actions which in the public interest should not be available for random public inspection, appears at the very outset in the first paragraph of section 3 of this act. It excepts from such inspection "(1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency."

Moreover, section 3 (b) excepts from random public inspection all final opinions or orders of every agency of the executive branch in the adjudication of cases required for good cause to be held confidential and not cited as precedents. Furthermore, section 3 (c) provides that, save as otherwise provided by statute, matters of official record shall in accordance with published rule be made available to "persons properly and directly concerned" except information held confidential for good cause found.

In addition to the explicit language of section 3 of the Administrative Procedure Act, the Attorney General's views are indisputably supported by a review of the legislative intent which is disclosed in the Senate report when the act was passed by the Senate. That report states that the provisions of this section include those which require agencies to publish or make available information on administrative law and procedure, and that all administrative operations should as a matter of policy be disclosed to the public "except as secrecy may obviously be required or only internal agency 'housekeeping' arrangements may be involved" (S. Rept. No. 752, 79th Cong., 1st sess., 8 (1945)). It also states that "These provisions require agencies to take the mystery out of administrative procedure by stating it. The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance" (*ibid.*, at p. 12).

Obviously, the latter statement does not affect the validity of the former statement that there are governmental functions, in addition to those relating to the protection of the national defense and the national security, which it would be contrary to the public interest to make available for random public inspection. For the same reason there are certain administrative actions which should only be disclosed to "persons properly and directly concerned."

That Congress recognized that there are governmental functions, in addition to those for the protection of the national defense and security, which in the public interest should not be subject to random public inspection is also shown in the memorandum of Attorney General Clark, which is in an appendix to that report. He submitted it to "serve to clarify some of the essential issues," and to "assist the committee in evaluating the impact of the \* \* \* [Administrative Procedure Act] on public and private interests" (*ibid.*, at p. 38). As far as is here material, the legislative intent as expressed in the Senate report is in harmony with the clarification of the essential issues in that memorandum of Attorney General Clark.

Thus, for example, he stated:

"The exception of any function of the United States requiring secrecy in the public interest is intended to cover (in addition to military, naval, and foreign affairs functions) the confidential operations of the Secret Service, the Federal Bureau of Investigation, United States attorneys, and other prosecuting agencies, as well as the confidential functions of any other agency.

\* \* \* \* \*

"Section 3 (c) is not intended to open up Government files for general inspection. What is intended is that the agency, to the degree of specificity practicable, shall classify its materials in terms of whether or not it is confidential in character and shall set forth in published rules the information or type of material which is confidential that which is not" (*ibid.*, at p. 39).

As the Senate report succinctly put it, "In many cases the interest of the person seeking access to the [official] record will be determinative (*ibid.*, at p. 12).

A review of the Senate report, including Attorney General Clark's memorandum therein, and of section 3 of the Administrative Procedure Act itself shows that Congress clearly recognized in 1945 that there are governmental functions other than those relating to the protection of the national defense and security which should be withheld from public inspection "in the public interest." Shortly after this Act became effective, Attorney General Clark amplified his views in the Attorney General's Manual on the Administrative Procedure Act (1947). There is attached for the information of the committee a copy of that manual which will be referred to herein as the "Attorney General's Manual."

In the introduction Attorney General Clark stated that "it was intended primarily as a guide to the several agencies in adjusting their respective procedures to the requirements of the Administrative Procedure Act" (Attorney General's Manual at 63. A review of the interpretation of section 3 of the act in the Attorney General's Manual shows that it was recognized that there are a variety of functions and actions of the executive branch which are entirely unrelated to the protection of the national defense and security, but which, nevertheless, require protection from random public inspection "in the public interest."

Thus, for example, with respect to the exception for "any function of the United States requiring secrecy in the public interest," the Attorney General's Manual stated:

"It is not restricted, however, to investigatory functions. The Comptroller of the Currency, for example, may have occasion to issue rules to national banks under such circumstances that the public interest precludes publicity" (Attorney General's Manual, at p. 18).

Plainly, such rules may be issued in instances which have no relationship whatever to the protection of the national defense or the national security. No reflective person can doubt the validity of this observation of a predecessor Attorney General.

There is attached a memorandum setting forth in more detail the documentation for Attorney General Rogers' statement that "Congress recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the public interest, and that the Government cannot otherwise function effectively." The memorandum also contains other comments on the bill principally concerning its style and language.

Finally, there is a question as to whether S. 2148 does not purport to invade the executive power of the President under the Constitution. Any such invasion would, of course, be contrary to the separation of powers which is provided by the Constitution.

The value and importance of that doctrine was also discussed by the Attorney General in his statement on March 6, 1958, before the subcommittee. In that statement he said that—

"The doctrine of the separation of powers was \* \* \* the very foundation stone of the Federal Government as established by the Constitution. It was regarded as the basic guaranty of the liberties of the people against tyranny. In view of this background, it is not remarkable that it has retained vitality and been given practical application throughout our history. Each branch [of our Federal Government] has acted upon it and has been protected by it.

\* \* \* \* \*

"The doctrine of separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no one of the three elements could become preeminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry."

That no one of the three great branches of Government—the legislative, executive, and judicial—may invade the powers vested in another branch is firmly established by judicial decisions. The Attorney General referred to several of them in this statement.

The protection which each of the three branches derives from intrusion or invasion by the other is summarized in the Attorney General's speech, as Deputy Attorney General, some 2 years ago at Marquette University. There he said:

"A considerable part of the Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memorandums, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot

be subject to disclosure if there is to be any orderly system of Government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if Government is to function." (This speech is reproduced in 40 Marq. L. Rev. S3-91 (1956).)

Of late popular slogans, such as "the people's right to know" and the like, have been raised in support of the proposition that there should be made available for inspection by the press, in the name of the public, every detail of the transaction of the business of the executive branch of the Government. The fallacy in the application of such a doctrine to the transaction of every detail of the business of the Government which is not concerned with the protection of the national defense and the national security is clearly set forth in that speech.

It may be that from time to time information in the possession of the executive branch has been withheld from random public inspection which need not have been so withheld in the public interest. Obviously I am unable to state whether there have been any such instances in the case of the other departments and agencies in the executive branch. The correction of any such errors in judgment by administrative officials does not lie in a purported invasion by the legislative branch into the performance of the functions of the executive branch, such as that apparently contemplated by some of the provisions of S. 2148.

To date, such slogans as "the right to know" have been concentrated to encourage congressional action that there be made available for random press inspection, in the name of the public, the transaction of all of the business of the executive branch. If Congress should see fit to pass such a bill as S. 2148 in its present form, can it logically refuse to take similar action with respect to the conduct of the business of the legislative branch? If Congress should seek to adopt such an approach with respect to the executive branch, clearly it cannot logically refuse to adopt a similar approach to the transaction of the business of the legislative branch.

Lest any Member of Congress doubt that such will be the case, the attention of the committee is invited to the quotation in the Attorney General's statement on March 6, 1958, of the statistics in a press account of the executive sessions of Senate and House committees in 1956. He quoted the following extracts from an article which appeared on September 12, 1956, which read as follows:

"Congress barred the public from 1,131 of its 3,121 committee meetings in 1956, or more than one-third of them.

"Spokesmen for several of those committees listed such things as national security, Government efficiency, and preserving the private rights of witnesses as reasons for closing meetings."

If Congress should pass S. 2148 as it is now drafted, it must expect that a similar slogan of "the right to know" will be raised with respect to the right to know every detail of the transaction of its business. A review of all these circumstances can only lead the committee to reach the same conclusion that the Attorney General did—that S. 2148 should not be passed.

The Special Committee on Legal Services and Procedure of the American Bar Association has drafted a bill to amend the Administrative Procedure Act in its entirety. It is reprinted in the issue of the Administrative Law Bulletin for July 1957. In view of the prospective presentation of such a bill for introduction, it would seem that the committee would prefer to defer consideration of a piecemeal amendment to a single section of the act until it has an opportunity to consider whatever draft of a bill may ultimately be approved by the American Bar Association for presentation to Congress.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Because of the interest of the chairman of the subcommittee on constitutional rights in the views of the Department on S. 2148, a copy of this report has been sent to him.

Sincerely yours,

MALCOLM R. WILKEY,  
Assistant Attorney General, Office of Legal Counsel.

MEMORANDUM TO ACCOMPANY LETTER RESPECTING S. 2148, 85TH CONGRESS

I. *Summary of legislative history of section 3 of the Administrative Procedure Act and its initial interpretation in the Attorney General's Manual on the Administrative Procedure Act (1947)*

Under the Administrative Procedure Act the first exception for information which may be excluded from public inspection is not limited to those governmental functions requiring secrecy for the protection of the national defense and security, but to those functions requiring secrecy "in the public interest." In Attorney General Clark's memorandum in an appendix to the Senate report on the Administrative Procedure Act he stated that—

"The exception of any function of the United States requiring secrecy in the public interest is intended to cover (in addition to military, naval, and foreign affairs functions) the confidential operations of the Secret Service, the Federal Bureau of Investigation, United States Attorneys, and other prosecuting agencies, as well as the confidential functions of any other agency" (S. Rept. No. 752, supra, at 39).

Hence, while the Administrative Procedure Act was pending before Congress Attorney General Clark made it plain that the exception from public inspection of any function requiring secrecy "in the public interest" included such functions as the confidential operations of the Secret Service, the Federal Bureau of Investigation, United States attorneys, and other prosecuting agencies, as well as the confidential functions of any other agency. His views are endorsed in the section entitled "Public Information" in the text of the Senate report (*ibid.* at 12).

With respect to this first exception the Attorney General's Manual stated:

"This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law-enforcement procedures, the disclosure of which would reduce the utility of such procedures. It is not restricted, however, to investigatory functions. The Comptroller of the Currency, for example, may have occasion to issue rules to national banks under such circumstances that the public interest precludes publicity."

"It should be noted that the exception is made only 'to the extent' that the function requires secrecy in the public interest. Such a determination must be made by the agency concerned. To the extent that the function does not require such secrecy, the publication requirements apply. Thus, the War Department obviously is not required to publish confidential matters of military organization and operation, but it would be required to publish the organization and procedure applicable to the ordinary civil function of the Corps of Engineers" (Attorney General's Manual at pp. 17-18).

With respect to the second exception in section 3 of the Administrative Procedure Act for information which should be withheld from random public inspection, that for "any matter relating solely to the internal management of an agency," the Senate report states that this category of information is "closely related" to the first exception excluding from random public inspection matters requiring secrecy "in the public interest" (S. Rept. No. 752, supra, at 12). With respect to this second exception the Attorney General's Manual stated:

"This exception is in line with the spirit of the public information requirements of section 3. If a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3. Thus, an agency's internal personnel and budget procedures need not be published \* \* \*" (Attorney General's Manual at 18).

With respect to the third exception in section 3 (b) of the Administrative Procedure Act for information which need not be made available for random public inspection, that for "all final opinions and orders in the adjudication of cases \* \* \* required for good cause found to be held confidential and not cited as

precedents," it is stated in Attorney General Clark's memorandum in an appendix to the Senate report:

"Section 3 (b) is designed to make available all final opinions or orders in the adjudication of cases. Even here material may be held confidential if the agency finds good cause. This confidential material, however, should not be cited as a precedent. If it is desired to rely upon the citation of confidential material, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts" (S. Rept. No. 752, supra, at 39).

Because of the phrase "in the adjudication of cases" in section 3 (b) of the Administrative Procedure Act, it should be noted that it does not require the publication of final opinions or orders which are not entered "in the adjudication of cases."

Section 3 (c) of the Administrative Procedure Act now provides that—

"Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

In Attorney General Clark's memorandum in an appendix to the Senate report he stated:

"Section 3 (c) is not intended to open up Government files for general inspection. What is intended is that the agency, to the degree of specificity practicable, shall classify its materials in terms of whether or not it is confidential in character and shall set forth in published rules the information or type of material which is confidential and that which is ~~not~~ not" (S. Rept. No. 752, supra, at 39).

In that report it was said, "In many cases, the interest of the person seeking access to the record will be determinative" (*ibid.* at 13).

When the Administrative Procedure Act was under consideration by Congress, it is thus clear that it was recognized that "matters of official record" which do not include information held confidential for good cause and which are not final orders or opinions in adjudicated cases should be "made available to persons properly and directly concerned," but that they need not be made available for random public inspection. Moreover, it was recognized by Congress that there was a category of information that was confidential, and that it is not in the public interest that such information be made generally available.

The recognition of these circumstances is also discussed in the Attorney General's Manual. With respect to section 3 (c) of the Administrative Procedure Act it is stated:

"The introductory saving clause is intended to preserve existing statutory requirements for confidential treatment of certain materials such as income tax returns."

\* \* \* \* \* In general it may be stated that matters of official record will include (a) applications, registrations, petitions, reports, and returns filed by members of the public with the agency pursuant to statute or the agency's rules; and (b) all documents embodying agency actions, such as orders, rules, and licenses. In formal proceedings, the pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record are 'matters of official record.'

\* \* \* \* \* "The great mass of material relating to the internal operation of an agency is not a matter of official record. For example, intra-agency memoranda and reports prepared by agency employees for use within the agency are not official records since they merely reflect the research and analysis preliminary to official agency action. Intragency reports of investigations are in general, not matters of official record; in addition, they usually involve matters of internal management; and, in view of their nature, must commonly be kept confidential" (Attorney General's Manual at 24-25).

Attorney General Clark's reference to "intra-agency memoranda and reports prepared by agency employees for use within the agency" as merely reflecting "the research and analysis preliminary to official agency action" obviously refers to the same matters as those in the directions in President Eisenhower's letter of May 17, 1954, to the Secretary of Defense, prohibiting the disclosure outside the executive branch of advice and recommendations among employees of that branch on official matters (100 Congressional Record 6263, daily edition, May 17, 1954), as distinguished from official actions thereon.

The Attorney General's Manual goes on to state:

"But even matters of official record need be divulged only to 'persons properly and directly concerned.' It is clear that section 3 (c) is not intended to open up Government files for general inspection. The phrase 'persons properly and directly concerned' is descriptive of individuals who have a legitimate and valid reason for seeking access to an agency's records. (See *United States ex rel Stowell v. Deming*, 19 F. 2d, 697 (app. D. C., 1927)), certiorari denied (275 U. S. 531). Each agency is the primary judge of whether the person's interest is such as to require it to make its official records available for his inspection.

"An agency may treat matters of official record as 'confidential for good cause found' and upon that ground refuse to make them available for inspection. Information held 'confidential for good cause found' may be either information held confidential by reason of an agency rule issued in advance (for good cause) making specific classes of material confidential, or such information as is held confidential for good cause found under a particular set of facts. The section does not change existing law as to those materials in Government files which have been heretofore treated as confidential. (See *Boske v. Comingore*, 177 U. S. 459 (1900); *Bochm v. United States*, 123 F. 2d 791, 805 (C. C. A. 8, 1941)" (Attorney General's Manual at 25).

Thus, Attorney General Rogers' recent statement, that Congress "clearly recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively," is indisputably supported by a review of the legislative intent which is disclosed in the Senate report on the Administrative Procedure Act, the explicit language of section 3 of the act and its interpretation under the direction of Attorney General Clark.

## *II. Comments concerning style and language*

The title of the bill is not well stated. As now stated, the title would indicate that the bill amends section 3 "of chapter 324" of the act of June 11, 1946 (Administrative Procedure Act). Reference to chapter 324 should be stricken, since the act does not contain chapter 324 or any other chapter. Chapter 324 is, in fact, the same as the act itself. The same fault occurs in the introductory material following the enacting clause.

As now stated, the bill would amend section 3 of the act in question to read as section 1002 of the act. The section, as it would be amended, should still be designated as section 3. The comparable section in title 5 of the United States Code is section 1002. Also, the section designated as 1002 is given the heading "Public Information." The section should not be given any heading. "Public Information" should either be omitted, or be indicated as a center heading as it is now so indicated in the Administrative Procedure Act.

The amendatory subsection (a) would provide that every agency shall separately state and promptly file certain documents for publication in the Federal Register and the Code of Federal Regulations. The same provision with respect to filing for publication in both the Federal Register and the Code of Federal Regulations occurs in the amendatory subsections (b) and (c).

Under section 3 (a) of the Administrative Procedure Act every agency must separately state and currently publish in the Federal Register. The Code of Federal Regulations is simply a special edition of the Federal Register and it may be somewhat misleading to require filing for publication therein.

More importantly, although rules and regulations relating to agency organization are required to be published in the Federal Register, they are not now and probably should not be codified. At the beginning of operations under the Administrative Procedure Act, agency organization material was codified, but codification was found to be cumbersome, inconvenient and unnecessary. As a result, all such material was decodified. It is, therefore, questionable that specific reference to the Code of Federal Regulations should be so made as to require publication therein. To the extent that substitution of a requirement for filing "promptly" may assure earlier publication than is now effected by use of the requirement to publish "currently," the amendatory section is probably not objectionable.

The amendatory subsection (a) would also require that all delegations of "final authority" be filed for publication. This requirement is somewhat vague because the meaning of the term "final authority" is not clear. This provision is merely a reenactment of a provision now found in section 3 (a) of the Administrative Procedure Act. If the section is to be amended, the meaning of "final authority" probably should be clarified. Omission of the word "final" might be preferable.

The amendatory subsection (c) would require the filing for publication of agency "orders and opinions." The present requirement is for publication of "final opinions or orders." Under section 2 (d) of the Administrative Procedure Act, the term "order" means the whole or any part of the final disposition. Opinion is not defined. Publication of interlocutory orders and opinions would entail considerable administrative service and expense which might not be justified by the result achieved. It is suggested that any requirement for publication of orders and opinions should be limited to those which are final.

On page 2, line 9, of the bill there should be deleted the word "reorganization," and in lieu thereof there should be inserted the word "revocation."

On page 2, line 16, of the bill the word "revocation" may be more appropriate than would be the word "repeal."

The amendatory subsection (e) would provide that no rule, etc., shall be relied upon or cited by any agency against any person, unless it has been duly published or made available to the public in accordance with the amendatory section, and that no person shall in any manner be required to "resort" to any organization or procedure not so published. The word "resort" is ambiguous. Although it is similarly used in section 3 (a) of the act, it should be clarified in any amendment of the section. "Resort" as here used is probably intended to mean "bound by or required to comply with."

Subdivision (2) of the amendatory subsection (f) would refer to information required to be kept secret in the protection of the national security. In the letter it has been pointed out why any such exception is too limited to protect information which in the public interest should not be available for random public inspection.

## APPENDIX EXHIBIT NO. 16

### SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS SURVEY OF WITHHOLDING OF INFORMATION FROM CONGRESS

#### EXHIBIT NO. 16 (A)

Memorandum to : Charles H. Slayman, Jr., chief counsel and staff director.  
From : Marcia J. MacNaughton, research assistant.

Subject : Summary analysis of Constitutional Rights Subcommittee survey of withholding of information from Congress.

Following is a summary analysis of the survey of agencies, executive departments, and congressional committees, made by the Senate Subcommittee on Constitutional Rights, regarding withholding of information from Congress. As you know, 57 committee chairmen responded to Senator Hennings' letter of inquiry of May 29, 1956, and 65 agency and department heads answered the Senator's letter of April 2, 1957.

The chief value of the subcommittee survey has been to show in three major ways the haphazard nature of executive withholdings. First, it has illustrated the confusion in Federal agencies and executive departments as to what should be an appropriate and constitutional basis for withholding information from Congress. Secondly, it demonstrates the varied nature of the information and material withheld by the executive branch and the independent agencies. Thirdly, it shows that information has been withheld by officials at various levels of authority.

#### VARIED REASONS FOR WITHHOLDING

The replies show that there is little agreement among executive officers as to what legal authority they possess to refuse to comply with congressional requests for information. Their reasons are almost as numerous as the refusals. Most frequently relied on to justify refusals is the President's letter of May 17, 1954, to the Secretary of Defense, with its attached memorandum from the Attorney General to the President. Written in connection with the Army-McCarthy hearings, when the President authorized the Secretary of Defense to withhold certain material from the Congress, this executive communication cites various precedents in support of the executive claim to a right to withhold information and papers from the Congress. The manifold uses to which this letter has been put since 1954 by departments and agencies withholding information are brought out quite strongly by our survey.

For instance, Senator Hennings, as chairman of the Subcommittee on Constitutional Rights, has on record several withholdings from the subcommittee based on the President's May 17 letter. During its 1955 investigation of State Department passport procedures, the subcommittee encountered two specific refusals of pertinent information. In response to both committee requests, a minor State Department official declined to furnish the information, as he explained, "in accordance with the traditional doctrine of the separation of powers as set forth in the President's letter to the Secretary of Defense dated May 17, 1954, and in the memorandum attached thereto from the Attorney General to the President which delineates this doctrine and the supporting precedents since this question is directed to the point of confidential advice furnished within the executive family." (P. 247, Security and Constitutional Rights hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 84th Cong., 1st sess.)

On another occasion, to clarify testimony given before the subcommittee by the Chairman of the Civil Service Commission, Senator Hennings requested a copy of a letter, mentioned in the Civil Service Commission handbook, in which the Attorney General advised the Commission on matters pertaining to Government personnel security procedures. The Commission refused the request, and referred the Senator to the Attorney General. However, a request directed to the Attorney General was denied on the basis of the May 17 letter from President Eisenhower to the Secretary of Defense.

In an effort to relate a withholding to the Chief Executive, the Acting Secretary of State sought the sanctum of the foreign relations area in refusing certain information and documents on East-West trade to the Senate Permanent Investigations Subcommittee. He said, "Any revelation on our part of the details of this program would constitute a breach of trust on the part of the United States, and, by jeopardizing the voluntary basis of trust upon which the program rests, would endanger our national security." But he deviated from this approach to his withholding, and noted that disclosure would be "contrary to the public interest." He proceeded then to refer the subcommittee to the President's May 17, 1954, letter to the Secretary of Defense, and concluded, "We are, therefore, required to deny to this subcommittee any documents that would violate this principle." (See survey reply from Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, p. 304, and survey reply from Department of State, p. 394.)

In one instance, the Chairman of the Securities and Exchange Commission felt he could not reveal information about a conversation with Presidential Assistant Sherman Adams, (1) because of the President's May 17 letter, and (2) because he was ordered not to. In a memorandum prepared in response to Senator Hennings' letter of inquiry, the Commission states that the Commissioner "advised the Subcommittee on Antitrust and Monopoly that the conversation related solely to his responsibilities under the principles expressed in President Eisenhower's letter of May 17, 1954, to the Secretary of Defense, which was made applicable to these hearings by Attorney General Brownell's letter of July 12, 1955 to Chairman Armstrong, and instructions from the President's special counsel, and further, that the conversation did not relate to the Commission's quasi-judicial proceedings under the Public Utility Holding Company Act."

The Commission significantly emphasizes that the Commission Chairman in this instance was specifically instructed by the Attorney General through the President's special counsel that he was not to testify on this matter, since it was "within the executive privilege of the executive branch of the Government. Accordingly," concludes the memorandum, "it was impossible for the chairman to testify since the privilege belonged to and could only be waived by the Executive himself." (See the Commission's reply, p. 415.)

One department head, in withholding certain information, in effect referred a Senate subcommittee to the Chief Executive. "It would be necessary to obtain an Executive order to obtain the desired information" was the reply given by the Treasury Department when the Senate Subcommittee on Antitrust and Monopoly requested financial data concerning meatpackers.

#### *Statutory authority*

The survey illustrates that departments and agencies alike have cited Federal statutes in order to imply a legislative sanction for their withholdings from the Congress, itself.

One independent agency, created by Congress, cited as authority a statutory provision enacted by Congress which pertained to unauthorized disclosures by that agency. In April 1955, the Central Intelligence Agency reported to the Senate Permanent Investigations Subcommittee that the agency was unable to furnish classified information on railroad systems within the U. S. S. R. This, said the agency, involved the protection of sources and methods, as provided in section 102 (d) (3) of the National Security Act of 1947, Public Law 253, 80th Congress, as amended, which provides in part, "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosures."

Cited also as an authority for withholding is section 161 of the Revised Statutes (5 U. S. C. 22), which Congress enacted to give department heads authority to prescribe regulations for their departments on such matters as conduct of officers and clerks, distribution, and performance of departmental business, and "custody, use, and preservation of the records, papers, and property" pertaining to their departments.

A provision of the Administrative Procedure Act (5 U. S. C. 1002 (c)) which requires good cause to be shown for restricting information, is also cited in the survey.

A survey reply received from the Department of Agriculture with attached memorandum and regulations illustrates the citation of these last two statutes in connection with a departmental refusal of information to Congress. In a memorandum explaining why minutes of the National Advisory Commission and other advisory committees would not be available to Congress, the Department said:

"The authorities relating to access to records of the Department are title 5, United States Code, section 22, authorizing regulations for the conduct of the Department's work, title 5, United States Code, section 516, giving custody of Departmental records to the Secretary, and title 5, United States Code, section 1002 (c) (sec. 3 of the Administrative Procedure Act), requiring good cause to be shown for restricting the availability of information. Pursuant to these authorities, the Department has designated certain records as confidential and certain other records as of limited availability." (See Department of Agriculture reply, p. 380.)

#### *Departmental and Agency authorities and discretion*

Departmental regulations are quoted in several instances to justify refusals such as the withholding by the Veterans' Administration of personnel data in connection with employment of certain individuals.

In other instances, "policy" has been cited by the withholding official. The Securities and Exchange Commission, for example, pleaded "agency policy" when it refused to release certain investigation files to the Senate Banking and Currency Subcommittee on Securities. In another example, the Department of Justice declined to furnish the Antitrust and Monopoly Subcommittee information in connection with a voluntary merger clearance program because information so supplied to the department was "confidential."

In some cases, only a withholding officer's own philosophy of the separation of powers, his own interpretation of custom, or his own perception of the necessity of public policy has accompanied refusal of requests for information. The following reply, for example, was received by a Senate Post Office and Civil Service Subcommittee investigating the administration of the Federal employees' security program, when the subcommittee directed a request to the Civil Service Commission:

"The security file which you requested is in the possession of the Civil Service Commission but it would not be appropriate for me to furnish it to your subcommittee. As you know, investigative information and privileged communications in the custody of the executive branch of the Government have long been withheld from the Congress and its committees for reasons of public policy and in order to maintain the separation of powers between the executive and legislative branch."

When the Senate Permanent Subcommittee on Investigations required materials relating to three school approved for training veterans, the Veterans' Administration would not furnish the bulk of the data because it "pertained to matters of internal administration, including conclusions among its officials—legal and administrative reports from field officers and instructions to such officers." A portion of their further reply, it will be noted, was taken verbatim from the President's May 17 letter:

"These are documents which, since the establishment of the Government under the Federal Constitution, have been held not subject to release to congressional

committees for the reason that it is essential to efficient and effective administration that employees of the executive branch of the Government 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 the discussions concurring such advices be disclosed."

Senator McClellan comments further on this withholding that "It is of interest that much of the correspondence the Veterans' Administration refused to furnish, were letters from the administration to outside individuals, such as officers or attorneys of the schools involved. Later the Veterans' Administration reconsidered and apparently determined that they were not within the purview of President Eisenhower's letter, and they were subsequently furnished the subcommittee." (See reply from Senate Permanent Subcommittee on Investigations.)

Perhaps one of the more extreme instances illustrating the confusion as to the proper basis for withholding is described in the reply of the Veterans' Administration (p. 420). A Post Office and Civil Service subcommittee had asked for personnel and security data in connection with employment of certain people by the agency. Four different reasons are given by this independent agency for not surrendering the various documents.

- (1) Executive Order 10450;
- (2) Executive Order 10501;

(3) The doctrine of separation of powers between the executive and legislative branches of the Government, and the President's May 17, 1954, letter, and the Attorney General's memorandum; and

- (4) Regulations of the Veterans' Administration.

#### NATURE OF MATERIAL WITHHELD

Secondly, the withholdings are haphazard in the nature of material withheld. Presented with such a variety of readymade excuses for not giving out information, an official is able to withhold from the Congress and the people anything he has a mind to withhold. The possibilities, as the survey shows, are infinite. From the results of the survey, it is difficult to find a common denominator for the different types of information, documents, and materials which agencies and departments have refused to release. Taken as a whole, the withholdings reported in the subcommittee survey are remarkable in their inconsistency.

The following examples, selected from the replies to the survey letter, prove the varied nature of information withheld.

Interdepartmental communications have often been refused congressional committees. For instance, subjects of one controversy were letters from the Atomic Energy Commission to the Department of Defense, along with an opinion by the AEC General Counsel concerning the authority of the Commission to exchange certain information with other countries under agreements for cooperation. Copies of these letters and the opinion were requested by the Joint Committee on Atomic Energy. The Commission informed the Joint Committee that the documents were internal communications within the executive branch of the Government, and considered privileged under the doctrine of separation of powers, but that the Commission would waive the privilege with regard to one letter and the opinion. The other letter, containing comments and suggestions of the Atomic Energy Commission, was not released.

On several occasions, congressional committees have been refused reports made by the Inspector General and the Auditor General to the Air Force and to the Army. (See Department of Defense reply, p. 385.)

Intradepartmental communications have frequently been withheld from Congress. To refer to an example cited above in connection with another aspect of the problem, the Veterans' Administration refused to furnish data relating to schools for veterans because the material included legal and administrative reports from field officers and instructions to such officers, as well as conclusions among Administration officials.

Senator Fulbright, as chairman of the Senate Banking and Currency Committee, reported that during a hearing on the Export Control Act, the Deputy Assistant Secretary for International Affairs, Department of Commerce, refused to reveal recommendations on scrap export which a bureau director in the Department had made to the Secretary.

The Solicitor of the Post Office Department declined to furnish to a House Subcommittee on Legal and Monetary Affairs his opinion with respect to certain

findings made in connection with a proposed contract for the purchase of motor vehicles, because he felt it was an internal management document.

The Atomic Energy Commission in 1956 refused to furnish to the Joint Congressional Committee on Atomic Energy AEC staff reports and analyses summarizing considerations affecting application for reactor safeguard construction permits which had been issued. The Commission based its refusal on the fact that the documents were working papers prepared for internal use of the Commission and contained the views and opinions of the members of the Commission's staff and its advisers. (Similar withholdings are reported in the survey reply of the Atomic Energy Commission, p. 374.)

Materials relating to foreign affairs have been the subject of withholding from Congress. For instance, the International List of Controlled Items and other documents relating to East-West trade controls were withheld from the Senate Permanent Investigations Subcommittee in a joint refusal by three departments and an agency, although some of the material had been published in a British Government periodical. Another time, terms of agreements between oil companies and the Iranian Government, and copies of arrangements made in connection with these agreements were refused this same Senate subcommittee by the State Department. (See reply and exhibits of the Senate Permanent Investigations Subcommittee, p. 301.)

Data and files on cases before quasi-judicial agencies have been refused Congress. For example, the Senate Banking and Currency Committee was told by the Securities and Exchange Commission that the Commission could not release investigation files for a case pending before the Commission, or confidential and public files for another case which had been before the Commission.

Data relating to the administration of justice has been withheld. The Justice Department has consistently withheld grand jury transcript and documents obtained pursuant to grand jury subpoena which have not become matters of public record, as well as reports of the Federal Bureau of Investigation. It has also refused to furnish information from a closed file on a criminal matter, and information submitted by companies in connection with a voluntary merger clearance program. (See p. 352.)

Numerous instances of withholding of material relating to personnel security files were reported by the Government Employees Security Subcommittee, and other Senate subcommittees. Time after time, according to committee reports, personnel documents and files were refused by the Department of State, the Veterans' Administration, the Defense Department, and other agencies and departments. (See, for example, survey replies of the Civil Service Commission, the Central Intelligence Agency, and the Post Office Civil Service Subcommittee on Government Employees Security Program, pp. 378, 376, and 362.)

#### WHO WITHHOLDS?

The survey has served to demonstrate in another way the haphazard nature of withholdings by illustrating the various levels at which material is withheld. Apparently almost anyone in the executive branch determines what shall be withheld and when it shall be withheld, from the President himself on down through the ranks of his subordinates. As authority becomes less concentrated, the withholdings, it seems, would become more dubious, because they are further from knowledge of the Chief Executive.

Some withholdings occur with the knowledge and consent of the President. For instance, the Director of the Bureau of the Budget refused certain records to a subcommittee "after discussion with the President." (See survey reply from Bureau of the Budget, p. 395.) In another case, the head of an independent agency refused to furnish information on the advice of the Attorney General, and through specific instruction from the President's special counsel.

One withholding approached the Cabinet level when three department heads and an agency director concurred in withholdings from the Senate Permanent Investigations Subcommittee. In this case, the Acting Secretary of State refused on behalf of the State Department, the the Secretary of Defense, the Secretary of Commerce, and the Director of the International Cooperation Administration. See reply of the Senate Permanent Investigations Subcommittee and the Department of State reply, pp. 301 and 394.)

In many instances cited in the survey, the withholding officer is the head of the department. One example of withholding at this level of authority as reported by Senator McClellan, chairman of the Senate Permanent Subcommittee on Investigations, occurred when the Secretary of Commerce refused to let the

subcommittee review minutes as well as recommendations made to and by the Joint Operating Committee of the Advisory Committee on Export Policy. (See reply from Senate Permanent Investigations Committee of the Government Operations Committee, and exhibits attached.)

In a great many cases reported in the survey, the withholding officer has been the alter ego of the head of a department. A request directed by Senator Hennings to the Attorney General was refused by the Deputy Attorney General. The Administrative Assistant to the Secretary of Interior withheld in the name of the Department of the Interior, according to the survey reply from that Department. (See p. 388.) The Acting Secretary and the Assistant Secretary of the Interior responded to other requests for information. (See reply from Department of the Interior, pp. 390, 391.) In another withholding the Acting Secretary of State spoke for the State Department. Many other examples of this practice can be seen in the survey replies.

The heads of independent agencies withheld for their agencies in several instances. For example, the Administrator of Veterans' Affairs has declined for the Veterans' Administration, and the Chairman of the Securities and Exchange Commission has refused in the name of his Commission. (See replies from those agencies, pp. 415, 419.)

However, the survey shows that withholdings also occur further down the line of authority. For instance, Department of Commerce Deputy Assistant Secretary for International Affairs refused to answer a question put to him by the chairman of a Senate Banking and Currency Subcommittee investigating export policies. Another example of decisions to withhold being made at a lower level can be seen in the refusal of the Administrator of the Bureau of Security and Consular Affairs in the State Department to supply the Constitutional Rights Subcommittee with information relating to passport procedures.

Taken as a whole, these examples from the survey and other instances cited in the survey replies demonstrate that withholdings occur at almost all levels of authority in the executive branch.

#### APPENDIX EXHIBIT 16 (B). LETTER TO SENATE COMMITTEES AND SUBCOMMITTEES

Senator Hennings, as chairman of the Subcommittee on Constitutional Rights, addressed the following letter to the chairmen of all Senate committees and the joint committees of Congress:

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
*May 29, 1956.*

DEAR SENATOR \_\_\_\_\_: The Subcommittee on Constitutional Rights is conducting a study of the withholding of information from Congress by various executive departments and independent agencies, with particular emphasis on cases in which the letter written by President Eisenhower to Defense Secretary Wilson on May 17, 1954, has been used to justify such withholding.

The President's letter of May 17, 1954, you will remember, was written in connection with the Army-McCarthy hearings before the Special Subcommittee on Investigations of the Committee on Government Operations, and included a memorandum to the President from the Attorney General setting forth various precedents to support the asserted right of executive departments and agencies to withhold papers and information from Congress.

I would appreciate greatly your informing this subcommittee of all occasions on which any executive department or executive officer of any independent agency has refused to give information to your committee since May 17, 1954. Please indicate the reasons given for any such refusals, whether they involved the May 17, 1954, letter or not.

Thank you for your cooperation in this matter.

Very truly yours,

THOMAS C. HENNINGS, Jr., *Chairman.*

## APPENDIX EXHIBIT 16 (C). REPLIES FROM COMMITTEES

UNITED STATES SENATE,  
COMMITTEE ON AGRICULTURE AND FORESTRY,  
*June 1, 1956.*

Hon. THOMAS C. HENNINGS, Jr.

*Chairman, Subcommittee on Constitutional Rights,  
Senate Committee on the Judiciary, Washington, D. C.*

DEAR SENATOR: Receipt is acknowledged of your letter of May 29, in which you request that I furnish your subcommittee with any instances on which any executive department or executive officer or any independent agency may have refused to give information to my committee, since May 17, 1954.

I wish to state that I know of no instance when the Senate Committee on Agriculture and Forestry has been refused information by any executive department, executive officer, or independent agency.

With kindest regards, I am,  
Sincerely yours,

ALLEN J. ELLENDER, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON ARMED SERVICES,  
*June 5, 1956.*

Hon. THOMAS C. HENNINGS, Jr.

*Chairman, Subcommittee on Constitutional Rights, Committee on Judiciary,  
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: Permit me to acknowledge receipt of your letter requesting information regarding any instances in which the executive branch of the Government may have denied information to the Armed Services Committee on the basis of a letter from the President to the Secretary of Defense dated May 17, 1954.

Insofar as I can recall, the committee has not been denied any requested information during the period involved, either on the basis of this letter or for other reasons.

With best wishes, I am,  
Sincerely,

RICHARD B. RUSSELL.

UNITED STATES SENATE,  
*Washington, D. C., June 7, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in reply to your letter of May 29, 1956, concerning information received by Congress from various executive departments and independent agencies.

In my capacity as chairman of the Subcommittee on Military Construction and chairman of the Subcommittee on Officer Grade Limitations, I, of course, deal primarily with the military departments. I believe I can say in all fairness that whenever we have asked for information the military departments have cheerfully furnished it. Sometimes it must be of a classified nature and this in the interest of security is understandable.

Trusting that this reply will be of some benefit, I remain,  
Most sincerely,

JOHN STENNIS.

UNITED STATES SENATE,  
COMMITTEE ON ARMED SERVICES,  
*June 1, 1956.*

Hon. THOMAS C. HENNINGS,

*Chairman, Subcommittee on Constitutional Rights, United States Senate,  
Washington, D. C.*

DEAR TOM: Your good letters of May 29, I will get into it re my committees, and if there is any question of withholding information, I will take the liberty of sending it to you pronto.

We may have a case, and I am checking.  
Regards.

Sincerely,

STUART SYMINGTON.

(On July 16, Senator Symington reported that there had been no instances of withholding during the period under study.)

UNITED STATES SENATE,  
COMMITTEE ON APPROPRIATIONS,  
June 1, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have received your letter of May 29, 1956, concerning the study you are conducting of the withholding of information from Congress by various executive departments and independent agencies.

This is to advise you that my Subcommittee on Department of Interior Appropriations has experienced no difficulty in securing information from the Department of the Interior.

Yours very sincerely,

CARL HAYDEN, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON APPROPRIATIONS,  
June 4, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This letter is in reply to your letter of May 29, 1956, in which you request a list of all occasions on which the Department of Defense has refused to provide information to the Defense Department Subcommittee of the Senate Appropriations Committee since May 17, 1954.

I know of no instance in which the Department of Defense has refused to provide information to the subcommittee.

Yours very sincerely,

DENNIS CHAVEZ,  
*Chairman, Subcommittee on Department of Defense.*

UNITED STATES SENATE,  
APPROPRIATIONS SUBCOMMITTEE ON DEPARTMENTS  
OF COMMERCE AND RELATED AGENCIES,  
June 6, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

MY DEAR SENATOR: Thank you kindly for your letter of May 29 requesting information concerning any refusals of any executive department or executive officer or any independent agency to give information to my committees since May 17, 1954.

I appreciate the opportunity to furnish information of this nature for consideration by your subcommittee, but I am pleased to advise that I know of no such refusal in connection with any of my committee work.

With kind personal regards, I remain,

Yours faithfully,

SPESSARD L. HOLLAND.

UNITED STATES SENATE,  
COMMITTEE ON APPROPRIATIONS,  
June 4, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR TOM: This is to acknowledge and thank you for your letter of May 29, inquiring if the executive departments or executive officers or independent agencies have refused to give information to the subcommittees of which I am chairman on or after May 17, 1954.

To my knowledge, there has been no instance since May 17, 1954, in which my subcommittees have had occasion to request information from the executive departments, that any information has been withheld.

With cordial good wishes, I am,  
Sincerely yours,

EARLE C. CLEMENTS.

UNITED STATES SENATE,  
COMMITTEE ON BANKING AND CURRENCY,  
*May 31, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR TOM: I am pleased to be able to inform you in response to your letter of May 29 that neither the Treasury nor Post Office Department has ever declined to give my subcommittee requested information. But, of course, we have never requested any information that could even remotely be called classified.

With kindest regards, I am,  
Sincerely yours,

A. WILLIS ROBERTSON.

UNITED STATES SENATE,  
COMMITTEE ON BANKING AND CURRENCY,  
SUBCOMMITTEE ON HOUSING,  
*June 6, 1956.*

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

DEAR TOM: Pursuant to your letter of May 29, 1956, I have made inquiry to determine whether any executive department or executive officer or any independent agency has refused to give information to the Housing Subcommittee since its date of origin, March 18, 1955. No instance of any such refusal has been noted.

Prior to that time, an investigation of housing was conducted by the Banking and Currency Committee, beginning April 19, 1954. There is no record that any Federal agency or employee refused to provide information on housing matters during the period of April 19, 1954, to March 18, 1955.

Sincerely yours,

JOHN SPARKMAN.

UNITED STATES SENATE,  
COMMITTEE ON BANKING AND CURRENCY,  
*June 15, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have your two letters of May 29 addressed to me as chairman of the Senate Committee on Banking and Currency and the Subcommittee on International Finance.

The only occasion on which any executive department or executive officer or any independent agency has refused to give information to this committee or this subcommittee since May 17, 1954, occurred on April 19, 1956.

At a hearing on the bill S. 3238, to extend the Export Control Act, Mr. Marshall M. Smith, Deputy Assistant Secretary for International Affairs, Department of Commerce, refused to answer a question which I put to him. Mr. Smith's testimony appears beginning on page 8 and continues through page 31 of the enclosed hearings. The particular incident is reported on page 26 of these hearings.

You will note that Mr. Smith did not cite the May 17, 1954 letter. He stated as his reason for not furnishing the requested information that, "I think it involves a legal point, but also because I think it is not material, because we had other recommendations, and all of the recommendations were not the same; and ultimately the Secretary had to exercise his best judgment in a mass of what you might call conflicting recommendations."

Sincerely yours,

J. W. FULBRIGHT, Chairman.

(The instance reported is set forth below as it appears on pp. 25-26 of the hearings on S. 3238 before a subcommittee of the Senate Banking and Currency Committee, April 19, 1956:)

Mr. SMITH. Not recently. We have had 1 or 2 requests in the past year for a special consideration in the matter of copper and aluminum, but I would say those are very isolated cases.

The CHAIRMAN. What countries did they come from? Do you remember?

Mr. SMITH. The requests? I doubt if I would want to put that on the record, Mr. Chairman. I would be glad to tell off the record.

The CHAIRMAN. Why? Do you think it is classified material?

Mr. SMITH. No, I do not know that it is classified, but I doubt if it would be in the public interest to give out that kind of information for reasons I will be glad to explain to you.

The CHAIRMAN. Well, we will receive your reasons in private then. I had no idea there was any such consideration involved in the administration of this act at this time.

Mr. SMITH. It does not happen very often.

The CHAIRMAN. It does not involve the Soviet bloc, does it?

Mr. SMITH. To some—there is a problem of security as well as short supply involved.

The CHAIRMAN. What part does the BDSA play in the administration of this act?

Mr. SMITH. The BDSA only serves to provide us with information on the domestic situation.

The CHAIRMAN. Do you consult with them regularly?

Mr. SMITH. We do. Yes, sir.

The CHAIRMAN. With whom do you consult in the BDSA with regard, for example, to steel scrap?

Mr. SMITH. We consult with the Deputy Director and the head and other members of the Iron and Steel Division.

The CHAIRMAN. Who are they?

Mr. SMITH. The current Director is a recent appointee, and I do not recall his name. The Deputy Director is Mr. Halcomb. He is permanent, but the Director is a WOC, and they are changing.

The CHAIRMAN. Who is he?

Mr. SMITH. I do not recall his name, sir. He is a recent arrival there in the organization.

The CHAIRMAN. Who was his predecessor?

Mr. SMITH. His predecessor was—I know these people but I cannot recall his name.

The CHAIRMAN. Did he not make a very strong impression upon you in consulting with you?

Mr. SMITH. I am sorry to say these people—I have every reason to trust them, but as I say I only meet them very occasionally, and they are changing so fast—they come for 6 months, and by the time you get to know them they are gone.

The CHAIRMAN. I think the record ought to show who they are. I do not know who they are either.

Mr. SMITH. Mr. Burley is the gentleman's name; the present Director.

The CHAIRMAN. John B. Burley? B-u-r-l-e-y?

Mr. SMITH. Yes.

The CHAIRMAN. Where is he from?

Mr. SMITH. I understand he is from Republic Steel.

The CHAIRMAN. Did he recommend that you put any obstacle in the way of the export of scrap?

Mr. SMITH. He has not to my knowledge. No.

The CHAIRMAN. Did his predecessor?

Mr. SMITH. His predecessor made recommendations, but I do not think I am at liberty to tell you what they were, Mr. Chairman.

The CHAIRMAN. Why not? Is that a security matter?

Mr. SMITH. Well, I think it involves a legal point, but also because I think it is not material, because we had other recommendations, and all of the recommendations were not the same; and ultimately the Secretary had to exercise his best judgment in a mass of what you might call conflicting recommendations.

UNITED STATES SENATE,  
COMMITTEE ON BANKING AND CURRENCY,  
June 15, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

.DEAR SENATOR HENNINGS: In reply to your letter of May 29, I am informed by the staff of the Committee on Banking and Currency that to their knowledge there have been no occasions on which any executive department or executive officer or any independent agency has refused to give information to the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency since May 17, 1954.

Sincerely yours,

J. ALLEN FREAR, Jr.,

*Chairman, Subcommittee on Production and Stabilization.*

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UNITED STATES SENATE,  
Washington, D. C., June 16, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR TOM: I have your letter of May 29, asking for any information which I may have regarding occasions on which any executive department or executive officer or any independent agency has refused to give information to my committee.

As chairman of the Subcommittee on Securities of the Banking and Currency Committee, I send you herewith a memorandum prepared by Mr. Myer Feldman, of the staff of the committee. I think you will find Mr. Feldman's memorandum self-explanatory.

I wish to say, however, the committee never pushed to an issue either of the cases referred to in Mr. Feldman's memorandum. In all probability, therefore, they are not clear cases of the sort that would interest your subcommittee.

With best wishes, I am

Yours very sincerely,

HERBERT LEHMAN.

JUNE 13, 1956.

Memorandum to : Senator Lehman.

From : Myer Feldman.

Bob Kubie has called to my attention the letter you received from Senator Hennings asking whether any executive department or independent agency has refused to give information to you since May 17, 1954.

The only instance in which information has been refused the Subcommittee on Securities was when you requested, in a letter dated October 18, 1955, that the Securities and Exchange Commission make available to the committee "the investigation files of the Commission upon Russell McPhail and all of the files of the Commission, both confidential and public, in the Libby-McNeill & Libby proxy contest."

In a letter dated November 10, 1955, Chairman Armstrong stated :

"This will acknowledge your letter of October 18, 1955. Normally, we would be most happy to have your committee review our investigative file on Russell McPhail together with the files relating to the Libby, McNeill & Libby proxy contest. There are, however, certain problems.

"With respect to Russell McPhail, this investigation is still open and in progress. It has been the consistent policy of the Commission not to release its pending investigation files. It has been our belief that such release might impair the integrity of the Commission's investigative process and seriously interfere with the Commission's responsibility of appropriate enforcement action, in case this becomes necessary. Our staff would, however, be happy to discuss the McPhail investigation with Mr. Feldman. We do not at present know what information he would desire on this subject but it may well be that we can provide him with sufficient material in the form of summaries or otherwise to meet his needs. A similar procedure was followed this spring in connection with information about certain investigations which was desired by your committee in connection with certain phases of the stock market study with mutually satisfactory results.

"With respect to your request to see our files in the Libby, McNeill & Libby proxy contest, we have been served by the defendants in *S. E. C. v. Mitchell May, Jr. et al.*, litigation arising out of that contest, with a notice of appeal in the Court of Appeals for the Second Circuit from the entry of a secondary injunction obtained in that case. Since this matter is still in litigation, it is the Commission's view, with which I am sure you will agree, that it would be inappropriate to disclose those files or discuss this case outside the court. Immediately upon the termination of the litigation, we will, of course, welcome your committee's review of our files."

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UNITED STATES SENATE,  
COMMITTEE ON BANKING AND CURRENCY,  
June 15, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In reply to your letter of May 29, I am informed by the staff of the Committee on Banking and Currency that to their knowledge there have been no occasions on which any executive department or executive officer or any independent agency has refused to give information to the Subcommittee on Small Business of the Senate Committee on Banking and Currency since May 17, 1954.

Sincerely yours,

WAYNE MORSE,  
*Chairman, Subcommittee on Small Business.*

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UNITED STATES SENATE,  
COMMITTEE ON THE DISTRICT OF COLUMBIA,  
June 5, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In the absence of Senator Neely, I am taking the liberty of replying to your letter of May 29, 1956, in which you inquire as to whether there have been any occasions where any executive department or executive officer or any independent agency has refused to give information to this committee since May 17, 1954.

The committee has not had an occasion to request information from the above sources during the period of time mentioned in your letter.

Trusting that the above supplies the information requested, I am,

Respectfully yours,

WILLIAM P. GULLEDGE, *Counsel.*

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UNITED STATES SENATE,  
COMMITTEE ON THE DISTRICT OF COLUMBIA,  
June 5, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Committee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Please let me acknowledge receipt of your letter of May 29, 1956, addressed to me as chairman of the Subcommittee on Judiciary of this committee, in which you inquire as to whether any executive department or executive officer or any independent agency has refused to give information to this subcommittee since May 17, 1954.

The Judiciary Subcommittee has not requested any information from the above sources during the period of time mentioned in your letter.

Trusting that this answers your inquiry and with kind regards, I am

Sincerely yours,

WAYNE MORSE.

UNITED STATES SENATE,  
COMMITTEE ON FINANCE,

June 11, 1956.

**Hon. THOMAS C. HENNINGS, Jr.,***Chairman, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in response to your inquiry for the Subcommittee on Constitutional Rights relative to Executive Departments and officers withholding information.

I have no worthwhile instances to report at present.

With my very best wishes,

Faithfully yours,

HARRY F. BYRD.

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,

June 7, 1956.

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

DEAR SENATOR HENNINGS: Thank you for your letter of May 29, 1956, concerning a study which your subcommittee is making of the withholding of information from Congress by various executive departments and independent agencies.

There appears to be no instance where any executive department or executive officer or any independent agency has refused to give information to the Committee on Foreign Relations since May 17, 1954.

I appreciate your giving this committee an opportunity to furnish this information.

Sincerely yours,

WALTER F. GEORGE, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,

June 7, 1956.

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

DEAR SENATOR HENNINGS: As the enclosed letter states, there have been no instances in which any executive department or independent agency has withheld information from the Subcommittee on American Republics Affairs.

Sincerely yours,

WAYNE MORSE.

(Following is the letter referred to by Senator Morse:)

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,

June 6, 1956.

**Hon. WAYNE MORSE,***United States Senate,**Washington, D. C.*

DEAR SENATOR MORSE: This will acknowledge your note of June 1 transmitting a letter to you from Senator Hennings inquiring of any instances in which the Subcommittee on American Republics Affairs of the Foreign Relations Committee has been denied information by the executive branch since May 17, 1954.

To my knowledge, there have been no such instances.

Sincerely,

PAT M. HOLT, *Consultant.*

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 9, 1956.

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I refer to your letter of May 29, 1956, requesting information with respect to any occasions when the Foreign Relations Subcommittee on Economics and Social Affairs may have been denied information by any of the executive agencies.

The late Senator Barkley served as chairman of that subcommittee and as of the present time no successor has been appointed.

To the best of the knowledge of the staff members of the Committee on Foreign Relations who worked with Senator Barkley, there was no occasion when his subcommittee was denied information which it requested from any executive department, officer, or independent agency.

Sincerely yours,

CARL MARCY.

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 9, 1956.

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Thank you for your letter of May 29 asking for information about any occasion when the Subcommittee on European Affairs of the Committee on Foreign Relations may have been denied information which it requested from any executive department, executive officer, or independent agency.

To the best of my knowledge, there has been no occasion since May 17, 1954, when the subcommittee has been denied any information which it sought.

Sincerely yours,

JOHN SPARKMAN.

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 9, 1956.

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Thank you for your letter of May 29 asking for information about any occasion when the Subcommittee on Far Eastern Affairs of the Committee on Foreign Relations may have been denied information which it requested from any executive department, executive officer, or independent agency.

To the best of my knowledge, there has been no occasion since May 17, 1954, when the subcommittee has been denied any information which it has sought.

Sincerely yours,

J. W. FULBRIGHT.

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
June 9, 1956.

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Thank you for your letter of May 29 asking for information about any occasion when the Subcommittee on Near Eastern and African Affairs of the Committee on Foreign Relations may have been denied information which it requested from any executive department, executive officer or independent agency.

To the best of my knowledge, there has been no occasion since May 17, 1954, when the subcommittee has been denied any information which it has sought.

Sincerely yours,

THEODORE FRANCIS GREEN.

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*June 12, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Thank you for your letter of May 29 asking for information about any occasion when the Subcommittee on United Nations Affairs of the Committee on Foreign Relations may have been denied information which it requested from any executive department, executive officer or independent agency.

To the best of my knowledge, there has been no occasion since May 17, 1954, when the subcommittee has been denied any information which it has sought.

Sincerely yours,

**HUBERT H. HUMPHREY.**

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UNITED STATES SENATE,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
*July 2, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights of the Committee on  
the Judiciary, Washington, D. C.*

MY DEAR SENATOR: In response to your letter of May 29, 1956, the principal matters in which the executive department have refused to give information to this subcommittee are set forth below.

**EAST-WEST TRADE**

The executive department suppressed information concerning the activities of an interdepartmental committee known as the Joint Operating Committee composed of representatives principally from the Departments of Commerce, Defense, State, and the Foreign Operations Administration, now International Cooperation Administration.

The President's letter of May 17, 1954, was cited in a letter of Assistant Secretary of State Hoover, dated February 20, 1956 (see pp. 262 and 263 of pt. I of the subcommittee's hearings on East-West trade, a copy of which is attached). Other pertinent correspondence relating to the suppression of information can also be found on pages 273, 275-277, 280-281, 282-284.

These departments and agencies likewise refused to give to this subcommittee information concerning the revisions of the Battle Act list and the international list which took place in 1954, except on a classified basis, even though this information was openly published in an official British Government organ, the Board of Trade Journal, on October 16, 1954. (See hearings, pt. II, p. 532 attached.)

From time to time there have been other occasions which show a growing tendency on the part of the executive departments to suppress information from Congress.

Prior to the East-West trade hearings, staff members of this subcommittee were assigned the duty of checking on the illegal traffic in strategic materials, principally copper, between the countries of the Western World and the Communist bloc. Staff members on their arrival in Europe in August 1955, found that cablegrams had been sent by Defense, State, and FOA to their respective offices abroad to refuse subcommittee staff members classified information regarding such illicit traffic. This information was refused to the staff members even though they have proper security clearances.

Mr. Stassen in his fifth Battle Act Report has misled Congress by stating:

"Minerals and metals of basic importance to the Soviet military power, such as aluminum, copper, nickel, molybdenum, cobalt, magnesium, tungsten, and titanium remain on the embargo list."

It was only through indirect means that the subcommittee staff discovered that copper had been taken off the embargo list and that the official statements made by Mr. Stassen were inaccurate and misleading.

**PAKISTAN GRAIN STORAGE ELEVATORS CONSTRUCTION**

Another hearing held in April and May 1955, on the subject of Foreign Operations Administration grain storage elevators in Pakistan, involved improprieties

in the award of a contract to construct grain elevators in Pakistan with Foreign Operations Administration funds.

Mr. Stassen, then Director of FOA, endeavored to suppress information concerning these contracts. Copies of certain documents pertinent to the investigation were at first refused to the subcommittee staff and members of the subcommittee.

The names of the project managers who were involved in the award of the contract were also refused to the subcommittee on orders of Mr. Stassen. Furthermore, Mr. Stassen refused to allow members of the subcommittee staff to interview certain employees of FOA. Subsequently, he relented to the extent that he finally made the material available and did permit such interviews but only on condition that the Agency's counsel be present during the interviews.

It is suggested that you examine pages 2, 3 and 4 of the Committee on Government Operations Report No. 1410, 84th Congress, 2d session, copy of which is attached.

#### REDEFLECTION OF REFUGEES FROM THE IRON CURTAIN COUNTRIES

Another instance in which suppression of information was encountered was in the investigation in 1955, on redefinition of refugees from the Iron Curtain countries. The subcommittee staff learned that Mr. Stassen, while Director of the Foreign Operations Administration, instructed his foreign offices not to supply classified information to members of the subcommittee staff even though such staff member had security clearances.

#### COMMUNIST OWNERSHIP OF GI SCHOOLS

In conjunction with the subcommittee's investigation into Communist ownership of GI schools indirectly receiving funds from the Veterans' Administration, we requested by letter dated September 6, 1955, copies of considerable correspondence, memorandums, etc., from the Veterans' Administration relating to three schools approved for training veterans.

In response to this request the Administrator of Veterans' Affairs wrote Senator McClellan under date of September 23, 1955, indicating that he would be unable to furnish the bulk of the data requested since they "pertain to matters of internal administration, including conclusions among its officials—legal and administrative, reports from field officers and instructions to such officers."

The Administrator went on to say that:

"These are documents which, since the establishment of the Government under the Federal Constitution, have been held not subject to release to congressional committees for the reason that it is essential to efficient and effective administration that employees of the executive branch of the Government 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 the discussions concerning such advices be disclosed."

It is observed that a portion of the last sentence quoted above is taken verbatim from the President's letter to the Secretary of Defense, dated May 17, 1954.

It is of interest that much of the correspondence the Veterans' Administration refused to furnish, were letters from the Administration to outside individuals, such as officers or attorneys of the schools involved. Later the Veterans' Administration reconsidered and apparently determined that they were not within the purview of President Eisenhower's letter, and they were subsequently furnished the subcommittee.

#### JUSTICE DEPARTMENT—CLOSED FILES

Another instance of suppression of information occurred when the subcommittee recently requested permission to examine a closed file in a criminal matter, but which the Justice Department refused to furnish without proper grounds.

#### CABINET MEMORANDUM

More recently the subcommittee had made requests of Mr. Maxwell Rabb, secretary of the President's Cabinet, to testify regarding the disclosure of the internal working papers from confidential files of the White House to Mr. J. Robert Donovan, the author of *The Inside Story*.

This matter is still under investigation and at this time it cannot be completely determined whether the facts relating to the source of information made available to Mr. Donovan will be suppressed.

The subcommittee is in the process of issuing a report on the East-West trade matter. Part of this report will be devoted to the suppression of information. When this report is approved by the committee, I will be glad to send you copies for your perusal.

I trust that this information will be of some service to your subcommittee. If I can be of any other assistance, kindly advise me.

Sincerely yours,

JOHN L. McCLELLAN, *Chairman*.

### EXHIBIT A

(Following is the correspondence referred to by Senator McClellan as it appears at pp. 261, 262, 263 of pt. 1 of hearings on East-West trade, held before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 84th Cong. 2d sess.:)

Letters between Senator John L. McClellan, chairman, Senate Permanent Subcommittee on Investigations and all agencies of the Federal Government relating to the inquiry of the subcommittee into East-West trade:

#### A. STATE DEPARTMENT

JULY 26, 1955.

Hon. JOHN FOSTER DULLES,  
*Secretary of State, Department of State,*  
*Washington, D. C.*

DEAR MR. SECRETARY: The Senate Permanent Subcommittee on Investigations of the Committee on Government Operations is presently conducting a study into the illicit trade with Communist-dominated nations and diversions of strategic materials.

The subcommittee is advised that certain personnel within the Bureau of Economic Affairs of the State Department are assigned to the duty of studying and checking reports of improper diversions of strategic materials to areas behind the Iron Curtain. It would be appreciated if you would supply to the subcommittee at an early date the names and titles of such personnel.

Thank you for your cooperation.

JOHN L. McCLELLAN, *Chairman*.

—  
DEPARTMENT OF STATE,  
*Washington, February 13, 1956.*

JOHN L. McCLELLAN,  
*Chairman, Senate Permanent Subcommittee on Investigations,*  
*United States Senate.*

DEAR SENATOR McCLELLAN: In accordance with our conversation at your office last Wednesday, February 8, in which Mr. Gordon Gray, Assistant Secretary of Defense, participated, and with your later conversation on February 9 with Mr. Gray and Mr. Thruston Morton, Assistant Secretary of State, I should now like formally to request to appear before your subcommittee in executive session at your earliest convenience. My appearance would be for the purpose of discussing with you and the other members of your subcommittee the problems involved in holding public hearings on the subject which your subcommittee is currently investigating, namely East-West trade controls.

I should like to reiterate that the Department of State, the International Cooperation Administration, and all of the other agencies concerned are anxious to cooperate with your subcommittee in this investigation. However, there are certain aspects of the subject which are sufficiently sensitive that, in our judgment, if they were discussed in public session it would risk serious injury to our international relations and jeopardize our efforts to maintain effective international controls.

I recognize that your subcommittee will want to know what the considerations are of which I speak. It is for that reason that I am asking to appear before you in order to give you in executive session the background of this complex problem and the various factors which govern our policies with respect to it. I hope

that, as a result of the discussions we will have together, the subcommittee will agree with the position of the executive branch that open hearings on this subject should not be held.

Sincerely yours,

HERBERT HOOVER, Jr.,  
Acting Secretary.

DEPARTMENT OF STATE,  
Washington, February 20, 1956.

Hon. JOHN L. McCLELLAN,  
Chairman, Permanent Subcommittee on Investigations,  
United States Senate.

DEAR SENATOR McCLELLAN: During the course of the current inquiry by the subcommittee into East-West trade controls, the subcommittee has made a number of requests for information and documents from the executive branch, some to the International Cooperation Administration, and others to the Departments of Defense and Commerce. The specific requests as to documents relate to the international lists, the Battle Act lists, and the working papers and minutes of the Joint Operating Committee which was set up as an advisory group in the executive branch with relation to the negotiations with our allies in 1954 concerning the international lists. In addition, the International Cooperation Administration has been specifically requested to supply information as to the certain recommendations of the Joint Operating Committee.

This letter relates to all such requests.

In relation to these requests, it should be stated what the agencies involved have supplied and have offered to supply to the subcommittee. The International Cooperation Administration has furnished to you the various Battle Act lists from 1952 to 1955 with a notation as to the items decontrolled or downgraded on or about August 25, 1954. As recognized by the subcommittee in its request, these documents and related information were supplied necessarily on a classified basis.

On February 14, I discussed with the subcommittee the overall policy considerations involved in the whole subject of the control of trade in strategic materials, and for the Departments of State, Defense, and Commerce, and the International Cooperation Administration requested, in view of considerations given to the subcommittee, first, that hearings on the subject of strategic controls be held in executive session and, second, that the appropriate officials at the policymaking levels be permitted to come before the subcommittee to fully explain our policy and actions in the negotiations with our allies in 1954.

I further referred to the matter of the documents involved: most of these documents are classified and highly sensitive; many of them involve our relations with other governments; and almost all of them are working level papers of the executive branch showing internal advice and recommendations.

In that connection, I stated that if the subcommittee decided to pursue its investigation along the lines suggested, the agencies involved were prepared to review the question of what documents could appropriately be turned over to the subcommittee in the light of the developing testimony, with proper consideration for the safeguarding of those that are confidential and sensitive.

It is my understanding that the subcommittee has denied these requests, at least insofar as holding the hearings in executive session is concerned, and has renewed its request for the documents involved. However, the executive branch has certain responsibilities and duties under the Constitution and our laws which it is bound to fulfill. These relate to the conduct of our foreign relations and to the effective and efficient administration of the executive branch.

As to East-West trade controls the present international system has existed on a voluntary basis between the United States and the nations friendly to it since 1948. The group of nations participating in this system of controls does not have a formal agreement which subordinates their actions to rule by majority. The system of controls depends for its very existence on the good faith of the participating nations. Any of these nations is free to take unilateral action at any time if for any reason it does not wish to abide by the suggested control list. Cooperation, therefore, is the only way in which the objectives of effective international control of strategic materials can be accomplished. In many instances participation of a particular nation in this program has been obtained only on the specific commitment that the details of such participation would be kept secret.

Thus any revelation on our part of the details of this program would constitute a breach of trust on the part of the United States, and by jeopardizing the voluntary basis upon which the program rests, would endanger our national security.

Because of this, the international lists cannot be revealed by the executive branch. We are, however, prepared through responsible officials to (1) furnish the subcommittee in open session information as to items deleted from the 1952 list in the 1954 revision, and (2) furnish the subcommittee in executive session on a classified basis information as to items downgraded, upgraded, or added to the list in the 1954 revision.

Apart from the Battle Act list, which already has been supplied to the subcommittee on a classified basis, and the international lists referred to above, the remaining documents in the executive branch relating to East-West trade controls consist of discussions and communications of an advisory nature among the officials and employees of the executive branch, highly sensitive intelligence information, and communications with our delegation and other representatives abroad containing recommendations, information regarding the position of other governments, and comments thereon. It is contrary to the public interest that their conversations or communications or any documents or reproductions concerning such advice be disclosed. May we refer you to the position of the president on the subject in his letter of May 17, 1954, to the Secretary of Defense. We are, therefore, required to deny to this subcommittee any documents that would violate this principle.

We recognize the right of the Congress to investigate the operations of the Government and we continue to stand ready to cooperate with this committee by having officials who were charged with the responsibility for the negotiations with the cooperating nations to appear before you to explain the considerations which guided their actions during these negotiations. We can advise you that Governor Stassen, who was charged with the chief responsibility involving these negotiations, will appear before the committee on a date mutually satisfactory to the committee and him.

We feel sure that your subcommittee in this manner can obtain an accurate picture of Government policy and actions in the area of international strategic controls.

I am authorized to state that this letter has the concurrence of the Secretary of Defense, the Secretary of Commerce, and the Director of International Cooperation Administration.

Sincerely yours,

HERBERT HOOVER, Jr., *Acting.*

## EXHIBIT B

(Following is other pertinent correspondence relating to the suppression of information, as printed in pt. 1 of the hearings on East-West trade before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 84th Cong., 2d sess., at pp. 273-277, 280-281, 282-284.)

THE SECRETARY OF DEFENSE,

Washington, March 5, 1956.

Memorandum for all military and civilian personnel of the Department of Defense.

Subject: East-West trade control hearings before the Senate Permanent Subcommittee on Investigations.

On February 20, 1956, the Department of Defense joined the Departments of State and Commerce and the International Cooperation Administration in a statement to the Senate Permanent Subcommittee on Investigations relative to documents and information requested by the subcommittee in its inquiry on East-West trade control. This statement was in the form of a letter from Herbert Hoover, Jr., Acting Secretary of State, to Senator McClellan, chairman of the subcommittee. A copy is attached.

1. The subcommittee was informed that the executive branch would be prepared through responsible officials to (a) furnish the subcommittee in open session information as to items deleted from the 1952 International List in the 1954 revision, and (b) furnish the subcommittee in executive session on a classi-

fled basis information as to items downgraded or upgraded or added to the list in the 1954 revision.

Since the custody of all records and papers in and relative to the business of the Department is in the Secretary, any request, subpena, or other demand for documents relative to this inquiry to whomever addressed shall be referred to my office.

2. Any request, subpena, or other demand to appear and testify before the subcommittee relative to the East-West trade-control inquiry should be honored. However, in accord with the principles set out in the attached letter of February 20, 1956, you are instructed not to testify either in public or executive closed session with respect to any advice, recommendations, discussion, and communications within the executive branch respecting any course of action in regard to East-West controls, or as to any information regarding international negotiations with the countries cooperating in East-West trade controls. You are further instructed not to testify in public hearings as to any matter which is classified for reasons of security or in any manner that may reveal information so classified. In the event that there is any doubt as to whether the particular requested testimony falls within the scope of these instructions, you are directed to inform the subcommittee that you must decline to testify until you have further consulted with the Department.

3. These instructions have the full force and effect of a Department regulation and should be observed without exception.

C. E. WILSON.

#### D. DEPARTMENT OF COMMERCE

JULY 26, 1955.

HON. SINCLAIR WEEKS,

*Secretary of Commerce,*

*Department of Commerce, Washington, D. C.*

DEAR MR. SECRETARY: The Senate Permanent Subcommittee on Investigations of the Committee on Government Operations is presently conducting a study into the illicit trade with Communist-dominated nations and diversions of strategic materials.

The subcommittee is advised that certain personnel within the Office of Export Supply in the Bureau of Foreign Commerce are assigned to the duty of studying and checking reports of improper diversions of strategic materials to areas behind the Iron Curtain. It would be appreciated if you would supply to the subcommittee at an early date the names and titles of such personnel.

Thank you for your cooperation.

Sincerely yours,

JOHN L. McCLELLAN, *Chairman.*

AUGUST 4, 1955.

HON. JOHN L. McCLELLAN,

*Chairman, Senate Permanent Subcommittee on Investigations,*

*Committee on Government Operations,*

*United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: Your letter of July 26 states that, based on advice that certain personnel in the Office of Export Supply of the Bureau of Foreign Commerce of this Department are assigned the duty of studying and checking reports of improper diversions of strategic materials to areas behind the Iron Curtain, you would like to be supplied with the names and titles of such personnel.

Since the problem of diversion of strategic materials has several divisions and involves communication and coordination with other departments, as well as divisions within the Bureau of Foreign Commerce, the mere furnishing of names and titles of the personnel who might be engaged in some aspect of the total problem would very likely not serve your purpose.

I am advised that certain members of that office have been in communication and held conferences with members of your subcommittee staff on some phases of this problem. However, since checking reports of diversions is only one small portion and aspect of our export-control function in a very broad field, and since the primary responsibility for the export control lies with the Director of Export Supply, Mr. John C. Borton, if it would serve to clarify the problem

from the standpoint of the committee I would be happy to have the Director or one of his immediate staff confer personally with you.

Please be assured of our desire to cooperate in every possible respect in this field of study in which your committee is engaged.

Sincerely yours,

SINCLAIR WEEKS, *Secretary of Commerce.*

NOVEMBER 22, 1955.

Mr. MARSHALL SMITH,

*Deputy Assistant Secretary of Commerce,*

*Department of Commerce, Washington, D. C.*

DEAR SIR: This subcommittee is making a study of export control operations for the past several years. Accordingly, it will be necessary to interview personnel of the Department of Commerce who were engaged in these operations. Mr. Herbert N. Blackman, former chairman of the Joint Operating Committee, will be the first one to be interviewed.

We will keep Mr. Nathan Ostrove, whom we understand has been designated as liaison to the subcommittee, advised as to such other personnel we deem essential to be interviewed in furtherance of the subcommittee's objectives.

Sincerely yours,

ROBERT F. KENNEDY, *Chief Counsel.*

DECEMBER 14, 1955.

Hon. SINCLAIR WEEKS,

*Secretary of Commerce,*

*Department of Commerce, Washington, D. C.*

MY DEAR MR. SECRETARY: The subcommittee has had under study the exercise of export controls and shipments of strategic materials to the Communist bloc for a number of years.

It is now engaged in a further study of these controls and in particular wishes to make an analysis of United States export-control lists which were downgraded in 1954.

The subcommittee is deeply concerned over the effects of the downgrading of these lists and wishes to ascertain the basis for each such action with a view toward determining whether there is a necessity for future legislation.

Since the Joint Operating Committee of the Advisory Committee on Export Policy was the operating group which conducted the review of items on the United States and other lists, the subcommittee desires to examine its operation in detail.

Pursuant to arrangements made through your liaison officer to the committee, Mr. Nathan Ostroff, one of our staff members, has interviewed Mr. Herbert Blackman and Mr. Mishell George, who were respectively chairman and Bureau of Foreign Commerce representatives on the Joint Operating Committee.

In conformity with your letter of August 4, 1955, these specific requests are made:

1. The subcommittee be supplied with the following names:

A. The name of the executive secretary of JOC.

B. The names and titles of the professional staff members of the Office of Strategic Controls Division directly related to the Joint Operating Committee work.

C. A list of the chairman of the task groups committee between January to July 1954 assigned to prepare the technical analysis and reports to the Strategic Controls Division which in turn used the task group analysis and other material to prepare its recommendations to the Joint Operating Committee.

In regard to access to classified material, Chief Counsel, Robert F. Kennedy, Mr. Jerome Adelman, and Mr. LaVern J. Duffy, assigned by the subcommittee to this study have security clearance up to and including secret. In the event classified material of a higher grade need be discussed, I would appreciate your taking this up with me personally and suitable arrangements will be made to review such material.

It is further requested that suitable space be made available to Mr. Adelman and Mr. Duffy so that they can review and examine the minutes and recommendations made to and by the Joint Operating Committee.

Your cooperation in this matter will be very much appreciated.

Sincerely yours,

JOHN L. McCLELLAN, *Chairman.*

THE SECRETARY OF COMMERCE,  
Washington, January 13, 1956.

Hon. JOHN L. McCLELLAN,  
*Chairman, Senate Permanent Subcommittee on Investigations,*  
*United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This will acknowledge your letter of December 14, 1955, which was received in this Department on December 22, 1955, relating to your committee's interest in the revision of strategic trade controls which took place in the summer of 1954.

I should like to call to your attention, in this connection, my 28th quarterly report to Congress, copy enclosed, which sets forth in considerable detail, pages 4 to 14, the policy determinations that led to that revision of controls insofar as United States exports were involved, as well as the exact nature and scope of the revised United States export controls. I also commend to your attention the fifth report to Congress on the so-called Battle Act by Mr. Harold E. Stassen, who was then the Administrator. As you know, the Administrator has the responsibility of determining, in consultation with other United States Government agencies, and keeping under constant adjustment, items which all nations receiving aid are required to control in accordance with the provisions of the Battle Act. This report likewise contains a complete account of the activities that occurred in 1954 in the latter area. And, you will find that both of these reports indicate the respective responsibilities of each Government agency that was involved in this exercise, including the consultations and procedures, both intragovernmental and intergovernmental, that were followed, the decisions that were made, and the reasons therefor.

I have noted your request for the names of certain employees involved in these activities, particularly, the executive secretary of the former Joint Operating Committee; the professional staff members of our Strategic Controls Division concerned with JOC work; and the chairmen of the so-called task groups assigned to technical commodity analysis. I should explain to you that these employees you mention did not have final or intermediate or, in most cases, any responsibility at all for the decisions that were made or for the determination of the underlying policies and criteria that led to such decisions. The executive secretary of JOC, for example, had only administrative and housekeeping duties related to the proper functioning of a committee. Similarly, only the Director of the Strategic Controls Division had any significant responsibility in this exercise. And, the task group chairmen to whom you refer were primarily commodity experts and their only responsibility was to present the facts on particular commodities and technical evaluations regarding the strategic rating of such commodities.

As pointed out in the enclosed reports, the review of United States security export controls was carried out through the Interagency Advisory Committee on Export Policy which regularly advises the Secretary of Commerce on his export control responsibilities pursuant to section 4 (a) of the Export Control Act. With respect to security export controls of foreign countries, the responsibility is assigned to the Battle Act administrator, who is advised by an Interagency Economic Defense Advisory Committee. And the Joint Operating Committee simply acted at the time as a coordinating committee at the working level for these two senior advisory committees, ACSP and EDAC. In other words, the recommendations of JOC were first, reviewed and approved or revised by ACEP and EDAC which, in turn, made recommendations to the Secretary of Commerce and the Battle Act administrator, respectively, and thence to the President, by way of the National Security Council.

Under the circumstances, while we earnestly desire to cooperate with your committee, I respectfully suggest that investigations of actions of this character should be directed to those who held and exercised policy and action responsibility rather than to subordinate staff personnel. On the other hand, I hasten to add that if you should at any time have evidence or any other indication of wrongdoing on the part of any person at any level in this Department, I should like to have it and you have my personal assurance that it will be immediately and thoroughly investigated and acted upon.

Accordingly, this is to advise you that the following were the members of my Advisory Committee on Export Policy during the period in question: Chairman, Samuel W. Anderson, formerly Assistant Secretary of Commerce for International Affairs

Department of Agriculture: Clayton E. Whipple, Acting Administrator, Foreign Agriculture Service

Atomic Energy Commission : Lyall E. Johnson, Chief, Licensing Controls Branch,  
Division of Construction and Supply

Department of Commerce :

Horace B. McCoy, Deputy Administrator, Business and Defense Services  
Administration

Loring K. Macy, Director, Bureau of Foreign Commerce

Department of Defense: Capt. Wakeman B. Thorp (USN), Deputy For Defense  
Economic Affairs, Office of Foreign Military Affairs, Office of Assistant Secretary  
for Defense (International Security Affairs)

Office of Defense Mobilization : Frederick Winant, special assistant to Assistant  
Director for Materials

Foreign Operations Administration: John Stambaugh, Assistant to the Director  
Department of the Interior : Joseph C. McCaskill, staff assistant, Office of the  
Assistant Secretary, Minerals Resources

Mutual Defense Assistance Control (Office of the Director of Mutual Security) :  
Kenneth R. Hansen, Assistant Deputy Director for MDAC

Department of State: Samuel C. Waugh, Assistant Secretary of State for Economic  
Affairs

Treasury Department: Andrew N. Overby, Assistant Secretary of the Treasury.

Also, the following were the members of the Economic Defense Advisory Committee, serving under Mr. Stassen :

Chairman, Adm. Walter S. Delany, Deputy Director, MDAC, Foreign Operations  
Administration.

Department of Agriculture: Fred J. Rossiter, Assistant Administrator, Foreign  
Agricultural Service.

Atomic Energy Commission : Lyall E. Johnson, Chief, Licensing Control Branch,  
Division of Construction and Supply.

Department of Commerce: Sameul W. Anderson, formerly Assistant Secretary  
for International Affairs.

Department of Defense: Capt. Wakeman B. Thorp (USN), Deputy for Defense  
Economic Affairs, Office of Foreign Military Affairs, Office of Assistant Secretary  
for Defense (International Security Affairs).

Export-Import Bank : Edward S. Lynch, Chief, Economics Division.

Foreign Operations Administration : John Stambaugh, Assistant to Director.

Office of Defense Mobilization : Frederick Winant, Special Assistant to Assistant  
Director for Materials.

Department of State: Thorsten V. Kalijarvi, Deputy Assistant Secretary for  
International Affairs.

Treasury Department: George H. Willis, Director, Office of International Finance.

In addition to the foregoing, the Central Intelligence Agency also participates  
in furnishing intelligence pertinent to the work but does not take part in policy  
determinations. The CIA has requested that you communicate directly with  
them if you desire to have the names of their personnel participating in this  
work.

I regret that I cannot accede to your request for permission to review all minutes and recommendations made to and by the Joint Operating Committee. I trust you will appreciate there are many reasons why we cannot grant such indiscriminate access to records and working papers which are essentially internal memorandums of advice given by staff personnel to those who had the responsibility for making decisions. Apart from any problems of security classification, it has always seemed to me, for example, that the release of working papers and other advisory materials prepared by staff subordinates, frequently conflicting and necessarily tentative, could only serve to discourage candid expression of ideas by career employees who do not exercise any ultimate responsibility, and thus adversely affect sound administration as well as proper policy determination. If you could specify the particular types or pieces of information you require, we should be glad to attempt to locate such information and determine whether or not it can properly be made available.

Please be assured again of our desire to cooperate in every possible way.  
Sincerely yours,

SINCLAIR WEEKS,  
Secretary of Commerce.

FEBRUARY 16, 1956.

Hon. SINCLAIR WEEKS,  
*Secretary of Commerce,*  
*Department of Commerce, Washington, D. C.*

MY DEAR MR. SECRETARY: On December 14, 1955, I wrote requesting among other things, that the minutes of the JOC meetings of 1954 at which Mr. Herbert Blackman of your Department presided, be supplied to this subcommittee for review.

That request was reiterated again in a conference on February 2, 1956, between Mr. Robert Kennedy, chief counsel of the subcommittee and Mr. Philip A. Ray, General Counsel of the Department of Commerce. Again on February 9, 1956, Mr. Ray was requested at a hearing of this subcommittee to make these documents available to us.

I, therefore, once again request that the minutes of the JOC meeting and the supporting documents be made available to this subcommittee. I wish to hear from you on this request by 10 o'clock a. m., on February 17, 1956.

Sincerely yours,

JOHN L. McCLELLAN, *Chairman.*

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THE SECRETARY OF COMMERCE,  
*Washington, February 27, 1956.*

Hon. JOHN L. McCLELLAN,  
*Chairman, Senate Permanent Subcommittee on Investigations,*  
*United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: I refer to Acting Secretary Hoover's letter of February 20, 1956, to you relating to the requests which have been made for information and documents concerning East-West trade controls from the executive branch.

This letter was a joint undertaking, in the preparation of which the Department of Commerce participated fully.

Since it was not possible for me to sign the letter in proper form before its delivery to you, I respectfully request that you accept this letter as a part of the record of the hearings in order to confirm my full agreement with the position taken by Mr. Hoover, as stated to your subcommittee by my representative, Mr. Philip A. Ray.

Sincerely yours,

SINCLAIR WEEKS,  
*Secretary of Commerce.*

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THE SECRETARY OF COMMERCE,  
*Washington, March 5, 1956.*

Hon. JOHN L. McCLELLAN,  
*Chairman, Senate Permanent Subcommittee on Investigations,*  
*United States Senate, Washington, D. C.*

DEAR SENATOR McCLELLAN: Your subcommittee has for some time been engaged in an investigation of East-West trade controls with particular reference to the actions taken by our Government and our allies in the international trade control negotiations in 1954.

In connection with this investigation, you have written to me under date of March 3, 1956, requesting that I appear as a witness before your committee on next Wednesday morning, March 7, 1956, at 10 a. m. Because of other commitments I will be unable to appear before your committee at that time, but at a later date I shall be glad to do so at a mutually agreeable time.

You further state in your letter that at a subsequent time the subcommittee will be very glad to hear Governor Stassen, who had the primary role in the negotiations of 1954 and other responsible policymaking officials from the other interested departments.

As a matter of fact, as a result of our discussion last Tuesday, I myself had understood that Governor Stassen would be heard this week. For reasons which I will mention I urge that your subcommittee continue with this program.

Based on my belief, Governor Stassen has been actively preparing to testify and it has been specifically requested that he be heard by the subcommittee on the date you mention, Wednesday, March 7, together with the others, Mr. Hollister, Director of International Cooperation Administration; Mr. McClellan,

Assistant Secretary of Commerce for International Affairs; Mr. Gray, Assistant Secretary of Defense, and Mr. Kalijarvi, Deputy Assistant Secretary of State, these being the present officials responsible for these activities in these departments.

Furthermore, it is particularly important that Governor Stassen be permitted to testify this week because of his scheduled departure for disarmament discussions in London on March 10, from which he will not return for at least a month, and probably 2 months.

I believe that Governor Stassen's testimony will be of paramount importance because as Director of Foreign Operations Administration and as the Battle Act administrator he had the primary role in the negotiations in 1954.

By your further letter to me of March 3, 1956, you request that certain named employees appear before your subcommittee on Tuesday, March 6, 1956, and bring with them various documents involving staff advice and recommendations. Insofar as the documents are concerned I am bound to advise you in accordance with the above-mentioned letter of Under Secretary Hoover of February 20, 1956, that they consist of discussions and communications of an advisory nature among the officials and employees of the executive branch, sensitive intelligence information, and communications with our delegations and other representatives abroad containing recommendations, information regarding the position of other governments, and comments thereon which I am not privileged to release.

You will recall that the executive branch has made repeated requests that the story of the 1954 negotiations should be presented to your committee by those officials responsible for carrying them out rather than by staff and career subordinates.

By letter of January 13, 1956, my Department offered complete cooperation with your committee but requested that your investigation "be directed to those who held and exercised policy and action responsibility rather than to subordinate staff personnel."

Again on February 14, 1956, the Acting Secretary of State reappeared before your committee in executive session and pointed out to your subcommittee that this matter involves sensitive international negotiations and agreements and classified national-security information. Subject to appropriate safeguards in this connection, he offered the full cooperation of the interested departments of the Government and specifically requested that "the appropriate officials at the policymaking levels be allowed to come before this committee to present our position on the matter of East-West trade."

Again under date of February 20, 1956, the Acting Secretary of State on behalf of the Departments of State, Defense, and Commerce and the Director of International Cooperation Administration communicated with your committee as follows:

"We recognize the right of the Congress to investigate the operations of the Government and we continue to stand ready to cooperate with this committee by having the officials who were charged with the responsibility for the negotiations with the cooperating nations to appear before you to explain the considerations which guided their actions during these negotiations. We can advise you that Governor Stassen, who was charged with the chief responsibility involving these negotiations, will appear before the committee on a date mutually satisfactory to the committee and him."

On that same date, officials of the Departments of Defense, Commerce, and the Director of the International Cooperation Administration appeared before your committee and presented this request.

Finally, in the discussion between us last week, as noted earlier in this letter, I had gained the impression that the appearance of Governor Stassen and the others this week would be agreeable.

It is my considered judgment that the best interests of the United States will be served by the subcommittee proceeding to hear Governor Stassen and the others at this time, as we have repeatedly requested. Any other course of action gives opportunity for distortions based on incomplete knowledge and in some cases gross inaccuracies, and can jeopardize the safety of the Nation by laying bare to hostile eyes information the disclosure of which will be harmful to the public interest.

I therefore urge that your subcommittee reconsider your proposed course of action so that your subcommittee members and the public may hear directly at this time from the responsible executive-branch officials as to what was done in the East-West trade negotiations and why it was done. Specifically, I urge again that your subcommittee consent to hear Governor Stassen and the other

appropriate officials who are now prepared to testify at length before you on March 7.

I am certain that you and the members of your own subcommittee, and the public, will feel that this is a reasonable request.

Sincerely yours,

SINCLAIR WEEKS,  
*Secretary of Commerce.*

THE SECRETARY OF COMMERCE,  
Washington 25, March 5, 1956.

Memorandum.

To : All employees.

From : The Secretary (Sinclair Weeks).

Subject: East-West trade-control hearings before the Senate Permanent Subcommittee on Investigations.

On February 20, 1956, the Department of Commerce joined the Departments of State and Defense and the International Cooperation Administration in a statement to the Senate Permanent Subcommittee on Investigations relative to documents and information requested by the subcommittee in its inquiry on East-West trade controls. This statement was in the form of a letter from Herbert Hoover, Jr., Acting Secretary of State, to Senator McClellan, chairman of the subcommittee. A copy is attached.

The subcommittee was informed that the executive branch would be prepared, through responsible officials, to—

(1) Furnish the subcommittee in open session information as to items deleted from the 1952 International List in the 1954 revision; and

(2) Furnish the subcommittee in executive session, on a classified basis information as to items downgraded or upgraded or added to the list in the 1954 revision.

Since the custody of all records and papers in and relative to the business of the Department is in the Secretary, any request, subpoena or other demand for documents relative to this inquiry to whomever addressed shall be referred to my office.

Any request, subpoena, or other demand to appear and testify before this subcommittee relative to the East-West trade control inquiry should be honored. However, in accord with the principles set out in the attached letter of February 20, 1956, from Mr. Hoover, you are instructed not to testify either in public or executive closed sessions with respect to any advice, recommendations, discussions, and communications within the executive branch respecting any course of action in regard to East-West trade controls or as to any information regarding international negotiations with the countries cooperating in East-West trade controls. You are further instructed not to testify in public hearings as to any matter which is classified for reasons of security or in any manner that may reveal information so classified. In the event that there is any doubt as to whether the particular requested testimony falls within the scope of these instructions, you are directed to inform the subcommittee that you must decline to testify until you have further consulted with the Department.

These instructions have the full force and effect of a Department regulation and should be observed without exception.

FEBRUARY 20, 1956.

Hon. JOHN L. McCLELLAN,  
*Chairman, Permanent Subcommittee on Investigations,*  
*United States Senate.*

DEAR SENATOR McCLELLAN: During the course of the current inquiry by the subcommittee into East-West trade controls, the subcommittee has made a number of requests for information and documents from the executive branch, some to the International Cooperation Administration, and others to the Departments of Defense and Commerce. The specific requests as to documents relate to the international lists, the Battle Act lists, and the working papers and minutes of the Joint Operating Committee which was set up as an advisory group in the executive branch with relation to the negotiations with our allies in 1954 concerning the international lists. In addition, the International Cooperation Administration has been specifically requested to supply information as to the certain recommendations of the Joint Operating Committee.

This letter relates to all such requests.

In relation to these requests, it should be stated what the agencies involved have supplied and have offered to supply to the subcommittee. The International Cooperation Administration has furnished to you the various Battle Act lists from 1952 to 1955 with a notation as to the items decontrolled or downgraded on or about August 25, 1954. As recognized by the subcommittee in its request, these documents and related information were supplied necessarily on a classified basis.

On February 14, I discussed with the subcommittee the overall policy considerations involved in the whole subject of the control of trade in strategic materials, and for the Departments of State, Defense, and Commerce and the International Cooperation Administration requested, in view of considerations given to the subcommittee, first, that hearings on the subject of strategic controls be held in executive session and, second, that the appropriate officials at the policymaking levels be permitted to come before the subcommittee to fully explain our policy and actions in the negotiations with our allies in 1954.

I further referred to the matter of the documents involved. Most of these documents are classified and highly sensitive; many of them involve our relations with other governments; and almost all of them are working level papers of the executive branch showing internal advice and recommendations.

In that connection, I stated that if the subcommittee decided to pursue its investigation along the lines suggested, the agencies involved were prepared to review the question of what documents could appropriately be turned over to the subcommittee in the light of the developing testimony, with proper consideration for the safeguarding of those that are confidential and sensitive.

It is my understanding that the subcommittee has denied these requests, at least insofar as holding the hearings in executive session is concerned, and has renewed its request for the documents involved. However, the executive branch has certain responsibilities and duties under the Constitution and our laws which it is bound to fulfill. These relate to the conduct of our foreign relations and to the effective and efficient administration of the executive branch.

As to East-West trade controls the present international system has existed on a voluntary basis between the United States and the nations friendly to it since 1948. The group of nations participating in this system of controls does not have a formal agreement which subordinates their actions to rule by majority. The system of controls depends for its very existence on the good faith of the participating nations. Any of these nations is free to take unilateral action at any time if for any reason it does not wish to abide by the suggested control list. Cooperation, therefore, is the only way the objectives of effective international control of strategic materials can be accomplished. In many instances participation of a particular nation in this program has been obtained only on the specific commitment that the details of such participation would be kept secret.

Thus any revelation on our part of the details of this program would constitute a breach of trust on the part of the United States, and by jeopardizing the voluntary basis upon which the program rests, would endanger our national security.

Because of this, the international lists cannot be revealed by the executive branch. We are, however, prepared through responsible officials to (1) furnish the subcommittee in open session information as to items deleted from the 1952 list in the 1954 revision, and (2) furnish the subcommittee in executive session on a classified basis information as to items downgraded, upgraded, or added to the list in the 1954 revision.

Apart from the Battle Act list, which already has been supplied to the subcommittee on a classified basis, and the international lists referred to above, the remaining documents in the executive branch relating to East-West trade controls consist of discussions and communications of an advisory nature among the officials and employees of the executive branch, highly sensitive intelligence information, and communications with our delegation and other representatives abroad containing recommendations, information regarding the position of other governments, and comments thereon. It is contrary to the public interest that their conversations or communications or any documents or reproductions concerning such advice be disclosed. May we refer you to the position of the President on the subject in his letter of May 17, 1954, to the Secretary of Defense. We are, therefore, required to deny to this subcommittee any documents that would violate this principle.

We recognize the right of the Congress to investigate the operations of the Government and we continue to stand ready to cooperate with this committee by having the officials who were charged with the responsibility for the negotiations with the cooperating nations to appear before you to explain the con-

siderations which guided their actions during these negotiations. We can advise you that Governor Stassen, who was charged with the chief responsibility involving these negotiations, will appear before the committee on a date mutually satisfactory to the committee and him.

We feel sure that your subcommittee in this manner can obtain an accurate picture of Government policy and actions in the area of international strategic controls.

I am authorized to state that this letter has the concurrence of the Secretary of Defense, the Secretary of Commerce, and the Director of the International Cooperation Administration.

Sincerely yours,

HERBERT HOOVER, JR., *Acting.*

### EXHIBIT C

(The following excerpt is taken from pt. 1 of the East-West trade hearings, 84th Cong., 2d sess., pp. 19-22, and pertains to the experiences of the Permanent Investigations Subcommittee with suppression of information by the executive branch.)

#### EAST-WEST TRADE

UNITED STATES SENATE,  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Wednesday, February 15, 1956, Washington, D. C.*

The subcommittee met at 10 a. m., pursuant to Senate Resolution 41, agreed to February 21, 1955, and Senate Resolution 202, agreed to February 1, 1956, in room 357 of the Senate Office Building, Senator John L. McClellan (chairman) presiding.

Present: Senator John L. McClellan, Democrat, Arkansas; Senator Stuart Symington, Democrat, Missouri; Senator Sam J. Ervin, Jr., Democrat, North Carolina; Senator Joseph R. McCarthy, Republican, Wisconsin; Senator George H. Bender, Republican, Ohio.

Also present: Robert F. Kennedy, chief counsel to the subcommittee; James N. Juliania, chief counsel to the minority; Jerome S. Adelman, assistant counsel; LaVern Duffy, investigator; Ruth Y. Watt, chief clerk.

(Present at the convening of the hearing: The chairman, and Senator Bender.)

\* \* \* \* \*

Senator McCARTHY. Am I correct in this, that the 200 million pounds of copper wire sent to Russia by the United Kingdom, much of that would find its way into the airplane production of Russia?

Mr. ADLERMAN. Whatever wire went in, there is no question but what it found its way eventually into the airplane construction.

Senator McCARTHY. And that is extremely important to the aircraft industry, is it not?

Mr. ADLERMAN. There is no question about it, sir.

Mr. KENNEDY. I want to come back to this JOC for one more moment. At that JOG level, which is the Joint Operating Committee level, which had Mr. Blackman from the Department of Commerce and these other representatives of the various United States Government agencies, they made recommendations as to items that should be removed from the list during this period of 1954; is that correct?

Mr. ADLERMAN. That is right.

Mr. KENNEDY. This was completely a United States position on these items that should be removed?

Mr. ADLERMAN. That is so.

Mr. KENNEDY. So that the minutes that were kept or the account of the meetings were regarding the United States position—is that correct—and had nothing to do with any foreign nation?

Mr. ADLERMAN. That is right.

Mr. KENNEDY. From an investigation that we have made, do you know approximately how many items the Joint Operating Committee suggested to be downgraded or removed from the embargo list? This is just the United States position without consultation with our allies.

MR. ADLERMAN. The figure that I have heard in the consideration of the 450 items is that they have dropped in JOC, before they ever went to COCOM or were considered in COCOM, approximately 100 items.

SENATOR McCARTHY. Could I interrupt you there, Mr. Kennedy?

MR. KENNEDY. Yes, Senator.

SENATOR McCARTHY. The thing that puzzles me is why we agreed to have our allies ship certain materials to the Soviet bloc and prevent American businessmen from shipping the same materials to the Soviet bloc. In your investigation, did you get any explanation for that?

MR. ADLERMAN. No; I don't know the reason for it, and I would like to know.

MR. KENNEDY. Have we requested the items that were removed or suggested to be removed by the Joint Operating Committee?

MR. ADLERMAN. Yes; we have, sir.

MR. KENNEDY. And we have been refused a list of those items?

MR. ADLERMAN. Absolutely refused.

SENATOR McCARTHY. Do I understand the committee cannot get a list of the items removed from the list? Is that right?

THE CHAIRMAN. You have reference, Senator, to what we did over here, what our JOC Committee did over here? That is the list you are talking about?

SENATOR McCARTHY. Yes.

MR. ADLERMAN. We do not have that.

SENATOR McCARTHY. And we cannot get that?

MR. ADLERMAN. They refuse to give it to us.

THE CHAIRMAN. I may say for the record that all of that has been requested and requested formally by letter, and it is still withheld from us.

SENATOR McCARTHY. May I say, Mr. Chairman, that it is certainly an unusual situation when the Communist nations can know what we are shipping to them, what we have taken off the strategic list, but the Congress cannot get that information. It is rather a fantastic picture.

THE CHAIRMAN. The Chair may say that in an opening statement at the beginning of these hearings, I stated that would be the crux of this inquiry, why Congress cannot have this information as to what the executive branch of the Government is doing in this field of operation, why we cannot have it so that we can legislate and appropriate intelligently and with better judgment. That is the position the committee takes. We feel that the Congress is entitled to this information. The executive branch, as of now, has taken the position that we are not entitled to have it. But we are going to try and get it.

If this committee has the power to get it, we are going to get it. That is the position that the Chair announced in the beginning.

MR. KENNEDY. I am through with this witness.

SENATOR McCARTHY. I would like to add to your statement, Mr. Chairman, that there can be no reason why the Congress cannot have this information because of the fact that the Soviet Union has it at this time. There is no reason why we should not have it.

THE CHAIRMAN. Let me ask you this question, Mr. Adelman, in line with this particular problem you are discussing: Do you have the official statement issued by Mr. Stassen immediately after the COCOM conference regarding the downgrading of this list?

MR. ADLERMAN. Yes. There is a press statement. I think Mr. Kennedy has it in the files.

THE CHAIRMAN. Among other things, if you have it, let us see if this is correct. I am reading from a document here:

"The Revision of Strategic Trade Controls, the Mutual Defense Assistance Control Act of 1951, the Battle Act, the 5th Report to the Congress, the First Half of 1954."

This is an official document from which I now quote:

"In announcing the revision, Stassen stated 'I am convinced that this revision which has been made with the concurrence of the Departments of State, Treasury, Defense, and Commerce, and approved by the President, will result in a net advantage to the free world of expanded peaceful trade, and more effective control of the war potential items. It is a move in the best interests of the United States.'"

(At this point, Senator Bender entered the hearing room.)

THE CHAIRMAN. Assuming the statement of Mr. Stassen, our representative at that conference, and the head of the Battle Act, assuming that statement to be true, then can you determine or think of any justifiable reason or excuse

why the information as to what was done and the process of doing it should be classified information?

Mr. ADLERMAN. I know of none.

The CHAIRMAN. It strikes me that if it promoted world peace and better control of strategic materials, if it actually accomplished that, then would not our Government, participating in it, and permitting our people to trade in the same item with the Soviet bloc, further enhance, or be calculated to further enhance, the benefits that would flow, rather than to detract from it?

Mr. ADLERMAN. That would seem to be a reasonable conclusion.

The CHAIRMAN. It seems to me the position is very inconsistent. If it served a good purpose, we could serve the purpose better by participating in it.

Mr. ADLERMAN. If it served a good purpose, Senator, why would they hesitate to give us this information now?

The CHAIRMAN. That is the point I am making. Here we have the declaration of the administrator of the Battle Act, stating that what they did served these good purposes. Yet that information, as of the moment, is classified to this committee and to the Congress, and we are denied the right to have it, to know it, and to let the American people know it. Is that the position we find ourselves in?

Mr. ADLERMAN. Exactly, sir.

Senator McCARTHY. I think, Mr. Chairman, we should make the record clear at this time. Mr. Stassen says this was done with the concurrence of the Defense Department. We had Defense Department witnesses in executive session and they positively stated that they did not concur in this position. I think it should be clear that Mr. Stassen was misstating the facts when he made this statement in this report.

The CHAIRMAN. The Chairman has stated that it is the purpose of the committee and we will proceed with it to the point of developing whether they did or did not. I think we are entitled to know that. Those are the things we are trying to inquire into.

Senator BENDER. Since Mr. Stassen has been brought into this, Mr. Chairman, do you not think it desirable to have him appear before the committee and make his statement immediately, so that we might, if we have any questions to raise regarding his veracity or the statements he made regarding the work of this organization, he will have the opportunity to tell this committee about it?

The CHAIRMAN. I will make this statement: This committee will not deny to Mr. Stassen or any other official of this Government the right and the opportunity to appear before this committee at any time they desire. We will more fully cooperate with their wishes in that respect than we have been able to get cooperation from them with respect to what we desire. So we are forced into the position of trying to get information that should be made available to us, and, therefore, we have to proceed in this manner to develop what the facts are.

I may be wrong but I think by the time they are all developed, probably some folks that are not now cooperating will want to come down here and give us some information that will be desirable to the Congress.

Senator McCARTHY. I may say, Mr. Chairman, that I was shocked this morning to learn that the Defense Department has refused to allow its witnesses to appear and testify before this committee. I certainly hope that the Chairman subpoenas them. I think they can refuse to testify to anything that might endanger the national security, but I do not believe any department can arbitrarily refuse to have its witnesses appear before this committee.

The CHAIRMAN. The Chair would have to modify just slightly what the Senator has said. As to whether they have definitely refused, I expect to get that information some time this morning. After the staff contacted them, I received a call from the Assistant Secretary telling me that he was trying to reach Secretary Wilson, who was at that time in conference at the White House. He had not been able to take the matter up with him, but he would do so, and would advise me as soon as he could confer with Secretary Wilson as to what the position and attitude of the Defense Department would be with respect to making available to the committee witnesses that it desired.

Senator McCARTHY. I thought there had been a definite refusal.

The CHAIRMAN. No.

Senator BENDER. The fact of the matter further is that in executive session yesterday, Mr. Herbert Hoover, Jr., appeared not only as a representative of the State Department but, as he said very bluntly, of all the Departments involved.

He said he would make available to us whatever information we desired in executive session.

The CHAIRMAN. I think the Senator has slightly exaggerated. I asked if we could have these documents in executive session, and as I recall, he said we would have to cross that bridge when we got to it.

Senator BENDER. I think we have his language here, when in a statement he said he would cooperate in every respect with the committee, and that there was not any disposition on his part to withhold any information.

The CHAIRMAN. We are giving him the opportunity to cooperate by letting the witnesses come and testify. We need not belabor this point, as we will reach these things as we go along. We are going to consult with the committee, and the committee is going to determine what steps we have to take as we meet with obstructions. If that is a harsh word, that is what it appears to the Chair to be. As we meet with these obstructions we are going to undertake to surmount them and overcome them. I do not know how much success we will have, but we will undertake this. If the executive branch of the Government persists in its present position, then the matter addresses itself, I think, to the Congress, first and to the American people, to judge whether the departments in the executive branch of the Government are justified in the position they are taking.

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#### EXHIBIT D

(The following exchanges appear on pp. 421-427 of part 2 of the hearings on East-West trade, before the Senate Government Operations Permanent Subcommittee on Investigations, 84th Congress, 2d session, during the March 9, 1956 testimony of Harold E. Stassen, Special Assistant to the President.)

Mr. STASSEN. \* \* \* Thank you for permitting me to present my statement, Mr. Chairman.

The CHAIRMAN. You are welcome, Governor.

Senator McCARTHY. How long will we be in session, Mr. Chairman?

The CHAIRMAN. Until 1 o'clock, and later if required. Governor, I read the statement last night.

Mr. STASSEN. Yes. I sent it up pursuant to your committee rules, Mr. Chairman.

The CHAIRMAN. Yes, you did that. I may say I read it last night at a very late hour, because we were in session quite late.

Mr. STASSEN. I worked some late hours to get it ready for you.

The CHAIRMAN. I have heard you read it with some modifications, which are quite proper. I gained the impression, and my first impression was, that it was a remarkable argument confirming the attitude and position of some of our allies that they are more interested in trade and profit than they are in defending and preserving security in peace. I have not been able to change that impression from your very solemn presentation of the argument.

Mr. STASSEN. Mr. Chairman, I am very sorry to hear you make a statement like that about our allies. Actually, the peace of the world depends upon the solid position of the free world as a whole. These nations know war. They have had damage in war much more extensive than the United States has had. They have been overrun by aggressors. They are close to the Soviet threat. They are courageous people. They have to evaluate all factors involved in the world situation as they decide their security and defense program.

So I do not feel, and I hope you really would not persist in maligning our allies because of their position on this item. They do have a different viewpoint.

The CHAIRMAN. Do you call that a malignment, if we oppose their sending materials of war and equipment to build a war machine for trade and profit? Do you call that a malignment?

Mr. STASSEN. No, Mr. Chairman. You said they were more interested in trade and profit than they were in peace and security.

The CHAIRMAN. I said you made an argument that confirmed them in that attitude in that position.

Mr. STASSEN. I say, you do not correctly characterize our allies' position, and I think it is unfortunate that you do thus speak of our allies.

The CHAIRMAN. Well, that may be your opinion, and I still maintain that you have made an argument, a very remarkable one, in support of that position.

Mr. STASSEN. I didn't support their position; I reported their position to you in the negotiation.

The CHAIRMAN. That is it, and you made arguments in support of it, and that is unfortunately, or regretfully, rather, the impression that has been made to me. In the very first paragraph, you say:

"It is my understanding that the committee wishes to have more information about the East-West trade control arrangements."

What the committee has been trying to do is to get full and complete information. Are you willing to give us full, detailed, and complete information?

Mr. STASSEN. I am willing to give you, and the executive branch is willing to give you, every bit of information that does not violate one of three considerations: One, security from the standpoint of intelligence; two, the rule on internal executive branch documents, which has been in effect since the beginning of our Government, and which is absolutely essential; three, the details of international negotiations which would make our relations with our allies more difficult. Those are the three restrictions.

The CHAIRMAN. Are you willing to give us the list of items that were decontrolled or downgraded at COCOM?

Mr. STASSEN. No; I do not have, of course, those lists now. They are not in my jurisdiction. The administration position on this as to what could be furnished has been sent to you in Secretary Hoover's letter.

The CHAIRMAN. All right. Let me ask you: Are you permitted to testify under the security cloak that is wrapped around Government officials in this matter? Are you permitted to testify before this committee with respect to, and advise the committee, the items that were disembargoed, the items that were placed on the quantitative list, and the items that were placed on the watch list? I believe you referred to them as list 1, 2, and 3.

Mr. STASSEN. Those three lists.

The CHAIRMAN. Are you permitted to testify to that before this committee?

Mr. STASSEN. Within the limits that I gave you, I can; yes.

The CHAIRMAN. All right. What are those limits? What would keep you from telling about each item?

Mr. STASSEN. To give each item in open session, in detail, would serve the enemy. It would give him information of specifically where we, in our intelligence analysis and in our negotiations with foreign governments, drew the line.

The CHAIRMAN. It would serve the enemy for you to disclose that?

Mr. STASSEN. That is right, in open session.

The CHAIRMAN. Then you took the liberty where it serves the enemy when it is something that you do not want to divulge to Congress, but when you can divulge one of them in public session and make an argument about it that serves the position of our Government, and the action it took. You are perfectly willing to do that?

Mr. STASSEN. I do not agree with your analysis.

The CHAIRMAN. Did you not refer to copper, single it out, and wind up, not in your prepared statement but a few minutes ago, and add to your present part statement that it was downgraded and put on list 3, which is the watch list? Did you not testify to that item?

Mr. STASSEN. Yes because this committee disclosed that information long ago. I think this committee acquired it—

The CHAIRMAN. May I ask you if you will testify to the other items the committee has disclosed?

Mr. STASSEN. If you ask me of any specific items that you previously disclosed, I will endeavor, within the limits that I previously gave, to respond to your questions.

The CHAIRMAN. All right. I just pointed out that you say you cannot disclose the list, and what action you took, but you, yourself, voluntarily singled out one in support of your argument, copper, and told the committee what action you took on it.

Mr. STASSEN. I didn't single it out, Mr. Chairman. I submit that you did, and the committee did, on the floor of Congress.

The CHAIRMAN. This is just one of many. But you single it out in matter of argument to support your position. That is just the problem that we are confronted with. When it serves the administration's position and policy to release an item or to make it public, you do so. But if it will serve Congress' purpose, then it is classified. That is just the plain fact right before us.

Mr. STASSEN. Mr. Chairman, surely you recall that you spoke on the floor of the Congress and disclosed this information about copper and copper wire to the whole world. It is then no longer intelligence information or a secret in any way.

The CHAIRMAN. Who was it a secret from before I disclosed it? Only the Congress and the American people. The other countries all know it.

Mr. STASSEN. No, Mr. Chairman. These lists and the manner of controls have been classified in every country in the world. Parts of the information—

The CHAIRMAN. Just one moment.

Mr. STASSEN. Parts of the information obviously became known as trade goes on. But if we would publish this whole list, you then furnish in one fell swoop to the Communists exactly how far they can go in ordering these items from the free-world nations, and you help the Communists. That is the plain point.

The CHAIRMAN. All right. You say I am helping the Communists. The allies, whose position you are defending, Great Britain—I hope our strongest ally—publishes the list so the Communists can see what she will sell, the very items that are today classified from the Congress and the American people.

Mr. STASSEN. The United Kingdom does not publish the international list, Mr. Chairman, that I know of.

The CHAIRMAN. Here it is; I hold it in my hand. This is Board of Trade Journal, October 16, 1954, in which wire, copper wire, is excluded, so they know they can buy it.

Mr. STASSEN. Would you give it to me, please?

(Document handed to Mr. Stassen.)

Senator McCARTHY. Just so the record is straight, Mr. Chairman, I think we should point out that the Chair was completely justified in making the statements on the Senate floor in view of the fact that Mr. Stassen had issued a report saying that copper had not been decontrolled. The Chair merely corrected that misstatement.

Mr. STASSEN. On the contrary, Senator. My report said that basic copper continued in embargo, and it said specifically to the committees and publicly at that time:

"Many of the 170 items remaining on the embargo list were redefined in such a way as to split off certain less important sizes and types of the goods covered by the item while keeping the embargo rating on the more important sizes and types."

I made a full report to the six committees of Congress that had jurisdiction in this matter while the negotiations were going on and when the negotiations were finished.

Senator McCARTHY. Governor, I merely point out to you that your report indicated that copper and copper wire was still under embargo. I think the chairman had a duty, when he discovered that that was false, to report that to the Senate. I merely rise to the defense of the chairman on this point at this time.

Mr. STASSEN. Mr. Chairman, I never reported to any committee—

The CHAIRMAN. Just a moment.

Mr. STASSEN. Mr. Chairman?

The CHAIRMAN. The Chair does not want any defense, not on the basis of anything that was said by him. I think the people are entitled to know it, and we had sworn evidence of it here, and I therefore felt at liberty to disclose it. It had been disclosed in public hearings.

Mr. STASSEN. Mr. Chairman, I never did report to any committee of Congress at any time that copper was under embargo.

Senator McCARTHY. On page 21 of your report you reported that copper was still under embargo.

Mr. STASSEN. It is.

Senator McCARTHY. You did not mention that we were going to ship 250 million pounds of copper wire, which is very important, to the Communist war machine, to Russia.

Mr. STASSEN. We have not shipped 250 million pounds, and you know we haven't, Senator.

Senator McCARTHY. If copper was under control, under embargo, how could you ship copper wire?

Mr. STASSEN. Copper wire, of the small sizes, has been on list 3, since August 1954, which means that the Western European nations license limited quantities of it, and they insisted on doing it on the basis that the Communists had more than enough copper for all their military purposes, that copper is a material

used for both civilian and military, and that they were going to insist on doing some copper wire trade.

Senator McCARTHY. If I may impose on the Chair for one more minute, I wish to go further.

Governor, in your report to the Congress, you said that copper was still under embargo.

Mr. STASSEN. That is right, and it is.

Senator McCARTHY. That is found on page 21 of the report. The committee found out, independently, despite the opposition of your Department, that our allies had shipped 250 million pounds of copper wire, the type that would be used in jet planes, to the Soviet Union. I merely point out at this time that the chairman was doing a service to the American people when he pointed out that your report, Governor, was completely, and as far as I know deliberately, false.

Mr. STASSEN. Well, you know that what you are saying now is not true, Senator, and I won't bother to answer it. Your figures are wrong, your facts are wrong, and you just simply—

Senator McCARTHY. What is wrong about the figure? Is 250 million wrong?

Mr. STASSEN. It is wrong; yes.

Senator McCARTHY. What is the figure, then?

Mr. STASSEN. Much less than that.

Senator McCARTHY. How much?

Mr. STASSEN. I will not give the figure.

Senator McCARTHY. You will not give the figure?

Mr. STASSEN. No.

Senator McCARTHY. The Department of Commerce gave us the figures of 250 million pounds. Do you want to say that the Department of Commerce report was false?

Mr. STASSEN. They gave you a figure on total licensing for a period of now almost 2 years. That is not the figure—

Senator McCARTHY. Governor, do not misquote again. This was not licensing; this was shipment, shipment of copper wire. The Department of Commerce gave us the figure of 250 million pounds, and you say that was false.

Mr. STASSEN. I say there has not been 250 million pounds shipped since this revision. There have been substantial quantities shipped. It is the United States position that none should be shipped, but the Western European countries insisted on sending these amounts.

Senator McCARTHY. Why do you say you cannot tell us how much was shipped? The Communists know how much they got. Why cannot the Congress know how much they got?

Mr. STASSEN. Because this involves also nations that are not in the control agreement, and it involves the question of just how much information we do get. I will not go through it in that form.

Senator McCARTHY. Governor, just one simple question puzzles me. The Communist Russia knows how many million pounds of copper they got. We are asked to appropriate money over a 10-year period to the nations that are shipping this copper to Communist Russia. Can you think of any reason on earth why the Congress should not know what Communist Russia knows?

Mr. STASSEN. No.

Senator McCARTHY. Well that is something.

Will you tell us, then?

Mr. STASSEN. Senator, if you ever succeed in finding out what Communist Russia knows, you will be a very valuable source of intelligence.

Senator McCARTHY. Will you tell us how much we ship to Communist Russia?

Mr. STASSEN. On copper?

Senator McCARTHY. You know the Department of Commerce reported how much was shipped. Will you tell us how much was shipped?

Mr. STASSEN. I say it is considerably less than the amount that you say, but it is substantial, and that we—the United States position of all four departments was that none should be shipped.

Senator McCARTHY. Did you disapprove of the shipment?

Mr. STASSEN. Yes, we insisted that copper wire ought to stay under embargo. The western Europeans insisted that they would ship some. They didn't want to put it on any list. They finally agreed to put it on list 3 and license it and endeavor to hold down the amounts. That was the final outcome of the negotiations.

The CHAIRMAN. Governor, may I inquire, on the basis of your report, a Member of Congress or an American citizen reading that report where you say copper is still under the embargo, would get no impression whatsoever that our allies were permitted to ship copper wire, would they?

Mr. STASSEN. Yes, because we had the general statement of the reductions of all items, and the redefinition to split off certain of the less important sizes and types of the goods covered by the item while keeping the embargo rating on the more important sizes and types.

The CHAIRMAN. I understand. But that would not give any impression that copper wire could be shipped.

Mr. STASSEN. It does not go into any of the details, you understand.

The CHAIRMAN. I understand. But the question was: A report of that character would not inform a Member of Congress, nor would it inform anyone who read it, that copper wire had been decontrolled, would it?

Mr. STASSEN. It wouldn't inform him one way or the other; no.

The CHAIRMAN. It carries the impression that it is under embargo, does it not?

Mr. STASSEN. We say:

"Many items were removed"—

This is our report after the negotiations—

"Many items were removed. These were either transferred to the atomic energy annex, demoted to a lower level of control, or decontrolled entirely. On the other hand, about 20 new items, embodying technological advances, were added to the list. Moreover, a few items, or parts of items, were promoted to a higher level of control. The result was a net reduction in the international embargo list, from about 260 items to about 170."

This is in this report that we made to the Congress for the first half of 1954, right after this revision.

The CHAIRMAN. The report was made so as not to reveal rather than to reveal detailed information as to what was done?

Mr. STASSEN. The report was made to give the maximum information to the Congress that could be given, and to correctly reflect the extent of the relaxation that we had to make in order to hold together the remaining trade controls.

The CHAIRMAN. So it was your position, representing the Government in making that report, it was your position that the Congress was not entitled to know that copper wire had been decontrolled?

Mr. STASSEN. No, it was our position that Congress was entitled to know everything we could tell under the restrictions that I told you at that time.

The CHAIRMAN. Did you feel that you could not tell that?

Mr. STASSEN. That is right, in that detail at that time.

The CHAIRMAN. For that reason, then, it was left out?

Mr. STASSEN. That is right.

## EXHIBIT E

(The List of Goods Controlled for Strategic Reasons, published in the Board of Trade Journal, October 16, 1954, appears, as noted in Senator McClellan's letter, in pt. 2 of the hearings on East-West trade at pp. 532-547.)

## EXHIBIT F

(Below is a pertinent excerpt from S. Rept. No. 1410, on Foreign Operations Administration Grain Storage Elevators in Pakistan, 84th Cong., 2d sess., mentioned by Senator McClellan in his letter. Pp. 2-5 relate to FOA suppression of information desired by the Permanent Investigation Subcommittee.)

### ATTEMPTS BY FOA TO IMPEDE THE INVESTIGATION

The initial step in the investigation was a request made by Senator McClellan, chairman of the subcommittee, of Mr. Harold E. Stassen, Director of the Foreign Operations Administration, by letter dated January 21, 1955, to make available to the investigative staff of the subcommittee all the files of FOA<sup>2</sup> relating to this project.

<sup>2</sup> FOA means Foreign Operations Administration.

Not receiving a response or even an acknowledgment of his letter, Senator McClellan again wrote to Director Stassen on February 4, 1955, repeating his request. On February 11, 1955, Mr. Stassen by letter acknowledged these requests made by the chairman and furnished to the subcommittee copies of a limited number of FOA documents.

On receipt of this material, Senator McClellan, by letter of February 16, 1955, for the third time requested that all the material in FOA's files relating to the Pakistan grain-storage program be furnished to the subcommittee, stating, "even a cursory examination reflects that the complete file on this matter has not been transmitted to us." To this latter request, Mr. Stassen replied on February 19, 1955, advising that the additional material in FOA's files would be made available for review.

As a result of this correspondence, arrangements were made for a member of the investigative staff of the subcommittee to review the additional material in the FOA's files in the office of Mr. Leonard J. Saccio, Deputy General Counsel of the Foreign Operations Administration.

After a review of this additional material, a request was made for copies of a number of the documents which the review showed would be necessary for the subcommittee. This request was denied by Leonard J. Saccio, Deputy General Counsel for FOA, upon instructions of Mr. Stassen.<sup>3</sup> As a result, a large portion of 3 weeks' time was taken by a subcommittee investigator in copying in long-hand the pertinent documents from FOA's files.<sup>4</sup>

Also requested was a copy of the application blank (form 57) executed by Robert H. Pinner, grain-storage engineer of the Ralph M. Parsons Co., who was under contract to FOA in an advisory capacity in Pakistan. This was also denied for the same reason.

To develop further the facts in this case it was necessary to conduct interviews with those officials in the FOA who were most familiar with this project. A request was therefore made for the names of the officials who had served as project managers on the Pakistan grain-storage matter in the Washington headquarters of FOA. This request was likewise denied by Mr. Saccio on orders of Director Stassen.

Information was developed by the staff that Mr. Howard P. Morrison had been one of the project managers at FOA. Accordingly, the Office of the General Counsel of FOA was requested on March 29, 1955, to have Mr. Howard P. Morrison appear for an interview at the office of the Investigating Subcommittee on March 30, 1955. The subcommittee had learned that Mr. Morrison had opposed the award being given to the Agricultural Construction Co., and the subcommittee staff wished to learn the basis for his taking a position contrary to that taken later by Mr. Stassen. Subsequent testimony of Mr. Morrison revealed that he was never advised by his superiors of this request for his presence.<sup>5</sup>

On the following day Mr. Christian Herter, the General Counsel of FOA, telephonically notified the Investigating Subcommittee that Mr. Morrison would not be permitted to appear for interview.<sup>6</sup> In view of this unusual action by FOA which would make a proper investigation impossible, a subpoena for Mr. Morrison's appearance on March 31, 1955, was issued. At the same time subpoenas were also issued for Mr. Virgil C. Pettit and Mr. Wessels Middaugh, both of FOA, who were known to have firsthand knowledge of the project.<sup>7</sup> A subpoena which was issued for Dr. D. A. FitzGerald, Deputy Director for FOA, was withdrawn after he assured the chairman that he would appear for interview at any time he was requested.

The three officials appeared in answer to the subpoenas. However, they were accompanied by Mr. Leonard J. Saccio, Deputy General Counsel of FOA, who stated he had orders from Director Stassen that they were not to be interviewed by any member of the staff of the subcommittee.<sup>8</sup> After communicating telephonically with his office, Mr. Saccio subsequently advised that these men could be interviewed by Mr. Robert F. Kennedy, chief counsel of the subcommittee, but only if he, Saccio, were present as a representative of Mr. Stassen and the FOA.<sup>9</sup> Mr. Kennedy explained that, since the investigation involved

<sup>3</sup> Pt. 1, pp. 9, 10.

<sup>4</sup> Pt. 1, p. 38.

<sup>5</sup> Pt. 1, p. 3.

<sup>6</sup> Pt. 1, p. 10.

<sup>7</sup> Pt. 1, p. 1.

<sup>8</sup> Pt. 1, pp. 8, 10.

<sup>9</sup> Pt. 1, pp. 8, 10.

a decision made by Mr. Stassen himself, his personal representative would not be permitted to be present at the interrogation.

As a result of the position taken by the FOA, Senator John L. McClellan, chairman, called the subcommittee into an immediate open hearing.

Mr. Saccio was called as a witness to explain this policy of Mr. Stassen. He stated that Director Stassen felt that the men in his agency should not be interviewed without Mr. Stassen or one of his deputies being present. Saccio testified that Mr. Stassen felt "the operating men in the agency should not be put in a position where their future usefulness to the agency will be impaired" and that Congress should receive explanations of what had been done in his agency only from him or his senior deputies.<sup>10</sup>

The impact on the Investigating Subcommittee of the unusual stand taken by Mr. Stassen is expressed in the words of Senator Ervin:

"Upon what meat doth this our Caesar feed, That he is grown so great?"<sup>11</sup> and by the statement of the chairman:

"I regret, if this is cooperation, that I have never known what it was before. We are going into this case and now I am going into it to the very bottom. I have had no preconceived ideas of the merits of it either way. But if it is the attitude of your department, of your agency and its chief, and you, to force this committee to do things the hard way without decent cooperation, this committee is going to do it the hard way."

"I regret that has become necessary. We are going to do it the hard way. You are making it cost the taxpayers more money because we have to bring you up here from your job, whereas you could come in a little while with conferences and let the witnesses tell what they know and you would save a lot of time, and you would save this committee a lot of labor."

"You would be able to be at your place down there running your agency instead of being up here in a committee room waiting to testify."

"I just can't conceive that an agency of the Government would do this where there is no question of internal security involved in any way whatsoever. There is nothing involved here except spending the money that has been taken from the taxpayers of this country and here is an agency that takes this position."

"It has not cooperated. We are just compelled, as I see it, gentlemen, to do it the hard way."<sup>12</sup>

The chairman thereupon ordered Messrs. Morrison, Pettit, and Middaugh to return the following morning for interviews with the staff of the subcommittee, and the subcommittee voted to subpoena Director Stassen and all the documents in the files of FOA relating to the Pakistan grain-storage project.<sup>13</sup>

Messrs. Morrison, Pettit, and Middaugh appeared the following morning with private counsel, as is provided for by the rules of the subcommittee, and were thereupon interviewed without the presence of a representative of FOA.

On March 31, 1955, a subpoena duces tecum was served on Mr. Harold E. Stassen, Director of FOA, instructing him to appear before the subcommittee and produce all FOA records in connection with the Pakistan grain-storage project.

Mr. Stassen appeared before the subcommittee in response to this subpoena on Wednesday, April 6, 1955. Chairman McClellan questioned him regarding certain specific documents and information from the FOA files, copies of which had previously been denied to the subcommittee staff, and which documents and information had an important bearing on the Pakistan grain-storage project. These documents totaled 21 in number.

In his appearance before the subcommittee, Mr. Stassen reversed his previous stand and promised to furnish immediately most of the documents desired. Relative to the remaining documents, he testified he wished to review them personally and if there was no confidential or classified material therein, these remaining documents would also be furnished to the subcommittee. Subsequently, copies of all those documents originally requested, and again requested of Mr. Stassen in the hearing, were furnished to the subcommittee with the exception of two documents which Senator McClellan reviewed and agreed should not be made part of the record.<sup>14</sup>

Also furnished this subcommittee by Mr. Stassen, under date of April 6, 1955, were the names of the four different project managers assigned to the Pakistan

<sup>10</sup> Pt. 1, pp. 4, 8.

<sup>11</sup> Pt. 1, p. 14.

<sup>12</sup> Pt. 1, p. 13.

<sup>13</sup> Pt. 1, p. 12.

<sup>14</sup> Pt. 1, pp. 44-54.

grain project in the Washington headquarters of FOA, which information had previously been refused.<sup>15</sup> Since this information was originally requested early in March 1955, there was a delay to the subcommittee of at least 1 month.

### EXHIBIT G

(Following are pertinent excerpts from Rept. No. 2621, 84th Cong., 2d sess., entitled "East-West Trade," report of the Committee on Government Operations made by its Permanent Subcommittee on Investigations, together with minority views:)

#### INTRODUCTION

\* \* \* \* \*

Another disturbing fact was the aura of secrecy which cloaked the so-called exercise of relaxation and revision of the list of strategic items. The Government departments and agencies involved in these transactions have endeavored to suppress and conceal the facts and have refused to permit this subcommittee to examine pertinent documents. These agencies have directed their employees to refuse to testify concerning these matters. A cloak of secrecy has prevented the subcommittee from ascertaining the whole truth. The question thus must be left at least partially unanswered as to why this country agreed to the shipment of strategic materials of the highest importance to a potential enemy by our allied nations and the part the United States Government played in such concurrence. In addition, we have not even been able to learn the details of methods of the relaxation of controls as agreed to by our Government. Despite these obstructions, the subcommittee has learned sufficient facts in public hearings to come to certain definite conclusions which will be discussed later herein (pp. 2 and 3).

\* \* \* \* \*

#### PART V. SUPPRESSION OF INFORMATION AND CENSORSHIP BY GOVERNMENT AGENCIES

In the past few years there has been a growing tendency by Government agencies to suppress news from Congress, the press, and the public, particularly where such news is embarrassing to whatever administration is in office. In more recent years certain presidential Executive orders have been the target of those opposed to censorship by Government. They include President Truman's Executive Order No. 10290 issued in 1951, President Eisenhower's order rejecting President Truman's order and substituting his own Executive Order No. 10051 issued in 1953, and the President Eisenhower's letter of May 17, 1954, directing the Defense Department not to give information to this subcommittee in the Army-McCarthy hearings.

The danger of suppression of facts and censorship by Federal agencies is more important today than ever. It is imperative as never before that there be no obstacle or blockade between the facts of today's world and the American people. Our liberty and the safety of our Nation must fundamentally be protected by a thorough understanding by the public of the great issues and the problems of today.

If the position of the executive departments were to prevail, it would mean that they would have an absolute right to deny to Congress or the public any information from the executive departments except such matters as are required to be public by statute.

Members of Congress who have the responsibility for voting appropriations for national defense for military and economic aid and assistance to our allies have the right, indeed the duty, to be informed and to know what action is being taken by the executive branch of the Government in this field of operation. Congress, the press, and the public have a right to know the attitude and the actions taken by nations with respect to trade in strategic goods with the Communist bloc.

This subcommittee under the Legislative Reorganization Act is charged with the duty of examining into the operations and efficiency of the executive departments. One of the further obligations of the Committee on Government

<sup>15</sup> Pt. 1, p. 54.

Operations (formerly Expenditures) is to study intergovernmental relationships between the United States and the States and municipalities and between the United States and international organizations of which the United States is a member.<sup>3</sup>

Investigations of the executive departments are necessary and proper, not only because Congress must learn the needs of the Department in order to legislate properly, but also because it has the responsibility to see that the Department is being operated in accordance with law and policy. When Congress has information that a Department is being run inefficiently, corruptly or in violation of law or policy, it is its duty under the Constitution to investigate so that corrective action may be taken.<sup>4</sup>

#### GOVERNMENT EXPERTS BARRED FROM REVEALING FACTS

Shortly after the Senate subcommittee hearings began, the Defense, Commerce, and State Departments, acting jointly with the ICA, directed their employees not to answer any questions pertaining to the internal operations of their departments which were related to the revisions of the lists of strategic materials. For example, all employees of the Department of Commerce were directed by the Secretary of Commerce, Mr. Sinclair Weeks, to refuse to answer any questions put to them by the subcommittee. The directive to the employees stated:

"\* \* \* You are instructed not to testify either in public or executive closed sessions with respect to any advice, recommendations, discussions, and communications within the executive branch respecting any course of action in regard to East-West trade controls or as to any information regarding international negotiations with the countries cooperating in East-West trade controls \* \* \*" (p. 282).

#### EXECUTIVE AGENCIES' LEGAL CITATIONS

The executive departments sought to sustain the legality of their position by citing the cases of *Boske v. Comingore* (177 U. S. 459); *Touhy v. Ragen* (340 U. S. 462); *U. S. v. Reynolds*, (345 U. S. 1); *SEC and Williams Timbers* (226 Fed. 2d 501).

None of these cases are applicable, since each case relates to court opinions on the right of Federal Government to withhold information from either the courts or private individuals, not Congress. In each of these cases the right to withhold information was based on authority granted to the agency by Congress to make regulations authorizing such withholding. In none of these cases was there an adjudication that the agencies had an inherent right to withhold information. In fact, the Government had expressly asked for a firm adjudication on this point in the Reynolds case, but the court refused to pass upon this request, and the case was adjudicated only on the basis of authority granted to the Defense Department and the Air Force by Congress. No case was cited giving any court ruling that the executive departments could withhold information from legislative committees.

#### CONSTITUTIONAL SEPARATION OF POWERS IS SUBJECT TO CHECKS AND BALANCES

The principal authority cited in the President's letter of May 17, 1954, is the theory that there is a constitutional separation of powers between the three branches of Government which cannot be infringed upon by another branch of the Government. The executive departments in urging this theory overlook the wisdom of our constitutional fathers who, when setting up our Government, provided for checks and balances between the three branches of the Government to prevent the exercise of tyranny by the legislative, executive, or judicial.

It was well stated by Chief Justice Taft in *Ex parte Grossman*, (267 U. S., at pp. 119-120):

"Finally, it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive, and judicial powers \* \* \*."

<sup>3</sup> Public Law 601, Rule 9, Committee on Expenditures, Sub-D.

<sup>4</sup> Senate Judiciary Memorandum, proceedings involving contempt of Congress, dated January 6, 1947.

"The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. All executive powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial, or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. *Ex parte Garland* (4 Wall. 333, 380). Negatively, one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed."

So, also, in Cooley's Constitutional Limitations, 7th Edition, the power of one branch to keep another branch within bounds of proper restraint and to check and balance one branch of Government against another has been set forth on page 64:

"The usual checks and balances of republican government, in which consists its chief excellence, will be retained. The most important of these are the separate departments for the exercise of legislative, executive, and judicial power; (a) and these are to be kept as distinct and separate as possible, except insofar as the action of one is made to constitute a restraint upon the action of the others, to keep them within proper bounds and to prevent hasty and improvident action. Upon legislative action there is, first, the check of the executive, who will generally be clothed with a qualified veto power, and who may refuse to execute laws deemed unconstitutional; and, second, the check of the judiciary, who may annul unconstitutional laws, and punish those concerned in enforcing them. Upon judicial action there is the legislative check, which consists in the power to prescribe rules for the courts, and perhaps to restrict their authority; and the executive check, of refusing aid in enforcing any judgments which are believed to be in excess of jurisdiction. Upon executive action the legislature has a power of restraint, corresponding to that which it exercises upon judicial action; and the judiciary may punish executive agents for any action in excess of executive authority. And the legislative department has an important restraint upon both the executive and the judiciary, in the power of impeachment for illegal or oppressive action, or for any failure to perform official duty. The Executive, in refusing to execute a legislative enactment, will always do so with the peril of impeachment in view.

#### THE PRESIDENT'S LETTER OF MAY 17, 1954

President Eisenhower in a letter addressed to the Secretary of Defense, dated May 17, 1954, during the Army-McCarthy hearings, directed the Secretary of Defense and the employees of the Defense Department to withhold information from Congress and the public "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."

This letter specifically stated to the Secretary of Defense as follows:

"\* \* \* You will instruct employees of your Department that in all their appearances before the subcommittee of the Senate Committee on Government Operations *regarding the inquiry now before it* (Army-McCarthy hearings) they are not to testify \* \* \*. [Italic and material in parentheses supplied.]

It is clear that this letter was intended to apply specifically to the Army-McCarthy hearings.

It has been reported that this letter has since been cited by 20 or more Federal agencies and departments as grounds for refusing information to Congress.

The application of the principle enunciated in the President's letter has been disputed and criticized by the House Committee on Government Operations.

The Committee Chairman, William L. Dawson, stated the claim "has never been upheld by the courts. It has been a mere Executive ipse dixit [say so]."

On May 3, 1956, the House committee issued a study entitled "The Right of Congress To Obtain Information From the Executive and From Other Agencies of the Federal Government." On page 25 of this study the committee drew the following conclusions:

"1. Refusals by the President and heads of departments to furnish information to the Congress are not constitutional law. They represent a mere naked claim of privilege. The judiciary has never specifically ruled on the direct problem involved in a refusal by Federal agencies to furnish information to the Congress.

"2. As far as access to information is concerned the courts have not distinguished basically between executive agencies and quasi-legislative or quasi-judicial agencies. Both appear to stand in the same status.

"3. Judicial precedent shows that even the President has been held to be subject to the power of subpoena of the courts. While this is so, it may be that the only recourse against the President himself is impeachment if he fails to comply with a subpoena of either the courts or the Congress.

"4. Any possible presidential immunity from the enforcement of legal process does not extend to the heads of departments and other Federal agencies. Judicial opinions have never recognized any inherent right in the heads of Federal agencies to withhold information from the courts. The courts have stated that even where the head of the department or agency basis his action on statutory authority the courts will judge the reasonableness of the action in the same light as any other claim of privilege. The courts have held that the mere claim of privilege is not enough.

"5. There is no inherent right on the part of heads of departments or other Federal agencies to withhold information from the Congress any more than they have a right to withhold information from the Judiciary \* \* \*."

#### INCONSISTENCY IN THE EXECUTIVE BRANCHES' POLICY IN REFUSING TO GIVE INFORMATION WHILE GIVING FAVORED PRIVATE CITIZENS SIMILAR INFORMATION

In the course of these hearings the subcommittee sought from the Departments of Commerce, State, and Defense, as well as the International Cooperation Administration certain documents, memorandums, and minutes of the Joint Operating Committee. The Joint Operating Committee is an interdepartmental committee set up to review items that were under control or embargo to the Soviet bloc and to make recommendations with respect to decontrolling or downgrading such items. These recommendations for the most part became the position of our Government at the COMCOM Conference in Paris in 1954.

The Senate Investigations Subcommittee was denied these documents on the basis that they were confidential interoffice memorandums and, therefore, could not be released to a congressional committee in aid of its legislative duties. The documents were refused to this subcommittee even on a confidential basis.

The Senate Investigations Subcommittee has taken the position that these documents should have been made available and that the subcommittee, Congress, and the public were entitled to know their contents.

The executive branches of the Government have been adamant in refusing to make such information available to this subcommittee, and it is difficult to reconcile such attitude with its willingness to give similar information to private individuals. It came to the attention of the subcommittee in the month of June that a book, written by Robert J. Donovan, had been published and was ready for early distribution entitled "Inside Story." The contents of the book are based upon documents, material, minutes, and other information similar in nature and character to that which this subcommittee had been trying to obtain in the course of discharging its legislative duties and responsibilities.

It is difficult to understand the attitude, action, and policy of the executive branch of the Government in refusing to give a congressional committee the facts and information needed for its legislative duties, while at the same time making available to a favored private citizen for commercial use and publication, confidential, secret documents and materials of similar character and nature.

In view of the disclosure concerning the material made available to Mr. Donovan, a request was made for the appearance of Mr. Maxwell Rabb, Cabinet Secretary, to appear and testify before this subcommittee on July 26, 1956, and explain the reasons and circumstances surrounding the releasing of this information to Mr. Donovan. Mr. Rabb failed and refused to appear.

Thereafter, a letter was sent to Under Secretary of State Hoover, Secretary of Commerce Weeks, ICA Director Hollister, Assistant Secretary of Defense Gordon Gray, calling attention to the fact that material of a confidential nature relating to the internal workings of the Government at Cabinet and staff levels had been disclosed to a private individual for a commercial purpose, and in the light of these facts, the chairman of the subcommittee again requested that the documents of the Joint Operating Committee, relating to decontrol of strategic materials, be made available to this subcommittee as early as possible.

#### RIGHT OF PUBLIC AND CONGRESS TO BE INFORMED

The issue of suppression of information raises not only the question as to the right of Congress to know, but also the question of the right of the public in a democracy to be informed as to the activities of its government.

The comment by Congress on censorship by Government agencies has been voluminous. Attention is called to the statement of Senator Ferguson in the Congressional Record, page 12498, September 27, 1951:

"It may be said that this practice of suppressing information in the executive department got its big start back in March of 1948. The Senator from Michigan was then chairman of the Senate Investigations Subcommittee, and was investigating things that could be embarrassing to the administration. The subject of the investigation was the operation of the Government's loyalty program, revolving around the case of William Remington. As a footnote to the inquiry it may be recalled that its revelations prompted the first of the President's famous 'red herring' statements. At about that time an Executive order was issued, placing certain files under the direct and exclusive jurisdiction of the President. On occasion the files were taken to the White House in order that they could not be subpoenaed. Witnesses were told they were not allowed to testify upon matters before the committee. In the course of our hearing, an admiral was able to tell the Senator from Michigan, off the record, the fact that because of an order by the President of the United States he was not permitted to testify."

Congressman Halleck, on September 27, 1951, Congressional Record, page 12513, stated:

"Now President Truman is seeking to change all that. His censorship order gives every agency and department of the Government the absolute power to decide what information shall be given out to the people and what shall be kept from them. These agency heads are absolute czars unto themselves. When they order the iron curtain down it stays down—a gag on the press and radio of the Nation. Even Members of Congress may be denied the information they need to conduct the affairs of Congress."

Congressman Talle, October 1, 1951, Congressional Record, page 12693, stated:

"For example, Mr. Speaker, just last week the President of the United States issued his infamous Executive Order 10290, establishing censorship in all the agencies and departments of the Federal Government. It is significant that this lid of secrecy is being clamped down even as congressional committees are sifting charges of corruption in the Truman administration unearthed by alert, enterprising news reporters."

Congressman Miller, on October 1, 1951, Congressional Record, Appendix A6290, stated:

"Mr. Speaker, the new secrecy order promulgated by the President extending to all Government agencies the authority to classify information and refuse to reveal what they consider to be a threat to security, opens a wide avenue to the destruction of the freedom of the press, one of our fundamental rights guaranteed by the Constitution. The ease with which it can be interpreted by officials to permit suppression of information that might endanger their own security or that of the administration in power has been amply illustrated by past performances of the present and immediate past administrations."

Congressman William H. Harrison, on October 16, 1951, in a speech published in the Congressional Record, page A6753, stated:

"I wish to protest, Mr. Speaker, against the withholding of information requested by Members of Congress, requests made in an honest effort to serve the people we represent."

Congressman Charles A. Wolverton, Congressional Record of August 15, 1952, page A5089, stated:

"Even congressional committees have been stopped cold by executive censorship. The House Judiciary Committee investigating the Department of Justice asked the Department for the files on all cases where it had refused to prosecute cases that had been referred to it for criminal action by other Government agencies. The Department refused."

"For many years congressional committees investigating Communists in the Government have been refused information or even cooperation by executive bureaus."

On two occasions Senator Bender of this subcommittee, then Congressman, had cause to insert into the Congressional Record on October 2, 1951, page A6315, the following statement:

"Mr. Speaker, the blinders are on, boys, and you had better keep your mouth shut, too. This is the significance of the new Truman directive to all agencies throughout the executive branch of our Government. Henceforth, they are to issue no statements or other information which requires safeguarding in order to protect the national interest. The four categories employed by the State and Defense Departments to withhold significant items from publication, top secret, confidential, and restricted, are henceforth to become the watchwords of all executive agencies.

"Just what this might mean is not difficult to guess. A congressional investigator seeking to discover how many employees have been added to a special department might be told promptly that this was restricted data, whose revelation might give valuable tips to the potential enemies of the Nation. Nonsense of this kind has always been possible when censorship has been invoked in the name of national emergencies.

"At this particular time, when so many of the Federal agencies are under careful scrutiny, the new order takes on particular meaning. Despite the President's assertion that it is not censorship, it will look like censorship, it will act like censorship, and unless the American press is very much mistaken, it will also smell like censorship."

Again, on October 8, 1951, Senator Bender inserted into the Record the following statement:

"Mr. Speaker, if the power over the purse is the power over liberty, the power over the press is the path to dictatorship. Censorship of news released from Washington in the executive departments exclusive of the Defense and State Departments has seldom been practiced in American history. Even in Defense and State, we have developed a marked antipathy to any efforts to cut off our supply of information, and the extension of these restrictions into executive organizations such as Mr. Truman has now authorized is wholly uncalled for. Certainly, data getting into the hands of espionage agents of foreign governments may be dangerous to our security, but this information is not released to the public. It is stolen from precisely those departments which are always protected by the most rigid standards of secrecy.

"What most of us find most objectionable in the President's order is the ease with which it can be used to cover up blunders and incompetence, and the absence of any provisions for removing secrecy provisions after the emergency has passed. We may now find our friends in other countries revealing information which we are not permitted to publish or broadcast.

"When a man gets the use of a blue pencil, he is strongly tempted to use it. America has grown great through the dissemination of news and information. No government has ever succeeded in fooling the American people too long because we have an alert press. If we stifle this source, we may well stifle America with it."

This statement is particularly prophetic, especially the sentence which states: "We may now find our friends in other countries revealing information which we are not permitted to publish or broadcast." The British have published substantially the same export-controls list as that which our Government departments and agencies seek to hide and conceal from the American people.

More recent congressional comment on suppression of facts are detailed herein.

Senator McClellan on the Senate floor (Congressional Record, Feb. 23, 1956, p. 2771) called attention to decontrol of strategic materials heretofore embargoed from going to the Communist bloc. He stated:

"The Government agencies acting in concert are doing everything to hinder and hamper the subcommittee's efforts to ascertain the facts concerning the relaxation of these controls. In addition to many oral requests, 13 letters have been written to various Government agencies requesting documents and pertinent information. Except for some cooperation from the Department of Defense, the information has not been forthcoming.

"The facts the subcommittee has developed thus far, and which I report to the Senate today, have not been made available or furnished to the subcommittee by the executive agencies of our Government.

"The information we have has been secured from documents and publications of foreign governments, where the information is being freely given out by our allies. That same information in the United States is being withheld by the executive branch of the Government from both the Congress and the American people. Let me give the Senate an example. The executive branch of our Government has declared even the Battle Act list to be classified, and therefore not available to the people of the United States. But classified and suppressed from whom? Not from the Communist or the Communist bloc countries. They know what they can buy; they know what they do buy and have bought.

"Mr. President, it is becoming quite clear that this material and the documents which the subcommittee has requested from the executive branch of the Government in the course of the investigation is being withheld from the United States Congress and the American public to prevent them from knowing what has happened, what has been done; to prevent them from knowing to what extent trade with the Communists in strategic things has been relaxed with the concurrence of the United States Government. Can it be, Mr. President, this classification, this policy of secrecy, this suppression or withholding of the truth, is a process or an action designed for the hiding of errors, inefficiency, and bad judgment of Government officials? I am convinced it is. If not, then why not give the Congress the information and let the American people know the truth.

"Mr. President, why should not the American people know it, and why should not the Congress have complete information about it, so Congress can use the information intelligently, both as regards appropriations and in connection with strengthening the Export Control Act and also the Battle Act. In my judgment, Mr. President, as the Battle Act is operating now, it is almost a farce."

Senator McCarthy in a discussion on the Senate floor (Congressional Record, Mar. 22, 1956, p. 4741) made the following remarks:

"I was extremely critical of the Democrat administration for withholding information from Congress. During the hearings which the very able Senator from Arkansas has been conducting, I was appalled by the even greater secrecy maintained by the executive branch today. As the years go by the Executive is becoming more and more arrogant and highhanded toward legitimate congressional requests for information. I sincerely hope that the Senator from Arkansas, as chairman of the committee, will force a showdown, to determine whether Congress can get information which it must have in order to legislate intelligently. I do not believe we can pass on the \$4.8 billion foreign-aid program the President has requested unless the Senator from Arkansas, as chairman of the committee, gets the information which he has been requesting and which has been refused consistently.

"I have never seen a more arrogant and evasive witness than Mr. Stassen. I hope the Senator will take some steps to get the information from him and other witnesses."

Senator Russell in discussing the trade in strategic materials stated as follows (Congressional Record, Feb. 23, 1956, p. 2774):

"I think, from the statement of facts he has presented, we have a very shocking picture of the failure of cooperation with the Congress in a field in which we have as direct a responsibility or a greater responsibility than the executive department in attempting to maintain a superiority in arms, in order that we may defend our country. It shows a great abuse of the power of classifying documents, but I cannot blame the individuals who are responsible for this matter for attempting to keep it from the American people. I hope the Senator from Arkansas and the Senate will pursue it until the whole picture is brought into the open."

Senator Jackson on the same floor discussion called for an explanation of why information was withheld from the subcommittee (Feb. 23, 1956, p. 2774, Congressional Record):

"I should like to say that now that Mr. Dulles has returned, I think it would be appropriate for him to come before our committee and explain—if he has a reason—why this information is being withheld.

"I shall be called upon, as will all other Members of the Senate, to vote on a large foreign-aid bill. I wish to know the facts. As one who has consistently voted for foreign aid, I believe I have a right to know the facts.

"Mr. Dulles is now back from his vacation; and I think it is high time that he appeared before our committee and gave us the facts, without further delay. Otherwise, he is inviting complete jeopardy of the foreign-aid program. We

have no other course but to oppose requests for further foreign aid, if we are not going to get from the executive branch of the Government any more information than we have been getting."

Senator Morse pointed out the need for Congress to be informed and he stated (Congressional Record, Feb. 23, 1956, p. 2775) :

"Mr. President, if the Senator from Arkansas will yield further to me, I wish to refer to several points which I think need to be reemphasized; I think some of them have already been emphasized by the Senator from Arkansas (Mr. McClellan), the Senator from Georgia (Mr. Russell), and the Senator from Idaho (Mr. Welker). I wish to point out that what our allies do in regard to supplying strategic materials to Russia happens to have a great effect on every man, woman, and child in the United States, and creates a great danger for all the American people. We cannot ignore that, and we cannot consider it separately from foreign aid.

"When the Congress comes to consider the foreign-aid program this year, we shall have to take a long, hard look at its ramifications, because if we are giving foreign aid, let us say, to England, in order to build up her economic and productive power, we must determine the use to which that productive power is being put. If that productive power is to be used to manufacture machine tools which will be sent to Russia—as the Senator from Arkansas has pointed out today—then that foreign aid threatens the security of American boys, in case of another war.

"Mr. President, I serve notice now that I do not intend to vote for a foreign-aid program when there is concealed from me what is happening in regard to the use to which that foreign aid is being put by alleged allies.

"Mr. McCLELLAN. I agree with the Senator from Oregon.

"Mr. MORSE. We have a right to know what goods foreign-aid countries ship to Russia. We are not asking for the disclosure of secrets which involve the war plans of our country, which should be kept secret—although on that point let me say that I think that in the United States we have gone a long way in keeping from the chairmen of the appropriate committees defense information which should be known to those leaders of the Senate and the House of Representatives. I believe it is silly to think that the security of our Nation is violated in some way if, for example, the chairman of the Armed Services Committee and the ranking Republican on that committee are taken into confidence; and the same is true of the Foreign Relations Committee—and I speak as a member of that committee. The same is true of the committee headed by the distinguished Senator from Arkansas."

Senator Symington likewise called attention to the direct bearing foreign aid has in relation to trade between our allies and the Communist nations. He pointed out (Congressional Record, Feb. 23, 1956, pp. 2775-2776) :

"May I have the attention of the distinguished Senator from Idaho (Mr. Welker)? He made a pertinent observation on the question of whether or not we were giving aid to countries which were, in effect, shipping materials made with that aid to the Communists. It is true that is what we have been doing. For example, we have given foreign aid to countries in order that they might develop copper mines. Those countries are shipping copper to the Communists, despite the fact we have not yet completed our own stockpile of copper to the point considered essential for our own security, and also despite the fact that, not too long ago, we were paying a premium price for copper on the world market as against domestic price.

"I voted for some foreign aid, and shall continue to vote for some foreign aid, provided we get into the record the fact we do not intend to have that aid used, directly or indirectly, to increase the war machine of the Communists.

"Does the distinguished chairman of the committee remember that at one point a Government consultant on machine tools was asked the following question: 'In other words, we can say, can we not, that we continue to embargo practically everything they do not want, and have lifted the embargo on just about everything they do want?'"

Senator Ervin in the discussion posed certain questions to Senator McClellan which are set forth herein (Congressional Record, Feb. 23, 1956, p. 2776) :

"I should like to ask the able Senator from Arkansas if the excuse given is that disclosure of such information might reveal some transactions with a foreign nation which might be of a confidential nature. Is that correct?

"Mr. McCLELLAN. Yes. I may say to the Senator that perhaps sometimes the request of the committee was so broad that it might have included documents

pertaining to other countries which were of a confidential nature, but we have tried to make clear in conversations and in letters that we were not trying to get any confidential documents which related to some other country. What we have been trying to get is a list, the Battle Act list, declassified, so that we can make it public. We have been trying to get the list of items together with the recommendations made by the so-called JOC committee, so that we might make some comparisons as to how far our representatives went beyond perhaps the very liberal action which was taken when we were trying at that level to hold the line on these things.

"Mr. ERVIN. That is the matter I wanted to draw attention to in my second question. I should like to ask the distinguished Senator from Arkansas if evidence taken before the subcommittee has not disclosed the fact that approximately 100 different items were recommended to be deembargoed by the JOC committee, and if the JOC committee is not entirely a committee composed of Americans operating within the departments of the Government, and if the committee has not been refused documentary evidence concerning actions of the JOC committee in making these recommendations.

"Mr. McCLELLAN. Yes; our committee has been refused all those documents, and even the recommendations. I should think there would be a list of items. We have been told that there is not even a list of items that JOC considered. Of course there may not be an actual list, but certainly there is a record, because recommendations were made, and those recommendations related to some specific items."

Senator Mundt, on the other hand, while agreeing with Senator McClellan that everything should be done to halt shipments of strategic materials to the Soviet bloc, took issue on some of the conclusions drawn to the effect that the refusal to disclose information and the suppression of information was a process to hide the errors of inefficiency and bad judgment of Government officials:

"Mr. President, I wish to associate myself with the chairman of the Committee on Government Operations, the Senator from Arkansas, from the standpoint of believing that our country should take every reasonable and every proper precaution to prevent shipments behind the Iron Curtain of any materials useful to their war machine.

"So that my position may be made very clear on the record, I may say that I made the motion in the Committee on Agriculture and Forestry, which was approved by the committee, to strike out of the farm bill a section which would have relaxed the arrangements whereby additional foodstuffs could be sent behind the Iron Curtain.

"I did that even though I come from a farm State and despite the magnitude of the problem of surpluses, because I recognize the fact that anything that feeds an enemy is a disservice to the Republic.

"Having said that, I must also say that, while I associate myself with what the chairman has said, and although I commend him, because I know he is approaching the matter on a nonpartisan basis, I am a little disturbed by some statements made during the colloquy to which I have listened, and which certainly would remind anyone of the fact that 1956 is a political year.

"There is one statement which seems to need comment by me. I refer to the chairman's statement:

"Can it be, Mr. President, this classification, this policy of secrecy, this suppression or withholding of the truth, is a process or an action designed for the hiding of errors, inefficiency, and bad judgment of Government officials? I am convinced it is."

"I certainly wish to dissociate myself from that conclusion. I think at the moment it is purely a political deduction.

"I believe we will find out whether there is inefficiency and I think we should—and I believe we will find out whether there were errors—and I think we should—and I believe we should find out whether there was bad judgment—and I think we will find that out, too.

"However, at this stage of uncompleted hearings, before we have even asked Governor Stassen to testify before us—and he should testify before our committee—I do not believe we can conclude now that there was error, inefficiency, or bad judgment. That should be something that should come at the conclusion of the hearings, not before they have actually started.

"In that connection, I should like to ask unanimous consent to have printed in the Record a letter written to the committee through our distinguished chairman, on February 20, by the Acting Secretary of State, Mr. Herbert Hoover, Jr., in which he sets forth the position of the State Department and lists those items

which in his opinion our committee should have in public session, those items which in his opinion the committee should have as a classified list, and those items which in his opinion might do jeopardy to our international relationships if they were made public in any way."

The letter referred to by Senator Mundt was placed in the record of the hearings and made an exhibit (p. 262); also see Congressional Record, February 23, 1956, page 2777.

Senator Ervin concluded the discussion with the following remarks (Congressional Record, Feb. 23, 1956, p. 2278):

"Mr. President, after watching the State Department encourage the Department of Commerce not to give us any information, and the Department of Commerce insisting that the State Department should not give us any information, I am inclined to the conclusion that they were actuated by the motives which actuated a teen-age couple in my section of the country. On one occasion John was at a party and was compelled by force of circumstances to see Mary home. It was the first time he had ever seen a girl home, and, when he reached her home, he said, 'Mary, do not tell any of the boys that I saw you home tonight, because they might tease me about it.'

"She said, 'You need not worry. I am just as much ashamed of it as you are.'"

"So, Mr. President, when I see the Department of Commerce insisting that the Department of State withhold information from the Congress of the United States and the American people, and the Department of State insists that the Department of Commerce do the same, I began to suspect that they are both ashamed of what has been going on in this field."

Other selected records of congressional comment criticizing secrecy and suppression of information in the Government can be found in the following Congressional Records:

March 22, 1956: Senator McClellan, Senator Symington, pages 4740-4742.  
February 21, 1956: Senator Henning, page 2612

January 23, 1956: Senator Daniels, page 918

February 20, 1956: Congressman Brooks, page 2555

June 21, 1955: Senator Neuberger, page 7507

July 19, 1955: Senator Humphrey, page 9394

August 3, 1955: Senator Humphrey, page 11319

August 25, 1955: Congressman Moss, page A6213

May 2, 1955: Congressman Quigley, page A2942

May 2, 1955: Congressman Meader, page A2932

June 27, 1955: Senator Humphrey, page A4692

June 28, 1955: Congressman Williams, page A4703

January 16, 1956: Congressman Lane, page A326

January 24, 1956: Senator Humphrey, page A709

April 16, 1956: Congressman Baker, page A3028

#### OFFICIAL POSITION TAKEN BY EXECUTIVE DEPARTMENTS ON DISCLOSURE OF INFORMATION

Mr. Herbert Hoover, Jr., Under Secretary of State, was designated as a spokesman for the executive departments. Secretary Hoover presented a letter to the subcommittee (p. 262) in which he reaffirmed the position taken by the Commerce and Defense Departments and refused to give the subcommittee the documents pertaining to the JOC on any basis whatsoever. He agreed to furnish the Battle Act list and international list only on a secret classified basis behind closed doors.

This letter requires an analysis. That part which referred to the JOC papers is set forth herein as follows:

"Apart from the Battle Act list, which already has been supplied to the subcommittee on a classified basis, and the international lists referred to above, the remaining documents in the executive branch relating to East-West trade controls consist of discussions and communications of an advisory nature among the officials and employees of the executive branch, highly sensitive intelligence information, and communications with our delegation and other representatives abroad containing recommendations, information regarding the position of other governments, and comments thereon. It is contrary to the public interest that their conversations or communications or any documents or reproductions concerning such advice be disclosed. May we refer you to the position of the President on the subject in his letter of May 17, 1954, to the Secretary of

Defense. We are, therefore, required to deny to this subcommittee any documents that would violate this principle."

This answer tends to becloud both the nature of the request made by the subcommittee and the nature of the documents requested. The requests for the documents were very clearly defined in letters to Vice Adm. Walter S. Delany, Deputy Director of the Mutual Defense Assistance Control, dated February 2, 1956, and to Mr. John B. Hollister, Director of the Mutual Defense Assistance Control Act and Director of the International Cooperation Administration, dated February 16, 1956. The substance of these letters is as follows: The subcommittee requested—

"\* \* \* the following information:

- "(a) A list of all items recommended to be removed by JOC in 1954.
- "(b) How many of these items were actually removed.
- "(c) What were the items.
- "(d) Why were they removed."

For further clarification it is pointed out that the requested documents and actions taken by JOC pertain to—

- (1) Actions taken by the United States Government employees alone.
- (2) The fact that the items recommended for removal and the actions taken by JOC took place before these times were reviewed abroad at COCOM and before consultation with any foreign governments or personnel took place concerning them.

(3) Testimony of Mr. Robert Martino, the Defense member of JOC, that the responsibility for the recommending for removal of the approximately 150 items rested on Mr. Herbert Blackman, Chairman of JOC.

(4) The fact that the deletion of decontrol of most of these items were recommended over the strenuous objections of Defense and other department experts, who contended that these items were highly strategic.

(5) The Strategic Control Section of the Department of Commerce, headed by Mr. Mishell George, likewise a member of JOC, changing and altering the facts and analysis sheets of these experts before they were submitted to JOC for consideration.

As to the offer to cooperate by having the high-ranking officials appear and testify in place of those who actually performed the actions, this aspect must be more closely examined.

#### *Herbert Hoover, Jr., Under Secretary of State*

Mr. Hoover was designated as the main spokesman for the executive departments to testify for them pertaining to the revisions of the lists.

The facts: He was not the official who was charged with the responsibility for the negotiations, since he was not even Under Secretary of State at that time, and he has no firsthand knowledge of the revisions of the lists.

#### *John B. Hollister, Director of the Battle Act and the ICA*

Mr. Hollister was designated as the spokesman for the Battle Act and the International Cooperation Administration.

The facts: Mr. Hollister was not an official who was charged with the responsibility of the negotiations. He was not even appointed to this position until after the negotiations were completed. Therefore, his testimony in many respects is of a secondary nature.

#### *Gordon Gray, Under Secretary of Defense*

Mr. Gray was designated as the spokesman for the Department of Defense.

The facts: Mr. Gray was not in the Defense Department at the time JOC action was taken or negotiations held with COCOM countries on a downgrading and deletion of strategic materials from the controls list. He therefore has no personal knowledge of this situation (p. 219).

#### *Sinclair Weeks, Secretary of Commerce*

The testimony taken indicates that Mr. Weeks had no personal knowledge of the intricate details of what happened at the JOC level in 1954. He can therefore discuss this matter only in generalities and not in the detail that the subcommittee wishes to examine into. At the time the subcommittee agreed to hear information in executive session Mr. Weeks asked the chairman if he could be excused on the ground that he had no information that would be helpful to them in this field.

*Harold E. Stassen, former Director, FOA, and former Battle Act Administrator*

Mr. Stassen did play an integral part in the revision of the lists, both Battle Act and the international. Although he stated he was not in the Paris negotiations, he obviously had direct responsibility for these revisions.

## SUPPRESSION OF JOC DOCUMENTS

In the face of these facts it is difficult to understand how the executive departments can contend that the actions of Mr. Blackman and Mr. George cannot be scrutinized by the subcommittee and that the documentary evidence of their actions cannot be examined.

The reasons advanced for the refusal to reveal information are set forth in the State Department letter of February 20, 1956, to wit: that it related to highly sensitive intelligence information and communications between delegations and certain representatives abroad containing recommendations regarding the positions of other countries. These reasons are not applicable, as they are not the documents we requested permission to examine. The subcommittee desired to examine the documents of the JOC and actions taken in this committee prior to the international negotiations.

It is reiterated that we desired to examine the actions taken by a chairman of a committee within the executive department of the United States who was delegated the authority to make recommendations prior to any international negotiations. These recommendations were made on a domestic level and by our own officials only. No other nations were involved in these decisions. No other nations were consulted on these recommendations, and it is apparent that the recommendations made by Mr. Blackman, while only advisory, had in fact the effect of a final decision made by this Government because, although the EDAC and ACEP, the Secretary of Commerce Weeks, and the Deputy Director and Director of the Battle Act had a right to review, change, and alter these recommendations, such formal review was seldom made. The records show that during the "crash review" between April 1 and May 20, 1954, ACEP and EDAC held no meetings (p. 211; see also p. 20 of this report). The subcommittee's requests for the minutes of these meetings have been denied. The positions taken by Mr. Blackman were seldom reversed with the exception of rare instances, such as where the Petroleum Logistics Section in the Defense Department made a major protest. (See p. 21, *supra*; p. 232 of hearings.)

As a matter of fact the subcommittee, through the chairman, Senator McClellan, stated that if the recommendations of the JOC were not final, the subcommittee would accept in lieu thereof whatever were the final recommendations of the Government. This also was refused (pp. 461-462).

## SUPPRESSION OF INFORMATION OF INTERNATIONAL LISTS AND NEGOTIATIONS

The subcommittee agreed not to press for public disclosure of the United States participation in the international negotiations and agreed to take this testimony in executive session on the plea that it might disturb the delicacy of our relations with foreign nations.

The Government agencies have refused to give public information regarding the international lists on the ground that to do so would be to violate agreements made with foreign nations in the COCOM group and that these foreign nations have domestic problems with their Communist minorities who, if they knew their nation was embargoing strategic materials to the Soviet bloc, would create great difficulties for the governments of these nations. Regarding this argument two matters should be considered.

(1) *Open publication of British list similar to international list.*—A list almost identical to the international list has been published by various nations abroad. It is a matter of public record that the Board of Trade Journal, an official organ of the British Government, on October 16, 1954, published a list under the title "Trade With the Soviet Bloc, Lists of Goods Controlled for Strategic Reasons" (exhibit 14, p. 532). This list is substantially the same as the international list, as demonstrated by the foreword, which contains the following language:

"For technical reasons and in order to facilitate matters for traders, some of the definitions used differ slightly from those agreed by the Coordinating Committee on East-West Trade. In no case, however, do the amended definitions alter the scope of the controls agreed by the Coordinating Committee." (COCOM) [Italics ours.]

(2) *Foreign export regulations a matter of open public knowledge.*—In each of the Battle Act reports published since 1952 there is appended the export control licenses requirements of each of the nations which received economic aid from the United States; therefore it is public information that there are export controls established to comply with and conform to the Battle Act. It is well known, and a matter of public information, that the Battle Act provides that any nation shipping materials of a strategic nature to the Soviet dominated nations can have the aid coming from this country terminated.

THE COMMUNISTS KNOW WHAT STRATEGIC MATERIALS THEY CAN OBTAIN—SECURITY CLASSIFICATION ACTS ONLY TO KEEP CONGRESS AND AMERICAN PUBLIC IN DARK

The State Department letter of February 20, 1956, does not explicitly claim national defense security is involved in the withholding of the information as to the JOC documents. It does, however, claim that if the details of the program, referring to the international system, were revealed, it would constitute a breach of trust on the part of the United States and jeopardize the voluntary basis upon which the program rests and thus would endanger our national security.

While the validity of this reasoning and the wisdom of such an arrangement are questioned, the subcommittee has taken the position that it will not press for public disclosure of the international program.

But the question arises whether secrecy is being urged only in part for the reasons named, and whether there are other undisclosed reasons. The Battle Act Administrator has already established as a matter of public record in his "Fifth Battle Act Report" and subsequent reports that over 200 out of 450 items of strategic importance had been removed from the international list, and as was pointed out by Senator Joseph McCarthy, the information as to what items the Communists can buy from the West is constantly known to them. The Communists know what strategic materials they have received, whether it be items which were entirely deleted from the list or whether it was decontrolled in one form or another. They know what they have bought, and they know what they can buy.

It would appear therefore that the refusal to disclose this information is not a matter of national security.

SUPPRESSION OF BATTLE ACT LIST

The Battle Act list admittedly was revised on August 25, 1954, and tailored to fit the changes made in the international list on August 16, 1954 (p. 22, Fifth Battle Act Report). The Battle Act (Mutual Defense Assistance Control Act of 1951) (see Fifth Battle Act Report, pp. 39-48) prohibited the granting of aid to free foreign nations if they engage in trade of strategic materials with the Communists. The Battle Act has never been invoked, and every violation during the past and present administration has been excused.

This indeed is one of the principal legislative aspects of this investigation: to ascertain and determine why the Battle Act has not been invoked, who was instrumental in failing to enforce its provisions, and what means and steps can be taken to preserve its function and the legislative intent from maladministration.

CONCLUSIONS

\* \* \* \* \*

(12) The entire story of the relaxation of the strategic trade embargo has been cloaked by an aura of secrecy not warranted by security considerations. The list of nonembargoed strategic materials has been in the realm of public information since October 1954. The list was then published by the British Board of Trade and has been available for a shilling. Moreover, the Communist nations knew what materials they purchased and could purchase. The only parties that have been kept in the dark are the Congress and the American public. The reasons advanced by the executive departments for classifying this information do not impress the subcommittee as being valid or tenable.

(13) The subcommittee cannot avoid the conclusion that the sole reason that the revised Battle Act list is classified is that its disclosure would reveal the ineffectiveness of the Battle Act as administered. The subcommittee believes that the executive branch wished to withhold from the American people the fact that foreign nations receiving aid from the American taxpayers are in turn helping the Communists to arm themselves against the United States and the free world.

(14) The executive branch endeavored to conceal and suppress facts that reveal administrative errors and negligence, such as the failure to provide for an effective review of the Joint Operating Committee recommendations.

(15) The executive departments and agencies directed and instructed their employees to refuse to testify and disclose pertinent evidence on the decontrol of strategic materials. The departments and agencies, in refusing to permit Congress to examine pertinent documents of the Joint Operating Committee and other interdepartmental committees, obstructed a duly authorized congressional investigation. The executive branch's claim of a "privilege" in these matters is unwarranted and not justified.

(16) The refusal of the executive branch of the Government to permit this congressional committee the right to examine documents pertaining to the work of the Joint Operating Committee on the ground that they were interoffice memoranda, while at the same time releasing similar interoffice memoranda of Cabinet-meeting level to a private citizen for the purpose of writing a book for his own profit, is inconsistent and irreconcilable as a matter of Executive policy, and such a position and action is without justification.

(17) The suppression of information noted in the five previous paragraphs represents a violation by the executive branch of the constitutional prerogatives of the Congress. Congress has a constitutional right to obtain all information necessary in the exercise of its legislative function. That right cannot, under our system of government, be limited or qualified by the unilateral action of the executive branch.

#### RECOMMENDATIONS

##### *Disclosure of information*

Congress should receive as a matter of course complete and current information on the administration of export controls, both domestic and international. Congress has the right to ascertain whether its intent as set forth in the Battle Act has been properly implemented by the executive branch. Congress is entitled to receive whatever information is necessary to make this determination.

1. It is recommended, if this end cannot be achieved through administrative action, appropriate legislation be enacted by Congress.

2. It is recommended that prior to the further removal of items of strategic importance from the control list, specifically including any item on the present China embargo list, a list of the proposed changes be submitted, before implementation at the international level, to the congressional committees on foreign relations, armed services, and Government Operations for appropriate review.

##### *Administration of the export control program*

The conclusion reached by the subcommittee indicates a serious degree of laxity in the administration of the Battle Act. In many cases the remedies are implicit in the conclusions, but the subcommittee also makes the following recommendations:

3. It is recommended that the strategic significance and military importance of materials be given a primacy in the administration of the act.

4. It is recommended that the Department of Defense, with its responsibility for our national security, play a more active role in negotiations for revisions of export controls.

5. It is recommended that the appropriate officials of Cabinet rank take a more direct responsibility in the administration of this program.

6. It is recommended that careful attention be given to the qualifications of the staff to whom the power of reviewing the significance of materials proposed for control or decontrol is delegated. Such staffs should include personnel with proper engineering and military logistic experience.

##### *The Battle Act*

The Mutual Defense Assistance Control Act of 1951 has far-reaching implications for our foreign policy and national security. Therefore:

7. It is recommended that a thorough reevaluation of this act be made by the proper committees of Congress and also by the executive branch of the Government.

8. It is recommended that the President submit to Congress by December 31, 1956, a complete report of the views of the executive branch with respect to revisions in the Battle Act.

9. It is recommended that this report be forwarded to the proper congressional committees in whose jurisdiction revision of the act will fall.

JOHN L. McCLELLAN, *Chairman*, Arkansas.  
HENRY M. JACKSON, Washington.  
STUART SYMINGTON, Missouri.  
SAM J. ERVIN, Jr., North Carolina.  
JOSEPH R. McCARTHY, Wisconsin.

(Pp. 27-49.)

MINORITY VIEWS OF SENATORS KARL E. MUNDT AND GEORGE H. BENDER

Senators Karl E. Mundt and George H. Bender did not concur in the East-West Trade Report, but submitted the following minority views:

\* \* \* \* \*

We would like to express ourselves now on that portion of the report which charges the executive branch with endeavoring to conceal facts and suppress information. At the very outset of this investigation all of the responsible officials of the administration indicated their availability to testify and give information in this matter. The administration recognized the right of Congress to investigate. No veil of secrecy was ever placed over these international controls, and the administration did not refuse to give the facts to the Congress and the American people. Everything the subcommittee requested, that could properly be given in public session, was made available. Witnesses testified and documents were released for insertion in the record as well as review of the staff. In some areas it was absolutely necessary, to assure the protection of our national security, that information be furnished on a classified basis in executive session. This was recommended by the responsible officials, and again all of the information was available to the subcommittee. To make some of this information available in public session would tell the Communist nations about our strategic and short supply, reasons for control or decontrol. To some extent by so doing, we would impart to the Soviets the exact status and description of controlled items, the amounts of quotas, and the items which should be placed on the so-called watch list for intelligence reasons. We would publicize for the benefit of potential enemies the thoughts, recommendations, advice, and working papers of subordinates who worked for those in the executive branch who held and exercised action responsibility. To make some of this information public would violate our agreements with our allies and would be prejudicial to our national security interests. Most of the documents involved in the international negotiations were classified and highly sensitive and involved our relations with other governments. We had given a specific commitment to the other nations in COCOM in many instances to keep the extent of participation of a particular nation in this program secret. Of necessity, certain information could not be made available publicly. All of the above was clearly related to the subcommittee in executive session. We are surprised the majority report criticizes an American Presidential administration because it insists on fulfilling its promises.

The subcommittee over the last many months has hammered that it has been denied information in this matter. As a matter of fact, the hearings were abruptly ended at the time when it was learned that one of the responsible officials, Adm. Walter S. Delany, Deputy Director for Mutual Defense Assistance Control, International Cooperation Administration, was available to testify in executive session and give all of the additional information which the subcommittee desired, and which it claimed was being denied by the administration. Admiral Delany testified on one occasion briefly, was never recalled, and the hearings have been adjourned. He volunteered to provide much additional information—but the committee failed to provide him that further opportunity.

It has been suggested that we might have been more successful if we had used more than the power of persuasion. President Eisenhower answered that contention on December 2, 1955, as follows:

"The easiest thing to do with great power is to abuse it—to use it to excess. This most powerful of the free nations must not permit itself to grow weary of the processes of negotiation and adjustment that are fundamental to freedom. If it should turn impatiently to coercion of other free nations, our brand of coercion, so far as our friends are concerned, would be a mark of the imperialist rather than of the leader."

In view of the fact that the majority report is based only on public testimony and disregards the preponderance of information furnished, of necessity, in executive session, the validity of this report is highly questionable. No report should be submitted without first objectively looking into all of the testimony and material available. We find that the report is replete with erroneous impressions and partisan implications. As an example, in many instances, the report fails to indicate whether or not the Soviet bloc is purchasing any of the commodities from free world countries of which the subcommittee complains. As an illustration, there is no evidence of any trade with the Soviet bloc in vertical boring mills, external cylindrical grinding machines, surface grinding machines, dynamic balancing machines, beryllium metal, zirconium, and others.

For some curious reason, the majority report persistently refuses to differentiate between items which COCOM nations are not prohibited from shipping abroad and the items which actually have been shipped. We feel certainly that to the extent our allies in COCOM have exercised internal controls and persuasion to prevent the shipment of significant items to Russia, our friends abroad deserve to be commended rather than to be subjected to the sharp criticisms of the majority report.

We submit that the report in its conclusions and recommendations is entirely misleading as to the effectiveness of international control of strategic materials. We heartily endorse the proposition that no goods of any strategic value should be the subject of trade with Communist nations. We wish it were possible to persuade friendly countries to join us in a common effort to this end. We wish every country in the free world would follow the splendid example of this Government in preventing shipments of supplies to Red China. We have made some progress, and we cannot relax our efforts now. These efforts deserve the understanding and support of all of us. They are not enhanced by partisan political attacks on the motives of those responsible for this urgently important aspect of our national survival. Unless it is recommended that the United States go it alone in resisting Communist aggression, we must strengthen rather than weaken our allies. We must confer with them as convincingly as possible—we can not coerce sovereign nations to accept our every recommendation. We regret other nations are not as realistic as the United States in restricting strategic shipments behind the Iron Curtain, but we rejoice in the fact competent American leadership and persistent persuasion has resulted in a continuation of international controls and helpful independent actions by friendly allies to the end that important curtailments continue to impose significant restrictions on the shipments of supplies to Communist countries.

KARL E. MUNDT, *South Dakota.*  
GEORGE H. BENDER, *Ohio.*

The members of the Committee on Government Operations, except those who are members of the Senate Permanent Subcommittee on Investigations, did not sit in on the hearings and executive sessions on which the above report was prepared. Under these circumstances, they have taken no part in the preparation and submission of the report, except to authorize its filing as a report made by the subcommittee (pp. 50-54).

UNITED STATES SENATE,  
*Washington, D. C., June 8, 1956.*

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

DEAR TOM: This is in answer to the two inquiries you recently addressed to me, one as chairman of the Reorganization Subcommittee and the other as chairman of the Railroad Retirement Subcommittee.

I wish to advise that in neither of those subcommittees have we had instances in which the administration refused to divulge information on the basis of President Eisenhower's May 17, 1954, letter, or, in fact, on the basis of any other authority.

Sincerely yours,

JOHN F. KENNEDY.

UNITED STATES SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
*June 11, 1956.*

Hon. THOMAS C. HENNINGS,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate.*

DEAR SENATOR: I am pleased to respond to your letter of May 29 asking as to the refusal of "any executive department or executive officer or any independent agency to give information" to the Committee on Interior and Insular Affairs since May 17, 1954, etc. An examination of the records of the committee generally indicate cooperation and full disclosure through correspondence or oral testimony on the part of the executive agencies and their spokesman.

However, the files reveal three instances which may be taken as an indication of attitudes, in particularly sensitive cases. The sensitivity does not relate to security, but touches more on the asserted rights of an executive department or agency to withhold papers or information from the Congress.

The first instance I shall cite grows out of a "statement of policy" contained in a report of this committee on H. R. 4663, a bill to authorize the Trinity division of the Central Valley project, California. The statement called for a full disclosure by the Department of the Interior in connection with negotiations for the sale of falling water under the administration's so-called "partnership" power policy. The Department of the Interior took umbrage at some phases of the statement as impinging on the executive prerogatives. The correspondence, attached as exhibit A, includes a copy of Senate Report 1154, on page 2 of which is the statement of policy to which I have referred.

The second instance relates to expressions by two members of the Senate Committee on Interior and Insular Affairs relative to the withholding of, or delays by, executive departments in forwarding reports or comments on S. 863, the Western Water Rights Protection Bill. I am not sure this is the type of information you are seeking, but I am passing the material (exhibit B) for such consideration as your subcommittee may desire to give it.

The third instance is one with which my committee was concerned from the standpoint of legislative operations. The disclosure of the withholding of information or at least a lack of frankness on the part of the responsible head of an independent agency, an arm of the Congress, was made before a subcommittee of the House Committee on Small Business.

Material relating to this third instance, which possibly has already come to your attention, is attached as exhibit C. It relates to S. 1333, a bill to authorize the Federal Hells Canyon Dam project on the Snake River, Idaho-Oregon. You were a cosponsor of this bill, with 30 other Senators. Hearings were held both in the field and in Washington. On May 18, you and 23 other Senators joined with me in a letter to Chairman Kuykendall, of the Federal Power Commission, asking that action by the Commission on an application of the Idaho Power Co. for a license for three low dams in the Hells Canyon reach of the Snake River. Additional correspondence is shown in the attached exhibit C, which also includes excerpts from hearings before the House subcommittee which you may feel warrants attention. The accompanying chronology of related events is striking.

Mr. Kuykendall testified before the subcommittee on July 28, 1955, several days before the 1st session of the 84th Congress adjourned. He stated the Hells Canyon proposal was "before the Commission now." Congress adjourned on August 2. On August 4, the Commission issued its opinion. The official document shows the opinion was adopted on July 27, the day before Chairman Kuykendall testified and 6 days before Congress adjourned. The fact of its adoption was withheld from a congressional committee and its issuance was delayed until the congressional session had closed.

I am submitting material in these three exhibits, listed in an attached sheet, for your consideration as to its applicability in connection with your deliberations.

If there is further information you desire, please advise.

Sincerely,

JAMES E. MURRAY, *Chairman.*

LIST OF ATTACHMENTS

Exhibit A:

Memorandum of November 14, 1955, from Goodrich W. Lineweaver to Senators Anderson, O'Mahoney, Jackson, Watkins, Millikin, and Kuchel, with enclosures as follows: Letter to Senator Murray from Assistant Secre-

tary of the Interior Aandahl of October 5, 1955, enclosing a copy of a memorandum to the Commission of Reclamation from the Secretary of the Interior.

Senate Report, No. 1154, July 27, 1955.

Copy of letter to Secretary of the Interior McKay from Senator Murray, August 4, 1955.

**Exhibit B :**

Memorandum of April 4, 1956, to members of the Senate Committee on Interior and Insular Affairs from Senator Murray, and attached excerpts from a colloquy between Senators Goldwater and Barrett.

**Exhibit C :**

Copy of letter to Chairman of Federal Power Commission (Mr. Kuykendall) from Senator Murray, July 28, 1955.

Copy of letter to Chairman of Federal Power Commission (Mr. Kuykendall) of April 18, 1955, signed by 25 Senators and copy of Mr. Kuykendall's reply of April 28, 1955.

Excerpts from testimony of Mr. Kuykendall before subcommittee on Subcommittee No. 1 on Regulatory Agencies of House Select Committee on Small Business, July 28, 1955.

Timing of Federal Power Commission's decision issuing Hells Canyon license to Idaho Power Co.

**EXHIBIT A**

NOVEMBER 14, 1955.

Memorandum to : Senators Anderson, O'Mahoney, Jackson, Watkins, Millikin and Kuchel.

From : Goodrich W. Lineweaver, committee assistant.

Senator Murray has asked me to forward to each of you copies of the enclosed correspondence from Assistant Secretary of the Interior Aandahl, relating to the statement of policy on page 2 of the report of the Senate Committee on Interior and Insular Affairs dated July 27, 1955, on the Trinity project authorization bill, H. R. 4663. In accordance with the usual practice, Senator Murray, on August 4 wrote to the Secretary of the Interior calling his attention to the statement of policy in the Senate committee report. You will recall that in the debate on the Trinity bill on the Senate floor, Senator Kuchel inserted the statement of policy in the Congressional Record at the conclusion of his remarks.

You will note that at the top of the second page of Secretary Aandahl's memorandum to the Commissioner of Reclamation he states that the "policy considerations expressed by the committee are in direct conflict with the responsibility imposed on the Secretary in the act and also inherent in his supervision of the bureaus in his Department." For your ready information I am enclosing a copy of the committee report on H. R. 4663. The correspondence attached is a copy of the letter to Senator Murray from Assistant Secretary Aandahl and a copy of a memorandum from Assistant Secretary Aandahl to the Commissioner of Reclamation dated October 5.

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D. C., October 5, 1955.

Memorandum to : Commissioner, Bureau of Reclamation.

From : Secretary of the Interior.

Subject : Sale of falling water, Trinity division, Central Valley project.

I. Your attention is called to the following clause in Public Law No. 386, enacted by the 1st session, 84th Congress :

"Provided, That the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water and, not later than eighteen months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress."

By our previous mutual understanding the Bureau of Reclamation is proceeding with these negotiations expeditiously to determine the areas of agreement and also the problems that will need further consideration in order that a position and recommendations can be established at an early date. You have reported considerable progress.

The sale of falling water offers an opportunity to help balance the Federal budget by reducing the investment of tax money in the project. Also the Federal investment in existing Central Valley project power facilities could be repaid earlier since higher cost Trinity power would not be pooled with present supplies. These achievements are dependent upon the negotiation of a contract that will meet satisfactorily other required objectives such as irrigation pumping.

II. Your attention is also called to the policy considerations stated on page 2 of the report from the Senate Committee on Interior and Insular Affairs, dated July 27, 1955. These policy considerations expressed by the committee are in direct conflict with the responsibility imposed on the Secretary in the act and also inherent in his supervision of the bureaus in his Department. Because of this conflict it becomes necessary for the Secretary's Office to specifically state its position and to leave no room for misunderstanding relative to the prerogatives that properly belong to the Secretary and in the executive department. For the purpose of this clarification the Secretary's Office advises that:

A. It will continue to give guidance in all policy questions that arise in the negotiation of any contract for the sale of falling water;

B. It will expect progress reports with an outline of what is being accomplished and of the difficulties that are encountered from time to time as might seem necessary for the Department's full information;

C. It will give guidance in the preparation of the report and the recommendations that are to be made to the Congress and will actively participate in the preparation and presentation of such reports;

D. It does assert this is a subject that involves substantial policy decisions as well as engineering and economic analyses, and that the Secretary's Office must participate all the way through in arriving at decisions of policy as they are used in the study, in contract negotiations, and in the presentation to the Congress.

(Signed) FRED G. AANDAHL.

(Following is the "statement of policy" mentioned by Senator Murray, as set forth on p. 2 of S. Rep. No. 1154, 84th Cong., 1st sess., of the Committee on Interior and Insular Affairs:)

#### STATEMENT OF POLICY

The committee suggests special attention to the following proviso, on page 2, beginning on line 13, of the bill:

*"Provided,* That the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water and, not later than 18 months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress."

In retaining this proviso in the bill, the committee states the following policy considerations as reflecting its conclusions with respect to the authorization and direction to the Secretary of the Interior set forth therein:

1. The engineering studies to be concluded should include (a) the proposed revisions in certain features to increase the power-generating potential to determine their effect on the basic concept of the Trinity division for increasing irrigation water supplies for the Central Valley project; (b) the feasibility of the increased capacity engineeringwise, economically and financially, for Federal installation and operation integrated with the Central Valley project, including the increased revenue and any other pertinent factors for purposes of comparison.

2. The inclusion of the proviso in the bill is in no respect to be considered a commitment on the part of the Congress to the sale of falling water or to any arrangement other than that of construction and operation of the entire project, including the power features, by the United States as authorized in the bill.

3. The proviso is in no sense to be understood as an authorization to waive, in any negotiation for the sale of falling water, any preference in the sale or transmission of power as expressed in section 5 of the Flood Control Act of 1944, in the Reclamation Project Act of 1939 or in any other law.

4. The negotiations referred to shall not be confined to any one non-Federal agency and either publicly owned or privately owned utilities shall have the opportunity to present proposals as the basis for negotiations.

5. The studies and reports are to be objective and factual without any pre-conceived result being sought. Any report or recommendation of the Secretary to Congress shall be accompanied by basic engineering, financial, or other technical reports, together with the findings of responsible officials of the Bureau of Reclamation, untrammeled by questions of high policy to be recommended to or considered by the Congress. The committee expects to be advised currently of the progress of the studies, reports, and findings as completed; and the progress of negotiations.

The committee concludes that, on the basis of the expert testimony at its hearing, that the Trinity division is feasible, from an engineering, economic, and financial standpoint, as proposed to be integrated with the Central Valley project for power and irrigation water purposes. It is in line with the California State water plan, adopted nearly 25 years ago. Therefore, any proposal that Congress should authorize a departure from the long-standing concept of federally constructed and operated multiple-purpose projects that have been found feasible by established standards will be carefully scrutinized.

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AUGUST 4, 1955.

Hon. DOUGLAS MCKAY,  
*Secretary of the Interior,*  
*Department of the Interior,*  
*Washington, D. C.*

DEAR MR. SECRETARY: Attached are copies of Senate Report No. 1154 of the Committee on Interior and Insular Affairs in connection with H. R. 4663, to authorize the Secretary of the Interior to construct, operate, and maintain the Trinity River division, Central Valley project, under the Federal reclamation laws.

I am calling your attention directly to the "statement of policy" on page 2 of the report for the guidance of the Department, including the Bureau of Reclamation, under the proviso on page 2, beginning on line 13 of the bill, which was passed by the Senate unanimously on Saturday night, July 30. This "statement of policy" was the principal subject of debate during consideration by the Senate of H. R. 4663. Senators during the debate unequivocally endorsed the statement as you will see from the Congressional Record of July 30, pages 19797-20802. Senator Kuchel, cosponsor of a companion bill in the Senate, inserted the "statement of policy" in the Record on page 20802 at the conclusion of his closing remarks.

Your attention and that of the Departmental and Reclamation staff is called particularly to paragraph 5 of the statement with respect to current reports of findings "by responsible officials of the Bureau of Reclamation, untrammeled by questions of high policy to be recommended to or considered by the Congress." I feel sure the Committee will have the full cooperation of yourself, Mr. Secretary, in this matter and that you will instruct the Departmental and Reclamation staffs accordingly. While we have no objection to observing the established channels for forwarding reports to the Congress, the position of the committee in this respect is that the original findings of a technical or economic nature should be submitted. This procedure was unqualifiedly approved by the Senate in passing the Trinity authorization bill without a dissenting vote.

The Committee on Interior and Insular Affairs has had the most pleasant and cooperative relationships with the Department of the Interior and the purpose of this letter is to avoid any misunderstandings.

Copies of this letter and the enclosures are being sent to Under Secretary Davis, Assistant Secretary Aandahl, Commissioner Dexheimer, and Regional Director Spencer at Sacramento for their information.

Sincerely yours,

JAMES E. MURRAY, *Chairman.*

## EXHIBIT B

UNITED STATES SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
*April 4, 1956.*

Memorandum to : Members of the full committee.  
From : James E. Murray.

You will be interested in the attached excerpts from a colloquy between Senators Goldwater and Barrett at a committee hearing on Monday, March 19 on S. 863 (and Senator Barrett's amendments thereto), a bill to govern the control, appropriation, use, and distribution of water.

In reviewing the transcript of the hearing, I was impressed with Senator Goldwater's views on two points, which I regard as of moment to bring to the direct attention of the members of the committee individually. When you have reviewed the comments of our two colleagues, particularly with respect to the trend that has been accentuated in the present administration with respect to the reports on pending legislation. I shall be glad to have your views as to appropriate action looking to correction of the situation emphasized by the two Senators.

Senator Goldwater's comments, while particularly pointed to the reports on S. 863, are directed generally toward the trend in the executive departments. I am sure we all feel that this trend is not particularly new but that it now being accentuated, as the Senator emphasizes. I quote the following paragraphs from the statement of the junior Senator from Arizona, which I feel are especially pertinent:

"I do not know why we in the legislative branch have to wait patiently and bend over backward and salaam toward the upper end of Pennsylvania Avenue waiting for these reports.

"I have read the Constitution a thousand times and I cannot find anything which says that when we are writing our legislation we have to wait for somebody up there to say yes or no.

"Personally, I do not like the idea of such reports having such a bearing on legislation. I think it is a complete infringement on the intent of the Constitution to have the executive, through its various agencies, influencing legislation down here."

Other phases of Senator Goldwater's statement relate to the merits of S. 863 and the proposed amendments, as well as to the ever greater need for the Western States to take action against the accelerated trend toward complete Federal control, especially with respect to water laws. The legislation before us well may be a step toward solving the water-rights phase of the problem.

My purpose in bringing the observations of Senators Goldwater and Barrett to the attention of each individual member of the committee is with a view to determining whether the Committee on Interior and Insular Affairs should consider the adoption of a rule which would seek to remedy the situation that is stated so succinctly. I have noted, over the years, the growing tendency in the executive departments to attempt to dictate to the Congress. They hold over our heads the threats of veto by the President, although I doubt if any President is often consulted directly prior to the making of such threats except with respect to major pieces of legislation which carry out his announced program.

When you have considered this memorandum, together with the attached copy of Senator Goldwater's observations and those of Senator Barrett on this subject, I will appreciate your comments, by April 20, on the following suggestion :

That the committee consider the adoption of a rule that would, among other things, seek expressions from the executive agencies only along these lines:

(a) Objective or factual reports to be submitted promptly as a matter of information;

(b) Specific authority or precedents are to be cited by the agencies in support of whatever conclusions they wish to state;

(c) Recommendations shall be couched in language that recognizes the legislative responsibility as separate from that of the executive;

(d) Unless reports are furnished promptly, the committee will assume there is no objection on the part of the executive agencies, including the Bureau of the Budget; and

(e) That when expressions such as "in accord" or "not in accord with the President's program" are used, there shall be specific references to the President's views rather than generalizations.

On receipt of your comments, I will call a special meeting of the committee to consider the subject. The date will probably be a day convenient to the majority of the committee during the first week in May.

JAMES E. MURRAY, *Chairman.*

**EXCERPTS FROM A COLLOQUY BETWEEN SENATORS GOLDWATER AND BARRETT AT A COMMITTEE HEARING ON MONDAY, MARCH 19 ON S. 863 (AND SENATOR BARRETT'S AMENDMENTS THERETO), A BILL TO GOVERN THE CONTROL, APPROPRIATION, USE, AND DISTRIBUTION OF WATER.**

Senator GOLDWATER. Senator Barrett, as you know, you and I discussed this situation last year when these court decisions came down and I agreed with you at that time concerning the necessity of legislation, and I do now more than ever.

I, myself, as a Republican, am deeply concerned and disturbed by the attitude of this administration as reflected in the several reports that we have before us where this administration heretofore has diverted most of its domestic efforts to getting the Federal Government out of the business of the several States, in conformity with the 10th amendment, it now seems bent on getting into the area that is most sacred and most important to the arid and semiarid States of the West.

They are, in effect, tampering with the way of life in the West that has existed since the West has existed; in fact, as was brought out this morning, the present recognition of water rights stems from the very founding of California and has been borne out through over 100 years of practice as accepted by the people of the West.

This attitude of the several agencies of the Government I think will seriously affect western land values inasmuch as water rights and land values are one and the same thing when one is figuring property and property values in our part of the country.

I think the very fact that these several agencies of Government have expressed themselves as being of a mind that the Federal Government should get into an area where the States have historically operated will probably throw a cloud over these values even as of now.

Now, one of these reports, the report of the Bureau of the Budget, I believe, they state on page 2, and I quote in part as follows:

"The fact remains that serious problems of Federal policy, regarding the exercise of water rights, particularly in the arid and semiarid areas of the West, have existed for a long time and there are basic conflicts which must be resolved."

Now, Mr. Chairman, you and I, coming from the West, know that that is not true. I cannot recall in my memory where the Federal Government and the State of Arizona have come into any argument that has not been resolved amicably and quickly and usually in the direction that the Federal Government wanted it to be resolved in.

Senator BARRETT. If my colleague will yield to me, the next witness is going to be the State engineer of Wyoming, and I am sure that he will confirm the statement that I am about to make, which is that there never has been a conflict between the Federal Government and the State of Wyoming with reference to water rights that interfered with the Federal Government in any shape or form.

Senator GOLDWATER. I knew that the experience of the chairman was the same as mine and I think witness after witness from all the 17 Western States will bear us out.

Many people, particularly people in non-Indian States, express concern over the Indians' rights. That is an area that might be called Federal policy.

I would just like to put this for the record: That in every major decree that Arizona has ever had concerning its rivers, the Indians' rights are the first to have been spelled out.

That is true of the Colorado compact and in the Kent system, which comprises the Salt and the Verde and the Gila decrees that applied to the Gila, the Indians' rights were fully and adequate protected. So it is just not true what the various Federal agencies of the Government are saying.

I concur in what Senator Malone has said: They have either done it through ignorance, and I would like to think that that is the case, or they have done it through malicious intent to interfere with our way of life and, as a Republican, I would resent that.

I appreciate the opportunity to make this statement and I also want to compliment you, Senator Barrett, on the excellent statement you made covering the whole problem this morning.

Senator BARRETT. Thank you very much, Senator Goldwater. I may say, in defense of the administration, that several departments of the executive arm of the Government are in favor of this legislation, so I have been advised for quite some time.

It is true, as you point out, Senator Goldwater, that the Justice Department has raised some legal questions, some constitutional questions, in hearings over on the House side.

I may say that water lawyers who have had extensive experience in that particular field for a long period of years in the West have examined the record and are wholly in opposition to the position taken by the Justice Department.

I am hoping as a result of these hearings we can at least convince every reasonable man on this committee that they are wrong in their contentions and their position and that the rule, as laid down by the Congress for the past 90 years, is a sound one and that there is no good reason why we should not reaffirm or restate that at this time.

I want to congratulate you at this time, Senator Goldwater, on the splendid statement you made here this morning.

Senator GOLDWATER. If I may be permitted to go one step further, because this brings up something that has been extremely distasteful to me before I came to the Senate and particularly since I have been here, and that is the idea that the executive branch of the administration enter into the legislative branch's work by the submission of these reports.

I do not know why we in the legislative branch have to wait patiently and bend over backward and salaam toward the upper end of Pennsylvania Avenue waiting for these reports.

I have read the Constitution a thousand times, and I cannot find anything which says that when we are writing our legislation we have to wait for somebody up there to say yes or no.

Personally, I do not like the idea of such reports having such a bearing on legislation. I think it is a complete infringement on the intent of the Constitution to have the executive, through its various agencies, influencing legislation down here.

Here is legislation that affects 17 Western States, some 138 million acres of land, which is more land than lies east of the Mississippi, and the millions and millions of people that live on it, and yet if we are to follow the accepted practice of Congress during the last 25 or 30 years, I would say that this legislation has a pretty bad start because several people, and I imagine most of them are from the Eastern States, have written these reports and written them in a way that will not be of benefit to the people that we represent.

I think it is incumbent upon us in this legislation, and in all legislation, to disregard whether it is favorable or unfavorable to those reports insofar as they influence legislation.

Senator BARRETT. I may say to my colleague that Senator Knowland spoke to me just a few minutes ago, and he wants an opportunity to appear before this committee. He feels just as strongly as you do that while the committee may feel under some compulsion to consider the reports that are brought up here by these departments of the Government, that, nevertheless, we in the Congress have the final responsibility and that it is going to be incumbent upon us to write legislation that we think is fair and equitable for the Western States and legislation that will at the same time protect the legitimate interests of the United States.

So far as I know, I think that is precisely what this committee is going to do, and what the Senate will do, and I hope what the House will do.

When we get this legislation down there to the White House, then is when their responsibility starts and if they want to take the position contrary to the position taken by the Congress since 1866, that again is their responsibility.

Senator GOLDWATER. Yes.

Senator BARRETT. Thank you very much, Senator Goldwater.

Senator GOLDWATER. Thank you very much.

## EXHIBIT C

JULY 28, 1955.

Hon. JEROME K. KUYKENDALL,  
*Chairman, Federal Power Commission,*  
*Washington, D. C.*

DEAR MR. CHAIRMAN: This refers to and brings up to date a report to you of April 18, 1955, signed by myself and 24 Senators stating the desire of the Congress to retain jurisdiction of the Hells Canyon development. Also we requested the Federal Power Commission to hold in abeyance any final action licensing the Idaho Power Co. to occupy and preempt hydroelectric generation sites in Hells Canyon. You courteously acknowledged the request on April 28 with assurances the Commission would give full consideration to the Senators' request when the Commission considered the record.

Since that exchange, major developments have occurred. These include Examiner William J. Costello's recommendation of May 6, 1955, to reject 2 of the 3 licenses sought by the Idaho Power Co., but recommending granting the Brownlee site license. Among the wealth of the examiner's findings now before your Commission for review is Mr. Costello's determination that while the Federal high Hells Canyon Dam comprises a definitely superior resource improvement, any recommendation thereof would be "a completely useless action" because the "likelihood" of congressional authorization by the Congress "is so remote."

Without belaboring the novelty of Federal Power Commission actions based on an examiner's predeterminations of what the Congress will, or will not, do, it is appropriate to inform you the clairvoyant talents of the examiner have not been substantiated. In both the House of Representatives and the Senate, since we last reported to you, the authorization bills for the Federal high Hells Canyon Dam have been moved forward in both branches of the Congress. They have received serious and prolonged public hearings. They won wide support and approval. Instead of showing favorable recommendation "a useless action," the record is to the contrary. After hearing many endorsements, subcommittees of both the House and Senate Committees on Interior and Insular Affairs, by formalized vote, positively acted to authorize the high dam. With this favorable endorsement (and no negative action) the authorization proposal now pends before the continuing 84th Congress for disposal after its recess.

It, therefore, seems appropriate that, as chairman of the responsible Senate committee, I advise you of these developments. They, and an additional multiplicity of positive incidental congressional actions, establish beyond challenge the Senators' previous assertions the Congress wishes to retain jurisdiction over the Hells Canyon development. That is exactly what the Congress has done. Therefore, on the basis of these facts, the Senators' request the Federal Power Commission hold in abeyance final action on the Idaho Power Co.'s single remaining and as yet undenied request for a license foreclosing Federal development is reiterated.

Sincerely,

JAMES E. MURRAY, *Chairman.*

UNITED STATES SENATE,  
 COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
 April 18, 1955.

Hon. JEROME K. KUYKENDALL,  
*Chairman, Federal Power Commission,*  
*Washington, D. C.*

DEAR MR. KUYKENDALL: You are doubtless aware that the undersigned are among the 30 members of the United States Senate who are cosponsors of S. 1333, "to authorize the construction, operation, and maintenance of the Hells Canyon Dam on the Snake River between Idaho and Washington, and for related purposes." A copy of the bill is enclosed for your information. Companion bills have been introduced in the House of Representatives.

The Senate Committee on Interior and Insular Affairs held hearings on the Senate bill during the week of April 3, at Boise, Idaho; Lewiston, Idaho; Pasco, Wash.; and Portland, Oreg., in order to give people at the "grass roots" opportunity to be heard for or against the legislation. As soon as practicable, further hearings will be held in Washington or in the field where engineering, economic and other data essential in consideration of the legislation will be sought.

The action of the Senate and the House of Representatives in referring the authorization bills to the appropriate committee of each House shows, in our opinion, desire of the Congress to retain jurisdiction of the Hells Canyon development.

Therefore, we, as among the sponsors of S. 1333, respectfully request that the Federal Power Commission hold in abeyance any action on the application of the Idaho Power Co. for a license under the Federal Power Act to construct hydroelectric dams in the Hells Canyon area, pending action by the Congress. The Idaho Power Co.'s applications are docketed as projects Nos. 1971, 2132, 2133.

Please acknowledge receipt of this request and advise of your Commission's action thereon as early as practicable.

Sincerely,

Signed by: Senators Murray, Chavez, Morse, Mansfield, Neuberger, Magnuson, Hennings, Hill, McNamara, Scott, Douglas, Symington, Kefauver, Fulbright, O'Mahoney, Clements, Lehman, Green, Humphrey, Sparkman, Kerr, Langer, Gore, Johnston.

FEDERAL POWER COMMISSION,  
Washington, April 28, 1955.

Projects Nos. 1971, 2132, and 2133, Idaho Power Co.

Hon. JAMES E. MURRAY,

United States Senate,

Washington, D. C.

DEAR SENATOR MURRAY: This will acknowledge your letter of April 18, 1955, and the request contained therein that the Commission hold in abeyance any action on Idaho Power Co.'s pending applications for licenses under the Federal Power Act to construct hydroelectric dams in the Hells Canyon stretch of the Snake River, pending action by Congress on legislation which, if approved, would authorize construction by the United States of a hydroelectric dam in the area in question.

The proceeding to which your letter refers is not, at the present time, before the Commission for any action. In accordance with the Administrative Procedure Act, the initial decision on the record of the hearing in this matter is now being prepared by the hearing examiner who presided over the hearing. Following the issuance of his initial decision, the law provides opportunity for the filing of exceptions by all of the parties and by the Commission staff, whereupon, some months from now, the matter will be before us for our action for the first time.

Having no foreknowledge of what the initial decision will recommend or of the exceptions which undoubtedly will be filed with respect to it, there is no present way of knowing whether any license or licenses would be justified.

You may be assured that the Commission will give full consideration to your request when the time comes for us to consider the record in the matter, including any exceptions to the examiner's initial decision.

By direction of the Commission.

JEROME K. KUYKENDALL, Chairman.

Same letter to: Senators Chavez, Morse, Mansfield, Neuberger, Magnuson, Hennings, Hill, McNamara, Scott, Anderson, Douglas, Symington, Kefauver, Fulbright, O'Mahoney, Clements, Kerr, Green, Lehman, Sparkman, Humphrey, Langer, Johnston, Gore, and Neely.

TESTIMONY BEFORE SUBCOMMITTEE ON SUBCOMMITTEE NO. 1 ON REGULATORY AGENCIES OF HOUSE SELECT COMMITTEE ON SMALL BUSINESS CONCERNING HELLS CANYON CASE BY JEROME K. KUYKENDALL, CHAIRMAN, FEDERAL POWER COMMISSION, ON JULY 28, 1955

(Questions by Mr. MacIntyre, counsel for committee and Representative Evins, Democrat, Tennessee, chairman of subcommittee),

Mr. MACINTYRE. What is the status of this Hells Canyon proposal in issue at the Federal Power Commission?

Mr. KUYKENDALL. The matter is before the Commission now. The hearings are all concluded, and arguments have been held.

Mr. MACINTYRE. How long has it been before the Commission for its consideration?

Mr. KUYKENDALL. I don't recall.

Mr. CONNOLE. July 6, I believe it was.

Mr. KUYKENDALL. I believe we had oral argument in that case on July 6.

Mr. MACINTYRE. July 6 of this month:

Mr. KUYKENDALL. Yes, of this year.

Mr. MACINTYRE. And you are sitting in judgment on this case?

Mr. KUYKENDALL. That is correct.

Mr. MACINTYRE. You have not recused yourself in any way?

Mr. KUYKENDALL. I have not what?

Mr. MACINTYRE. Recused or disqualified yourself in any way from participating in a decision on it?

Mr. KUYKENDALL. I know of no reason why I am disqualified.

Mr. MACINTYRE. And how recently have you been considering that matter at the Power Commission?

Mr. KUYKENDALL. We have had it under advisement since July 6, when the arguments were concluded.

Mr. MACINTYRE. Considering it from day to day?

Mr. KUYKENDALL. Oh, we don't meet on it every day. The Commission meets and we consider that. We have other matters before us, too.

Mr. MACINTYRE. What was the date of the last meeting at which the Commission considered the matter?

Mr. KUYKENDALL. I don't think it is proper for me to divulge what the Commission is doing in consideration of any particular case which is before it, any more than a court should divulge those things.

Mr. EVINS. The question will be withdrawn.

Mr. MACINTYRE. You have been asked by a number of Representatives of the United States Congress to advise them before any action is taken on this matter, I believe, have you not?

Mr. KUYKENDALL. We got a letter from a number of Senators asking us to withhold decision until Congress had an opportunity to act on the bills pertaining to Hells Canyon which were before it.

Mr. MACINTYRE. Is it your opinion that that will be done?

Mr. KUYKENDALL. I repeat again, I do not think it is proper for me to discuss action on a matter that is before the Commission for decision.

Mr. EVINS. Withdraw the latter question.

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#### TIMING OF FEDERAL POWER COMMISSION'S DECISION ISSUING HELLS CANYON LICENSE TO IDAHO POWER CO.

Official records show:

July 27, 1955: Federal Power Commission adopted opinion and order issuing license to Idaho Power Co. for three dams in Hells Canyon reach of Snake River, Idaho-Oreg.

July 28, 1955: Chairman Jerome K. Kuykendall, FPC, before House Subcommittee on Small Business, stated "matter [Hells Canyon proposal] is before the Commission now."

August 2, 1955: Congress (1st sess., 84th Cong.) adjourned.

August 4, 1955: Federal Power Commission issued opinion and order (adopted on July 27).

The only explanation attributed to Federal Power Commission is that time from July 27 to August 4 was required to process "opinion and order," probably meaning mimeographing, binding, etc.

The opinion consisted of 23½ mimeographed pages, double spaced. The order issuing the license was made up of 14 pages, single spaced, and the accompanying form for acceptance by the Idaho Power occupied one-half page, double spaced.

#### CONTRASTED TIMING OF PRESIDING EXAMINER'S DECISION

In contrast to the 8 days required between the adoption of the Commission's opinion and order is the factual handling of the decision of the presiding examiner, William J. Costello.

Mr. Costello's decision was filed May 6, 1955, and issued the same day.

The Costello decision was made up of the following material:

Seventy-one pages, multilithed, which consisted of the following:

Forty-nine pages of discussion of various phases of the applications of the Idaho Power Co. and the testimony for and against the proposed Federal Hells Canyon high dam.

Twenty-two pages of findings and conclusions, single spaced.

The table of contents occupied a page and one-half in addition.

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UNITED STATES SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
June 8, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have your letter of May 29, in which you request information concerning the refusal of any executive department or executive officer to supply any information to this committee.

As chairman of the Subcommittee on Indian Affairs, I can state that the executive departments and their officers have been most cooperative in supplying any and all information requested by the subcommittee.

Sincerely yours,

JOSEPH C. O'MAHONEY.

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UNITED STATES SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
June 11, 1956.

Hon. THOMAS C. HENNINGS,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate.*

DEAR SENATOR: I am acknowledging receipt of your letter of May 29, relative to information that might have been withheld by executive agencies in connection with matters before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs.

I have seen a copy of Chairman Murray's reply to an identical inquiry from you. There is no further information that I can add to what is contained in Senator Murray's comments and the exhibits attached to his letter to you.

Sincerely,

CLINTON P. ANDERSON,

*Chairman, Subcommittee on Irrigation and Reclamation.*

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UNITED STATES SENATE,  
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
June 22, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Committee on the Judiciary,  
United States Senate, Washington, D. C.*

MY DEAR SENATOR: As I informed a member of your staff by telephone, I do not recall any particular instance with which I was associated, either before the Interstate and Foreign Commerce Committee or any of our subcommittees where the letter written by President Eisenhower to Defense Secretary Wilson on May 17, 1954, has been used to justify the withholding of information from Congress by various executive departments and independent agencies.

Please forgive the delay in my belated reply but I have had the staff thoroughly check the record to ascertain whether there have been any occasions on which any executive department or executive officer or any independent agency has refused to give information to the committee or any of the subcommittees since May 17, 1954.

Best personal regards.

Sincerely yours,

WARREN G. MAGNUSON, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
June 14, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have your letter of May 29, 1956, relative to a study which your Subcommittee on Constitutional Rights is conducting on the withholding of information from Congress by various executive departments and independent agencies, with particular emphasis on cases in which the letter written by President Eisenhower to Defense Secretary Wilson on May 17, 1954, has been used to justify such withholding.

While there have been some instances since May 17, 1954, where reports on legislation have been requested of executive departments or agencies and no response received, yet there has been no occasion during the mentioned period where any executive department or executive officer of any independent agency has refused to give information to the Committee on the Judiciary or any of its ad hoc subcommittees.

This reply does not cover any occasions where any continuing subcommittee may have met with a refusal, since it is my understanding that similar inquiry has been directed to each such subcommittee chairmen of the Committee on the Judiciary.

With kindest regards, I am

Sincerely yours,

JAMES O. EASTLAND, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
CONSTITUTIONAL AMENDMENT SUBCOMMITTEE,  
June 14, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have your letter requesting instances when various executive departments and independent agencies withheld information from any congressional committee.

There were several instances when information was withheld during the recent so-called Dixon-Yates hearings.

However, the staff of the Anti-monopoly Subcommittee has been cooperating with your staff in furnishing the requested information.

Should any other instances arise, I shall be happy to forward the information to you.

With kindest regards, I am

Sincerely,

ESTES KEFAUVER,  
*United States Senator.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
June 8, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

MY DEAR MR. CHAIRMAN: With reference to your letter of May 29 concerning the study by your subcommittee of the withholding of information from Congress by various executive departments and independent agencies, I desire to bring to your attention the hearings in the Dixon-Yates matter.

The subcommittee headed by Senator Kefauver repeatedly asked different officials to testify and were refused on the basis of the President's letter of May 17, 1954, to which you refer. I am asking Mr. McHugh of the subcommittee staff to go into this matter and advise you fully.

With just every good wish and kindest regards to you, I am

Sincerely,

WILLIAM LANGER.

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,  
*Washington, D. C., June 26, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR TOM: As you know, the staff of the Antitrust and Monopoly Subcommittee has been in close contact with your office and with members of your Constitutional Rights Subcommittee in connection with your request for information concerning occasions on which any executive department or executive officer or independent agency refused to give information to this subcommittee since May 17, 1954.

The most notable example of such refusal occurred in connection with the Dixon-Yates hearings. The complete record has been made available to your staff and if you desire any additional information, please get in touch with Mr. Donald P. McHugh, chief counsel of the subcommittee.

I would like to refer very briefly to certain other situations which, while not directly responsive to your request, may nevertheless be of some interest to you:

1. In response to my letter of May 24, 1956, the Department of Agriculture on May 29, 1956, in a letter signed by Earl L. Butts, Assistant Secretary, agreed to furnish certain information and permit staff members of this subcommittee to examine files on the understanding that this information would be held confidential. Material has been furnished by Agriculture and files have been examined but it is not as yet clear what precise restrictions are intended to be placed upon the use of this information.

2. In response to a request for certain financial data concerning meatpackers, the Treasury Department stated that it would be necessary to obtain an executive order to obtain the desired information.

The staff of the Antitrust and Monopoly Subcommittee is presently looking into the method of obtaining such an order.

3. The Department of Justice initially declined (1) to furnish certain information in connection with the subcommittee study of General Motors, and (2) to permit an examination of a staff memorandum on United States Steel prepared by the Antitrust Division. Subsequently, the information involving General Motors was furnished, and preliminary arrangements for obtaining data on the steel memorandum were made, but because of the press of other business the subcommittee did not push this matter.

4. The Department of Justice has declined to furnish to this subcommittee information in its files which was furnished by companies in connection with its voluntary merger clearance program on the ground that information so supplied is confidential.

5. The Department of Justice has consistently refused to permit the subcommittee to examine grand-jury transcript and documents obtained pursuant to grand-jury subpoena which have not become matters of public record. In accordance with longstanding policy, the Department has refused to permit examination of Federal Bureau of Investigation reports.

If there are any further details your staff desires in connection with these or other matters, please get in touch with Mr. McHugh.

Sincerely yours,

JOSEPH C. O'MAHONEY, *Acting Chairman.*

(The reported withholding in connection with an investigation of the Dixon-Yates contract is set forth below in the exchange between Senator Kefauver and J. Sinclair Armstrong, Chairman of the Securities and Exchange Commission, as it appeared on pp. 378-379 of the Senate Antitrust and Monopoly Subcommittee hearings on Power Policy, July 13, 1955):

Mr. ARMSTRONG. Mr. Chairman and members of the subcommittee, in the last paragraph of Senator Kefauver's letter addressed to me as Chairman of the Commission on June 27, 1955, which was placed in the record of the hearings before this subcommittee yesterday, Senator Kefauver inquired as follows:

"I should like to inquire from you whether any request or representation was made to the Commission with respect to the suspension of the hearings. I should also like to inquire whether any representation was made to the Commission by any official or representative of the Government asking that the hearing:

scheduled for June 13 be canceled, or whether such cancellation was discussed by the Commission with any officials or representatives of any other branch of the Government."

After the conclusion of my testimony before this subcommittee yesterday, I obtained from the Attorney General of the United States an opinion with respect to the subject matter of Senator Kefauver's inquiry of June 27, set forth above. I should like to have placed in the record at this time Attorney General Brownell's letter to me, which reads as follows—

Senator KEFAUVER. Do you want to read it all, Mr. Armstrong?

Mr. ARMSTRONG. I do, sir; I certainly do, Mr. Chairman.

Senator KEFAUVER. I thought if you placed the whole letter in the record and you wanted to read part of it—but you wish to read it all?

Mr. ARMSTRONG. I would like to read the letter of the Attorney General, Mr. Chairman.

Senator KEFAUVER. Yes, sir; you read the letter.

Mr. ARMSTRONG. This is on the letterhead of the Office of the Attorney General, Washington, D. C., dated July 12, 1955, addressed to—

Hon. J. SINCLAIR ARMSTRONG,  
*Securities and Exchange Commission,*  
Washington, D. C.

DEAR MR. ARMSTRONG: You have submitted a letter from Senator Kefauver dated June 27, 1955, addressed to you and your reply to him dated July 11, 1955, and asked for our opinion with respect thereto.

It is my opinion that the position which you have taken in behalf of the Commission in paragraph 4 of your letter is sound. I agree that it would not be consistent with the orderly conduct of the administrative processes of your agency to subject to concurrent congressional review the manner in which the Commission is discharging its quasi-judicial functions on any pending application. The question of whether an application or a matter is still pending with your Commission is, of course, one which is for the determination of the Commission.

With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within the executive branch of the Government on the principles as set forth in the President's letter of May 17, 1954, to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the agency. Likewise, any communication from others in the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954.

You inquired specifically whether when a proceeding is pending before the Commission a request to the Commission for an adjournment by someone in the executive branch outside the Commission is likewise covered. Because such a proceeding is quasi-judicial in nature, it is my opinion that such a request would not be covered by the President's letter of May 17, 1954, and once the proceeding is no longer pending before the Commission such information should, upon request, be made available by the Commission to an appropriate congressional committee.

Sincerely yours,

HERBERT BROWNELL, Jr.,  
Attorney General.

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
June 4, 1956.

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

DEAR SENATOR HENNINGS: Thank you for your letter of May 29, 1956, advising that the Subcommittee on Constitutional Rights is conducting a study of the withholding of information from Congress by various executive departments and independent agencies, and asking whether any department or agency of the executive branch of the United States Government has refused to give information to the standing Subcommittee on Federal Charters, Holidays, and Celebrations.

Since I have assumed chairmanship of this subcommittee in the 84th Congress, I can recall no instance where any department or agency of the executive branch of the United States Government has refused to give information to this subcommittee, upon request.

I trust that this is a sufficient answer to your inquiry.

With kind regards, I am

Sincerely yours,

JOSEPH C. O'MAHONEY,

*Chairman, Subcommittee on Federal Charters, Holidays, and Celebrations.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,

June 4, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In answer to your letter of May 29, 1956, relating to the President's letter of May 17, 1956, which has been used as a basis to refuse to give information to the Subcommittee on Improvements in Judicial Machinery, I must report that I know of no instance in which any department or agency of the executive branch of the United States Government, or any other branch for that matter, has refused to give information to such committee upon request. I have been a staff member assigned to that subcommittee for the past 7 years and I believe this statement would cover that period of time.

I trust that the foregoing supplies you with the information you requested.

With kindest regards, I am

Sincerely,

GEORGE S. GREEN,  
*Professional Staff Member.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY,  
*Washington, D. C., June 5, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In answer to your request of May 29, 1956, the Subcommittee To Investigate Juvenile Delinquency has had no occasion arise where a member of the executive department has refused to appear before the subcommittee since May 17, 1954.

With kindest regards, I am,

Sincerely,

ESTES KEFAUVER, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,

June 14, 1956.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This acknowledges your letter of May 29, 1956, relative to a study which your Subcommittee on Constitutional Rights is conducting on the withholding of information from Congress by various executive departments and independent agencies, with particular emphasis on cases in which the letter written by President Eisenhower to Defense Secretary Wilson on May 17, 1954, has been used to justify such withholding.

There has been no occasion during the mentioned period where any executive department or executive officer of any independent agency has refused to give information to the Subcommittee on National Penitentiaries of the Committee on the Judiciary.

With kindest regards, I am,

Sincerely yours,

OLIN D. JOHNSTON,

*Chairman, Subcommittee on National Penitentiaries.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS,

June 1, 1956.

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

DEAR SENATOR HENNINGS: With reference to your letter of May 29, 1956, the Subcommittee on Patents, Trademarks, and Copyrights has made fairly frequent requests of executive departments for information. Our inquiries have been directed primarily to the Patent Office and to the Antitrust Division of the Department of Justice. Upon consultation with my staff I have found that there have been no instances where the departments and agencies in question have withheld papers or information.

With kind regards.

Sincerely yours,

JOSEPH C. O'MAHONEY, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON TRADING WITH THE ENEMY ACT,  
*Washington, D. C., July 13, 1956.*

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

DEAR TOM: In the press of matters relating to S. 4205 and other matters affecting the work of the subcommittee I have inadvertently failed to acknowledge your communication of May 29.

We have no specific instances of the departments deliberately withholding information from us. There is a total lack of cooperation insofar as frankly communicating all the necessary information, and doing so in a prompt manner, which is essential to the performance of our legislative functions. I made reference to the same on March 15, on page 4282 of the Record. It was not until yesterday that we received the annual report of the Office of Alien Property which was issued as of June 30, 1955.

With kindest personal regards, I am,

Sincerely yours,

OLIN D. JOHNSTON, *Chairman.*

(Following is Senator Johnston's comment on withholding of information, as it appears on p. 4282 of the Congressional Record for March 15, 1956:)

THE ABSENT SECRETARY OF STATE

Mr. JOHNSTON of South Carolina. Mr. President, as chairman of the Judiciary Subcommittee on Trading With the Enemy Act I have been trying since December 9 of last year to get certain communications from the Secretary of State which will serve to delineate and interpret public statements made between representatives of our Government and the Government of the Republic of Western Germany relating to matters affecting seized assets of former enemies. To date I have not received the letters which the subcommittee requires.

I have been charitable in saying that the Department's failure to send these communications has been an oversight. I am trying again today to get the communications which I feel are essential to a better understanding of some of the problems involved.

No doubt if the Secretary of State would follow the admonition of Mr. Walter Lippmann, whom our friends on the other side of the aisle like to quote with such approval, the subcommittee might hope to receive the necessary information. In his column in the Washington Post today Mr. Lippmann criticizes the Secretary of State and calls him "the absent Secretary." I believe Mr. Lippmann's article is worthy of inclusion in the Record, and I ask that it be printed in the Record at this point.

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON ATOMIC ENERGY,  
*June 29, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary, United States Senate.*

DEAR SENATOR HENNINGS: By your letter to me dated May 29, 1956, you requested information on the occasions on which any executive department or executive officer or independent agency has refused to give information to the Joint Committee on Atomic Energy since May 17, 1954.

The Atomic Energy Act of 1954 grants to the Joint Committee on Atomic Energy certain express statutory powers in enabling it to obtain information from the executive branch of the Government. Section 202 of the Atomic Energy Act of 1954 reads, in part, as follows:

*"The Commission (Atomic Energy Commission) shall keep the Joint Committee fully and currently informed with respect to all of the Commission's activities. The Department of Defense shall keep the Joint Committee fully and currently informed with respect to all matters within the Department of Defense relating to the development, utilization, or application of atomic energy. Any Government agency shall furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy."* [Emphasis added.]

From the above quotation it can be seen that the act placed varying requirements upon different executive agencies and departments, depending on the amount of work within that agency or department relating directly to atomic energy. As to the Atomic Energy Commission, an absolute requirement was made that the Commission shall keep the Joint Committee fully and currently informed with respect to all of the Commission's activities. As to the Department of Defense, the requirement was made that the Department shall keep the Joint Committee fully and currently informed with respect to all matters within the Department relating to the development, utilization, or application of atomic energy. As to any other Government agency, the requirement was made that such agency should furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy.

The Atomic Energy Act of 1954 was signed by the President and became law on August 1, 1954.

Acting under these express statutory provisions, the Joint Committee is of the opinion that it has authority and power to obtain, on any given occasion, any information it may desire from the Atomic Energy Commission. However, on particular occasions, the Joint Committee may, if it deems it advisable, elect not to exert its full statutory powers.

In this connection, I would like to direct your attention to the reply made by the Atomic Energy Commission in September 1955 to the questionnaire submitted to it by the Subcommittee on Government Information of the House Committee on Government Operations. At page 18 of this reply, in the answer to question No. 4 on that page, the Commission stated that, in "two instances" between July 1, 1954 and July 1, 1955, the Commission had declined to supply information to the Joint Committee on Atomic Energy "because of the privileged nature of the information sought."

In each of the "two instances" referred to by the Commission, the Joint Committee could have obtained the information sought, but elected to refrain from exercising its powers to the fullest extent permitted by law.

I have been authorized to say that Senator Gore, Senator Jackson, Senator Pastore, Congressman Dempsey, Congressman Holifield, Congressman Kilday, and Congressman Price, who are the chairmen of the various subcommittees of the Joint Committee on Atomic Energy and who received similar letters from you dated May 29, 1956, on this question, are in accord with the views expressed in this letter.

Sincerely yours,

CLINTON P. ANDERSON, *Chairman.*

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON THE ECONOMIC REPORT,  
*June 13, 1956.*

Hon. THOMAS C. HENNINGS,  
*Senate Office Building, Washington, D. C.*

DEAR SENATOR HENNINGS: Your letter of May 29 inquired as to the extent to which information has been withheld from the Joint Economic Committee by various executive departments and independent agencies.

The Joint Executive Committee is not an investigating committee to the degree that are most of the other committees of Congress. It has been able, therefore, to secure the information it has needed from the executive agencies without extreme difficulty. Sometimes it has had to go back a second time, as in the case where it tried to get the facts with respect to the recent controversy between the Treasury and the Federal Reserve Board over rediscount rates. The attached press releases and copies of exchange of letters illustrates the withholding of certain information from the committee. This information, however, was secured at a hearing yesterday; copy of the transcript is attached.<sup>1</sup>

We appreciate your study of this important matter and the joint committee wants to cooperate with you in every way. If we can be of further assistance please let us know.

Sincerely yours,

PAUL H. DOUGLAS, *Chairman.*

(The following exhibits were submitted by the Joint Committee:)

CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON THE ECONOMIC REPORT,  
*May 23, 1956.*

MEMORANDUM

To : Members of the Joint Committee on the Economic Report.  
From : Representative Wright Patman, chairman, Subcommittee on Economic Stabilization.

Subject : Correspondence respecting recent monetary developments.

The workings of monetary policy, through its effect upon interest rates and availability of credit, intimately affect the lives and fortunes of every business, every homeowner, every farmer, every citizen.

It is not surprising, therefore, that many people are disturbed by widespread press stories and whisperings of conflicting opinions at responsible and official levels concerning the wisdom of the recent action of the Federal Reserve System in raising the rediscount rate.

On May 10, I accordingly advised members of the Subcommittee on Economic Stabilization that I was writing the Chairman of the Federal Reserve Board and various members of the executive department, for the sole purpose of getting the record clear precisely as to what lies behind these press stories. The inquiry was not intended to question the judgment of the action itself, the internal procedures of the system, nor the propriety of outside consultation, but merely to learn something of the conditions under which the action was taken. The questions were specific and sought nothing more than simple, factual replies.

I am disappointed, therefore, and I may say, vexed at the unresponsiveness of the replies which have been received from the very agencies which should be most interested in providing a clear public record. The general professions of mutual respect and best wishes for each other contained in the letters from the Secretary of the Treasury and the Chairman of the Board of Governors are only too obviously intended to avoid answering the 3 or 4 simple, easy-to-answer questions concerning the specific incident which has aroused recent public concern. From the marked similarity in the two replies one might almost infer that the vaunted pattern of consultation applies to the problems of dealing with congressional mail, as well as to policy matters. The evasiveness of Secretary Humphrey's letter is all the more remarkable since, when questioned 2 days later before the Senate Finance Committee, he admitted: "If it had been my responsibility I would not have made this last move."

A reading of the questions and the replies is the best evidence of this avoidance. For that reason it seems appropriate that the full text of the exchange of correspondence be released to speak for itself.

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<sup>1</sup> Official verbatim transcript of hearings before Joint Committee on the Economic Report, June 12, 1956.

Certainly the hope expressed in the letters to the agencies; namely, that by their replies the necessity for public hearings could be avoided, is given no encouragement or support by the unresponsive answers. A date for hearings will be set in due course.

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CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON THE ECONOMIC REPORT,

*May 10, 1956.*

Hon. WILLIAM McC. MARTIN, JR.,  
*Chairman, Board of Governors of the Federal Reserve System,  
Washington, D. C.*

DEAR MR. CHAIRMAN: You are no doubt aware of the press stories which have appeared in recent days indicating exceptions taken by various members of the Cabinet, specifically secretaries Humphrey, Mitchell, and Weeks, together with Dr. Arthur F. Burns, Chairman of the Council of Economic Advisers, to the recent action of the Reserve System in raising the rediscount rate.

While it is perhaps too early to judge the merits of the conflicting viewpoints, and it is not my intention in this letter to pursue the arguments for and against the prevailing restrictive money policy, I am deeply concerned about the forces, governmental as well as other, to which the Board is subjected in the performance of its duties. The record which has given rise to these press comments should be made accurate and clear.

Preparatory to consideration of the matter by our Subcommittee on Economic Stabilization, as Chairman I am writing to the several administration officials and to yourself. I would like to have your answer some time next week to the following questions:

1. Is it a fact, to your knowledge, that the decision of the Board of Governors "went against the wishes" of administration advisers? If so, whom?
2. What communications and representations from executive department officials or their subordinates did the Board have before it at the time of reaching its decision?
3. How and by whom were these representations made, to you as Chairman, to other members of the Board, or to the Board as a body?
4. Have you or the Board had any subsequent communication, through official or unofficial channels, from members of the Cabinet or their responsible subordinates criticizing the action which the Board has taken?

I hope that your answer, together with those from the several Administration officials, will sufficiently illuminate the facts so that we can avoid the necessity for public hearings.

In asking you these questions, I want to assure you that we are not now seeking to probe into the judgment of the Board in the exercise of its responsibilities. Nor are we asking for information as to the Board vote or discussions which led to the decision. Since, however, the Board does act, as an agent in carrying out the powers delegated to it by the Congress, I feel that it is not only proper but necessary that we should inquire as to the nature of the influence brought to bear upon it.

Sincerely yours,

WRIGHT PATMAN,  
*Chairman, Subcommittee on Economic Stabilization.*

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CONGRESS OF THE UNITED STATES,  
JOINT COMMITTEE ON THE ECONOMIC REPORT,

*May 10, 1956.*

[Same letter to Secretary Sinclair Weeks, Department of Commerce, Secretary James P. Mitchell, Department of Labor, and Chairman Arthur F. Burns, Council of Economic Advisers.]

Hon. GEORGE M. HUMPHREY,  
*Secretary of the Treasury,  
Washington, D. C.*

DEAR MR. SECRETARY: Beyond referring to questions at recent press conferences by the President, it is certainly not necessary here to call your attention to the number of press comments in recent days which have noted the existence of differences of opinion between certain administration officials, including yourself, and the Board of Governors of the Federal Reserve System in respect to the

Board's action in raising the discount rate. I am sure you are also aware of the widespread public concern, both before and since the so-called accord of 1951, in the independent role of the Federal Reserve System as an agency carrying out the delegated powers of the Congress.

It is perhaps too early to judge at this time the merits of the conflicting viewpoints as to the prospects for further inflationary or deflationary pressures, and the appropriate monetary policy in the circumstances. The record which has given rise to this public discussion should, however, be made accurate and clear.

Preparatory to considering the matter by our Subcommittee on Economic Stabilization, as chairman I would like, therefore, to have your answer some time next week to the following questions:

1. Did you, and for what reasons, disagree with the action taken by the Board of Governors?

2. Did you or your associates, and by what channels—telephone conversations, memorandums, or meetings—communicate your views or make representation to System officials, either Chairman Martin, the Board, other members of the Board, or staff members?

3. Subsequent to the action taken by the Board, have you or your subordinates communicated your criticisms to representatives of the Board other than through the press stories purporting to state your views, either publicly or privately expressed?

I hope that the answers which we receive from you, the other officials, and the Board itself will sufficiently illuminate the facts so that we can avoid the necessity for public hearings.

As I have told Chairman Martin in writing to him, we are not now concerned with probing into the wisdom of the Board's decision but feel, however, that the Congress is entitled to and must of necessity know the forces brought to bear upon its agency in carrying out delegated powers constitutionally assigned to the Congress.

Sincerely yours,

WRIGHT PATMAN,  
*Chairman, Subcommittee on Economic Stabilization.*

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,  
*Washington, May 16, 1956.*

Hon. WRIGHT PATMAN,

*Chairman, Subcommittee on Economic Stabilization,*

*Joint Committee on the Economic Report, Washington, D. C.*

DEAR MR. PATMAN. This is to acknowledge your letter of May 10, with regard to the recent action of the Federal Reserve System in raising rediscountrates.

The directors of each of the 12 Federal Reserve Banks who initiated this action, with the subsequent approval of the Board of Governors, voted for increased discount rates prior to publication of the press stories to which you refer. The decisions to increase discount rates were taken separately at each of the 12 Federal Reserve banks by their respective boards, consisting all told of 108 directors.

As you know, the Treasury and the Federal Reserve work as partners in discharging their responsibilities. To this end there must be and there is constant consultation and cooperative discussion between them with respect to economic and related problems with which both are concerned. Similarly the Federal Reserve, in keeping abreast of developments in the economy, necessarily maintains contacts with branches of the Government other than the Treasury. Such consultations do not, however, mean any loss of independence by the Federal Reserve in discharging the responsibilities delegated to it by the Congress.

From time to time there are bound to be differences of judgment, of emphasis and of timing. It would be astonishing in a democracy if this were not so and indeed it would be reason for grave concern if precautionary action had to wait for unanimity.

There has been no departure now or at any time during my chairmanship from the procedure of full and frank discussion between members of this Board and staff and officials of other interested Government agencies with a view to discharging public responsibilities in accordance with the best obtainable judgment and the independent exercise of that judgment.

Sincerely yours,

WM. McC. MARTIN, JR.

THE SECRETARY OF THE TREASURY,  
Washington, May 15, 1956.

Hon. WRIGHT PATMAN,

*Chairman, Subcommittee on Economic Stabilization,  
Joint Committee on the Economic Report,  
Congress of the United States, Washington, D. C.*

DEAR MR. CHAIRMAN: I have your letter of May 10 and am glad to answer your questions.

As I have testified before your committee, the Treasury recognizes fully the independent responsibility of the Federal Reserve System for its decisions, and as long as I have been here we have never encroached on its domain.

However, as I have also testified before your committee, I believe it is in the best interest of the people of this country and Government operations as a whole that there should be the fullest consultation and cooperation between the Treasury and the Board. To promote this, Mr. Martin and other members of the Board and various members of the Treasury Department, including myself, make it a continuing practice to keep in the closest possible touch with each other to discuss fully current conditions and prospective trends in order that each of us may be posted as to the other's thinking and appraisal of the various influences affecting the economy both currently and prospectively.

It is, of course, only natural that we often have some differences of judgment arising from varying appraisals of the timing and effect of economic trends. We both are glad to have the benefit of the other's views, as well as the views of many other people in trying to help us reach our own independent judgments.

There is nothing in the events to which you refer that is at variance with our regular practice.

Yours very truly,

G. M. HUMPHREY,  
*Secretary of the Treasury.*

THE SECRETARY OF COMMERCE,  
Washington, May 15, 1956.

Hon. WRIGHT PATMAN,

*Chairman, Subcommittee on Economic Stabilization,  
House of Representatives, Washington, D. C.*

DEAR MR. CONGRESSMAN: I have yours of May 10 and following are my answers to your questions:

1. I did disagree with the action taken, but my disagreement was more in the realm of "timing" than otherwise.

2. Neither I nor any of my associates have had any communication with the Reserve Board—collectively or individually—on this subject.

3. I have not communicated any criticisms to representatives of the Board. In fact, I actually did not criticize the Board's action in my press conference to which you have made reference.

In this respect the press asked me the following question:

"Do you have any information on the recent increase in the discount rate's impact on housing particularly?"

My answer follows and I'm sure you'll agree that it was not voiced in a critical but in a factual vein.

"Of course, that is a field I don't move into very much. I leave that to the Treasury and the Reserve Board. Money is tight today and money is short, and that may prove to be a handicap as we move along here."

I think this answers your three questions.

Sincerely yours,

SINCLAIR WEEKS.

UNITED STATES DEPARTMENT OF LABOR,  
OFFICE OF THE SECRETARY,  
Washington, May 16, 1956.

Hon. WRIGHT PATMAN,

*Chairman, Subcommittee on Economic Stabilization,  
Joint Committee on the Economic Report,  
Congress of the United States, Washington, D. C.*

DEAR CONGRESSMAN PATMAN: This is in reply to your letter of May 10 in which you request my answers to the questions regarding the recent action of

the Board of Governors of the Federal Reserve System in raising the rediscount rate.

I did not communicate my views or make representation to System officials, either Chairman Martin, the Board, other members of the Board, or staff members; and to my knowledge neither have any of my associates, either before or after the action taken by the Board.

Sincerely yours,

JAMES P. MITCHELL,  
*Secretary of Labor.*

THE CHAIRMAN OF THE COUNCIL OF ECONOMIC ADVISERS,  
*Washington, May 18, 1956.*

Hon. WRIGHT PATMAN,  
*House of Representatives,*  
*Washington, D. C.*

DEAR CONGRESSMAN PATMAN: I am writing in reply to your inquiry of May 10. In keeping with its duties prescribed by law, the Council of Economic Advisers keeps constantly in touch with the departments and agencies of the Federal Government that are principally concerned with economic matters. The Council's efforts in this direction have been described in its annual reports to the President, which have been published in recent years as appendixes to the Economic Report of the President.

I find it necessary and important to discuss the economic situation and governmental economic policies fairly frequently with Chairman Martin, among others.

You have inquired about the Federal Reserve Board's recent action with respect to discount rates. In view of somewhat conflicting tendencies, particularly the divergent movements that have occurred of late in retail trade and capital expenditures, I doubt the timeliness of this action. However, it must be recognized that some uncertainty inevitably attaches to judgments on a matter of this type.

The conversations that members of the Council have with officials of the Federal Reserve Board do not, of course, involve or raise any question concerning the independence of the Board. This is entirely clear as a matter of both law and policy.

Sincerely yours,

ARTHUR F. BURNS.

CONGRESS OF THE UNITED STATES  
JOINT COMMITTEE ON THE ECONOMIC REPORT  
SUBCOMMITTEE ON ECONOMIC STABILIZATION  
(For A. M. release)

*June 7, 1956.*

Representative Wright Patman (Democrat of Texas) announced today that the Subcommittee on Economic Stabilization, of which he is chairman, will hold a public hearing at 10 a. m. on June 12, in the Senate District of Columbia hearing room (room P-38) of the Capitol, on procedural matters and differences of opinion between certain administration officials and the Board of Governors of the Federal Reserve System in respect to the action of April 13 in raising the discount rates.

The hearing will relate to the specific matters covered by a recent exchange of correspondence between the chairman of the subcommittee, William McC. Martin, Chairman of the Board of Governors, and Secretary George Humphrey, Department of the Treasury. The correspondence itself, which sought to inquire into the facts behind widespread press stories of conflicting opinions at responsible official levels, was released by Mr. Patman on May 23. The expectation and hope are that the hearing will be brief and deal principally with the circumstances surrounding the specific incident, leaving for a later date the detailed questioning as to the merits and wisdom of the action itself.

In addition to Chairman Patman, the other members of the subcommittee are Senator Joseph C. O'Mahoney, Senator Arthur V. Watkins, Representative Augustine B. Kelley, and Representative Jesse P. Wolcott. Under the rules of the committee, other members of the full committee are welcome to attend and participate in all subcommittee hearings.

WILLIAM H. MOORE,  
*Staff Economist.*

UNITED STATES SENATE,  
COMMITTEE ON LABOR AND PUBLIC WELFARE,  
*June 1, 1956.*

HON. THOMAS C. HENNINGS, Jr.,  
*United States Senate.*

DEAR SENATOR HENNINGS: In response to your letter of May 29 requesting information as to occasions on which any executive department or any executive officer of any independent agency refused to give information to this committee, I am happy to inform you that no such instances have come to my attention.

On the contrary, the agencies with which I have been concerned both as chairman of the Subcommittee on Education and as a member of the Committee on Labor and Public Welfare have been most cooperative. Those agencies are primarily branches of the Department of Health, Education, and Welfare and the Veterans' Administration.

Sincerely yours,

JAMES E. MURRAY.

UNITED STATES SENATE,  
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,  
SUBCOMMITTEE ON GOVERNMENT EMPLOYEES' SECURITY PROGRAM,  
*July 13, 1956.*

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

DEAR SENATOR HENNINGS: Replying to your letter of May 29, addressed to me as chairman of the Government Employees Security Subcommittee I wish to say that the subcommittee was constantly confronted by the refusal of executive departments and agencies to supply requested data even when such information was demanded by subpoena.

There were literally dozens of such instances where the department and agency heads refused either on the contention that the materials sought had been received in confidence or, more often, as stated by the Chairman of the Civil Service Commission, because of the "principle laid down by President Eisenhower in his letter of May 17, 1954."

Practically all of the refusals were made a part of the printed record of the subcommittee and to save time I have had a member of our staff deliver to Miss Mary Irwin of the staff of the Subcommittee on Constitutional Rights, copies of parts I and II of our printed record with markings to denote the instances of refusal to comply with requests for documents needed in the subcommittee's investigation.

I might add that the report of the subcommittee, now in preparation, contains a chapter of some 17 pages under title "Refusal of Agencies To Submit Documents on Request or in Compliance With Senate Subpenas." The subcommittee report will also contain an important recommendation on this subject. A copy of the report will be sent to you as soon as available.

Aside from the above instances before the Subcommittee on the Government Employees Security Program I have no further cases to report.

OLIN D. JOHNSTON, *Chairman.*

(Excerpts referred to by Senator Johnston are reproduced below as they appear in the printed hearings before the Subcommittee to Investigate the Administration of the Federal Employees' Security Program. 84th Cong., 1st sess.:)

## A

The CHAIRMAN. I think it would be well in closing that we make a statement here.

In closing this first hearing, I should like to state that the subcommittee has many complaints that set forth prima facie cases of injustices under the security program.

To adequately appraise the situation, it is essential that the staff be given access to the files in the executive offices pertaining to these cases. A few cases have been selected at this time and requests have been transmitted but as yet no files have been released to the subcommittee or its staff.

For example, we have asked several departments for the entire personnel and security files on certain individuals including all correspondence, documents, hearing records, et cetera. Samples of the pertinent portions of the replies thus far received are as follows:

From the Department of Agriculture :

"The request as presently worded includes material of a security and investigative nature which is obtained and kept in confidence in the interests of national security, basic investigative problems, and the protection of the employee. For that reason, we desire to consider the request further before responding in more detail to your letter."

From the Department of State, we received the following reply :

"Since much of the material contained in the files has been received in confidence, your request raises important policy questions in connection with the responsibilities of the executive branch and its relationships to the legislative branch, and, in addition, the joint responsibilities of all branches of the Government for the public welfare.

"You are aware, of course, that investigative materials have traditionally been handled in a most careful manner in order to protect the rights of individuals, insure efficient administration, preserve sources of information, and for other reasons.

"In view of the interest of your committee in Mr. (—), a careful review of all pertinent policies and directives is being made and you may expect to be further advised."

Then, from the Foreign Operations Administration :

"As you know, files of employees of the executive branch contain material which is not only received in confidence, but which must be maintained in confidence for various reasons, including affording full protection to national-security information and to the rights of the individuals.

"Your request for access to the FOA security and personnel files of Mr. (—) is directly related to the important policy matter with respect to the responsibilities of the legislative and executive branches of Government.

"I am, of course, aware of the interests of your committee, and wish to assure you that I am now having undertaken a review of all current statements of policy and directives relating to this broad policy matter. You will be further advised relative to this."

Next, from the Department of Defense :

"As you are no doubt aware, your letter raises important questions of policy with respect to relationships and responsibilities of the legislative and executive branches of the Government, and how the public interest can best be served with respect to the handling and use of investigative material. This material is received in confidence and has been maintained in confidence to protect national-security information, investigative sources and technique, as well as the rights of individuals, and for other reasons.

"It is the desire of this Department to cooperate to the maximum extent with the Congress in the performance of its investigative duties. I assure you that any apparent lack of cooperation with members of your staff is not due to a lack of desire to cooperate with your committee, but rather is based upon current understanding of long-standing orders and policies relating to the very sensitive nature of investigative material.

"Accordingly, a review of all current statements of policy and directives, in the light of the interest of your committee, is being made, and you will be further advised."

Then, from the Veterans' Administration :

"Careful consideration has been given to your request and to the problems of policy presented therein. A portion of the material requested in your letter has been received in confidence and correspondingly has been maintained in the same manner in order to afford protection both to the Government and to the rights of the individuals concerned.

"In view of the interest of your committee, as well as the responsibility of this agency as a part of the executive branch, a complete analysis of all directives and statements of policy bearing on this problem is being made, and I will in the near future advise you further with regard to this agency's right to furnish the information and files requested."

I wish to assure the executive agencies upon whom requests have and will be made that the records and files sought are for the purpose of analysis and study.

As the result of such studies, it may be necessary to call certain representatives of the executive agencies to explain their actions.

But there is no intention on the part of the subcommittee to create sensational news or unnecessarily embarrass anyone (p. 17, 18 of hearings held May 26, 1955).

## B

(Excerpt from record of the hearing of June 17, 1955, pp. 192, 199, 200, 201, 217:)

### STATEMENT OF WENDELL B. BARNES, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION

The CHAIRMAN. Our next witness is Mr. Wendell B. Barnes, Administrator, Small Business Administration.

Mr. Barnes, will you please stand and be sworn. Do you solemnly swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BARNES. I do.

The CHAIRMAN. Mr. Barnes, when you were subpoenaed here, the sergeant at arms served a subpoena duces tecum directing you to bring with you to this hearing the personnel and security files in the possession of the Small Business Administration pertaining to Mr. George V. McDavitt, together with all correspondence, documents, hearing records, and so forth, pertaining to his employment in the Small Business Administration.

Do you have these documents as requested to turn over to the subcommittee?

Mr. BARNES. Mr. Chairman, in response to the subpoena of the committee, I bring to the committee today the personnel and security files of George V. McDavitt, Director of the Office of Compliance and Security. I have with me a digest of the background of George V. McDavitt, and I can supply you with a photostatic copy of Mr. McDavitt's application form 57, which was filed with the Small Business Administration on April 5, 1954.

The security file of Mr. McDavitt is the property of and is in the custody of the Civil Service Commission. However, I wish to point out that the personnel security files contained investigative material, and, therefore, I shall be unable to furnish these to the committee. I am prepared to furnish and have already furnished in letters to the committee certain types of personnel background of Mr. McDavitt, and I now offer in the record a copy of the application—

Mr. HADLICK. Wait a minute, Mr. Barnes. Are you going to comply with the subpoena or are you not?

Mr. BARNES. I have complied with it to the extent of my ability under the regulations pertaining to the executive branch of the Government.

Mr. HADLICK. You have a subpoena for the files on Mr. McDavitt. Do you have those in your possession?

Mr. BARNES. I have the personnel files and such security files as relate to Mr. McDavitt in my office.

Mr. HADLICK. Will you please turn those over to the chairman?

Mr. BARNES. I will not, sir, other than the material which I am permitted to under the regulations pertaining to the executive branch of the Government. I will turn over any—

Mr. HADLICK. Wait a minute. Are you going to comply with the subpoena?

Senator CARLSON. I think he has answered the question. He has stated he has.

Mr. HADLICK. I do not recommend letting a man called here make a speech and thumb his nose at the subpoena power of the Senate. That is up to you, Mr. Chairman, of course.

The CHAIRMAN. That is a question that the subcommittee will determine right now. Please call Senator Neely back, and we will, after excusing everybody, go into executive session and see what we will do in regard to this matter.

(Thereupon, the open hearing was recessed and the subcommittee went into executive session, after which the open hearings were resumed, and the following proceedings were had.)

The CHAIRMAN. The subcommittee met in executive session, and the question before us was how to proceed when we had subpoenaed Mr. Barnes to bring certain records which were as follows:

"The personnel and security files in the possession of the Small Business Administration pertaining to Mr. George V. McDavitt together with all cor-

respondence, documents, hearing records, etc., pertaining to his employment in the Small Business Administration."

This question is before us; all those records have not been brought.

The committee, in order to expedite matters and go ahead with the proceedings here this morning, will hear Mr. Barnes, but the legal staff is instructed to look into the legal phase of this matter to see whether or not Mr. Barnes has carried out his subpoena in full by bringing these records.

This is a question that has developed in other hearings before us. Each instance must be decided upon its own facts.

Whether or not Mr. Barnes has a right to refuse to bring in these records as stated in this subpoena is a question for our legal staff to look into and advise the committee later.

Mr. HADLICK. May we have it understood that the subpoena is still outstanding and continuing until dismissed by you at a later time when complied with?

The CHAIRMAN. That is generally understood.

Mr. GILLETTE. Mr. Chairman, on behalf of the legal staff, may I ask a question? The instructions that you have just given to the staff, as I understand it, is to prepare a brief on this general question of the production of documents in the hands of Government agencies and not only this particular case. You want us to report on this case but also to report on the general question of the right of the executive branch of the Government not to produce certain documents when subpoenaed by the United States Senate.

The CHAIRMAN. On this general question also. It will probably be coming up from time to time.

Senator NEEDY. Mr. Chairman, specifically, do we not want the subcommittee to report whether it has the authority under the law to compel this witness or any other witness in similar circumstances to produce documents such as those he has refused to produce?

This question is an old one, and it has been debated around many hearing tables during the last 30 years. But unfortunately the Supreme Court has never decided it.

In my opinion, a test case should be made and this is a good time to do it. Mr. Barnes is doing what many other administrative heads have done. He may be right. Nevertheless the highest court in the land should, without further delay, be asked to determine and proclaim the law of this intolerably prolonged controversy.

The CHAIRMAN. It is very important in this particular hearing, because we want not part of the facts, but all of the facts, before us.

Mr. HADLICK. Mr. Chairman, I have been chided today for pulling out a document that our investigators bring in. How are we going to get the facts if we cannot look at these files? It is impossible to make a complete study of them without the complete files.

Do we have to tell our men to do it clandestinely?

Senator CARLSON. Mr. Chairman, I think it has been stated very well by the Senator from West Virginia that those of us who have served in Congress for many years are familiar with this problem; and I concur with the thought that our staff should make a study of this and then bring it in for our subcommittee to determine.

Then, if there is any way it can be done without violating security in any way, I will certainly look at it favorably and with a great deal of interest.

The CHAIRMAN. Are there any other statements along the same line? Mr. Case, did you have anything you wished to say?

Senator CASE. No, Mr. Chairman; I am not a member of the subcommittee, but am here merely as a member of the committee.

The CHAIRMAN. And we are glad to have you.

Senator CASE. The constitutional line between the prerogatives of the executive and the legislative are not clear, have never been clear, and will not be clear, and there is a need to have restraint on the part of both the legislative and the executive branches of the Government in every case.

I would be confident if this matter is pursued along those lines, this problem can be worked out.

The CHAIRMAN. You may proceed, Mr. Barnes.

Mr. BARNES. Mr. Chairman and gentlemen of this committee, I do not feel I need to more than mention the fact that I am most respectful of this committee, and that my refusal to submit these documents was dictated by the separation of power between the legislative and executive branches, and that I am

willing to cooperate with your committee to the limits of the ability of the executive branch of the Government to do so.

I have requested permission to appear before this committee several times during the past 2 weeks. I have asked to appear voluntarily and no subpoena was necessary.

Mr. HADLICK. Mr. Barnes who made the decision as to your bringing these documents? Is that your own decision?

Mr. BARNES. It was my own decision under the regulations that are in force on heads of agencies in the executive branch of the Government, sir.

The CHAIRMAN. Did you take it up with anybody outside of the agency?

Mr. BARNES. Yes, I discussed it with several agencies and have referred to the memorandums issued by former Presidents, and by President Eisenhower on the general subject; and I am sure that this administration is willing for me to cooperate with you to the extent of the authority that has been authorized for heads of agencies and departments.

I am sure that my testimony will enlighten the committee on the facts that deal with this general problem. We do not have anyone in our agency that is not willing to testify before this committee without subpoena.

The CHAIRMAN. Did you refer the matter to the Justice Department?

Mr. BARNES. I have not discussed it specifically with the Justice Department.

The CHAIRMAN. What do you mean by "specifically"?

Mr. BARNES. There was a letter prepared, as I recall, by a former Justice Department employee for President Truman, and there was another letter that possibly they had some activity in connection with for President Eisenhower, which was dated May 17, 1954, I think.

I had both of those by me in compiling the information which I have brought in, which I have offered to the committee. I certainly want the record to show that I have offered that information in response to the subpoena.

\* \* \* \* \*

This complaint, together with other factors, indicated Mr. Lyell was not competent to perform the duties assigned to him. He said this morning he would like to see again a copy of this letter that I received about this, together with the letters received by them with the names deleted.

However, it was addressed to another agency, and I have checked with the other agency, and it can be revealed as long as the names are deleted. The communications are as following: This one is to Mr. McDavitt.

"Relative to our telephone conversation of May 5, 1955, I am attaching a copy of the letter from \* \* \*.

"As I expressed to you, such incidents can have a very harmful effect on the entire security program; and I assume that you will take corrective measures to insure against any repetition."

Mr. HADLICK. Mr. Barnes, is not a letter of that kind also subject to security regulations?

Mr. BARNES. No, sir; it is not. It was solely on the activities of an employee in the field, relating to his employment. It was furnished to us, and we ascertained in advance whether or not a copy could be available.

The witness himself has consented for its release, asking and saying he would like to see a copy of it.

Mr. HADLICK. I want to point out that we are getting what documents they want to give us, and we cannot get what we want.

## C

(Letter printed in hearings record, p. 359, pt. 1, July 14, 1955:)

CIVIL SERVICE COMMISSION,  
Washington, D. C., July 5, 1955.

Re George V. McDavitt.

Hon. OLIN D. JOHNSTON,

*United States Senate.*

DEAR SENATOR JOHNSTON: On June 7, 1955, you requested me to furnish the Subcommittee on Government Employees' Security Program with the entire personnel and security file of George V. McDavitt, Director, Office of Compliance and Security, Small Business Administration.

We have now been advised by the St. Louis Records Center that the service record and personnel folder for Mr. McDavitt were furnished to the Small Busi-

ness Administration in May 1954 in connection with his employment in a position excepted from the competitive civil service. Such information as is available from that file will, therefore, have to be obtained from the Small Business Administration.

The security file which you requested is in the possession of the Civil Service Commission but it would not be appropriate for me to furnish it to your subcommittee. As you know, investigative information and privileged communications in the custody of the executive branch of the Government have long been withheld from the Congress and its committees for reasons of public policy and in order to maintain the separation of powers between the executive and legislative branches of Government.

Sincerely,

PHILIP YOUNG, *Chairman.*

D

(Excerpt from record of hearing of July 28, 1955, pp. 381, 382:)

STATEMENT OF HON. PHILIP YOUNG, CHAIRMAN, CIVIL SERVICE COMMISSION

Mr. YOUNG. Mr. Chairman, I am glad to respond to your invitation to appear here this morning; and in response to your subpoena, I have brought along with me the files of George V. McDavitt, William J. Houston, and Alice M. Cooney. I am prepared to turn over to the subcommittee a copy of the forms 57 and a copy of the service histories relating to the persons designated in the subpoena.

I must, however, respectfully decline to submit any other portions of the files to the subcommittee. My action in this respect, sir, is upon the principle laid down by President Eisenhower in his letter of May 17, 1954, to the Secretary of Defense, directing that the request of the Committee on Government Operations for the production of certain documents be denied.

The President's letter points out that 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 that it is not in the public interest that any of our conversations or communications of any documents or reproductions concerning such advice be disclosed; moreover, these files contain reports of investigation collected by the Civil Service Commission and other investigative agencies in the executive branch.

Since the files that you have requested are in this category, I have no alternative but to respectfully refuse to submit them.

Mr. HADLICK. Mr. Chairman, could we place in the record a letter from Mr. Young refusing the files on Mr. McDavitt? Also, I would like to incorporate in the record his similar refusal to the committee on William J. Houston, and Alice M. Cooney.

The CHAIRMAN. Yes.

(The above-mentioned documents are as follows:)

CIVIL SERVICE COMMISSION,  
Washington, D. C., July 5, 1955.

Re William J. Houston.

Hon. OLIN D. JOHNSTON,

*United States Senate.*

DEAR SENATOR JOHNSTON: In response to your letter of June 7, 1955, requesting the security and personnel file of Mr. William J. Houston, an employee in the Security Appraisal Office of the Civil Service Commission, I am submitting herewith an official transcript of Mr. Houston's civilian Federal employment as furnished to me by the Federal Records Center, St. Louis, Mo. In addition, I am furnishing a complete employment record of Mr. Houston as it is reflected in the files of the Civil Service Commission.

The security file which you requested is in the possession of the Civil Service Commission but it would not be appropriate for me to furnish it to your subcommittee. As you know, investigative information and privileged communications in the custody of the executive branch of the Government have long been withheld from the Congress and its committees for reasons of public policy and in order to maintain the separation of powers between the executive and legislative branches of Government.

Sincerely,

PHILIP YOUNG, *Chairman.*

CIVIL SERVICE COMMISSION,  
Washington 25, D. C., July 22, 1955.

Re Alice M. Cooney.

Hon. OLIN D. JOHNSTON,

*United States Senate.*

DEAR SENATOR JOHNSTON: On July 18, 1955, you requested me to furnish the Subcommittee on Government Employees' Security Program with the file regarding Miss Alice M. Cooney, who until recently worked for the Small Business Administration.

The Civil Service Commission has the security file regarding Miss Cooney but it would not be appropriate for me to furnish it to your subcommittee. As you know, investigative information and privileged communications in the custody of the executive branch of the Government have long been withheld from the Congress and its committees for reasons of public policy and in order to maintain the separation of powers between the executive and legislative branches of Government.

I am attaching, however a copy of the Standard Form 57, Application for Federal Employment, from which Miss Cooney received her appointment with the Small Business Administration as well as a copy of her service history in the Federal Government.

Sincerely,

PHILIP YOUNG, *Chairman.*

## E

(Excerpt from record of hearing of September 26, 1955, pp. 634, 635 of pt. I:)

TESTIMONY OF SCOTT MCLEOD, ADMINISTRATOR, BUREAU OF SECURITY AND CONSULAR AFFAIRS, DEPARTMENT OF STATE

Mr. HADLICK. Mr. McLeod, pursuant to subpoena served upon you, are you prepared to turn over the records requested in the subpoena?

Mr. MCLEOD. Mr. Chairman, I have brought those records with me in accordance with the subpoena, but in view of the traditional attitude on this thing and the separation of powers, I must respectfully decline to furnish the committee these files.

Mr. HADLICK. May I, for the purpose of the record, Mr. Chairman, have the subpoena entered in the record at this point and whatever action the subcommittee wishes to take pursuant to the witness' refusal to be decided at a later time.

The CHAIRMAN. Hearing no one opposing, it will be entered into the record.  
(The above-mentioned document is as follows:)

### UNITED STATES OF AMERICA

### CONGRESS OF THE UNITED STATES

To Mr. SCOTT MCLEOD, *Administrator, Bureau of Security and Consular Affairs, Department of State, Washington, D. C.*, Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Government Employees' Security Subcommittee of the Committee on Post Office and Civil Service of the Senate of the United States, on Monday, September 26, 1955, at 10:30 o'clock a. m., at the Senate Caucus Room, Room 318, Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee and to bring with you for submission to the subcommittee for its study all files, correspondence, documents, records, etc., in your possession or the possession of the State Department relating to the following individuals: Wolf I. Ladinsky, Joseph E. Vargo, Jonathan Thursz, Peter Regis, and Johnnie R. Hooker.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Joseph C. Duke, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 16th day of September, in the year of our Lord one thousand nine hundred and fifty-five.

OLIN D. JOHNSTON,  
*Chairman, Committee on Post Office and Civil Service.*

## F

(Excerpt from the printed record of the hearing of September 27, 1955, p. 764: )

TESTIMONY OF HON. JAMES H. SMITH, JR., ASSISTANT SECRETARY OF THE NAVY (AIR), ACCOMPANIED BY HON. ALBERT PRATT, ASSISTANT SECRETARY OF THE NAVY (PERSONNEL AND RESERVE FORCES)

Mr. HADLICK. Mr. Smith, you were served with a subpoena duces tecum for the records of Mr. Abraham Chasanow. Have you those records with you?

Mr. SMITH. I will have to refer you to my counsel here, the Judge Advocate General.

Adm. IRA NUNN. Of Course, we are unable to produce the records of Mr. Chasanow. We have offered to produce an expurgated version of his record if he consents. We think we must think of his rights in this case, as well as comply with current instructions regarding these personnel files.

The CHAIRMAN. Have you taken that up with him whether or not he would consent?

Admiral NUNN. Yes, sir; we have, and he has not as yet consented, so far as we know.

Mr. HADLICK. I would like to have the subpoena placed in the record to show noncompliance with it.

The CHAIRMAN. That will become a part of the record.

(The above-mentioned document is as follows: )

UNITED STATES OF AMERICA

CONGRESS OF THE UNITED STATES

To Mr. JAMES H. SMITH, Jr., Assistant Secretary of the Navy for Air, Department of the Navy, Washington, D. C., Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Government Employees' Security Subcommittee of the Committee on Post Office and Civil Service of the Senate of the United States, on Tuesday, September 27, 1955, at 10:30 o'clock a. m., at the Senate caucus room, room 318, Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and to bring with you for submission to the subcommittee for its study all files, correspondence, documents, records, etc., in your possession or the possession of the Department of the Navy relating to Mr. Abraham Chasanow.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Joseph C. Duke, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 16th day of September, in the year of our Lord one thousand nine hundred and fifty-five.

OLIN D. JOHNSTON,  
Chairman, Committee on Post Office and Civil Service.

## G

(Excerpt from the printed record of the hearing of September 27, 1955, p. 858, 859: )

TESTIMONY OF H. V. HIGLEY, ADMINISTRATOR, VETERANS' ADMINISTRATION

Mr. HADLICK. Mr. Higley, you are the Administrator of the Veterans' Administration?

Mr. HIGLEY. Yes, sir.

Mr. HADLICK. You were served with a subpoena calling for the files on 49 individual cases?

Mr. HIGLEY. Yes, sir.

Mr. HADLICK. Are you prepared to deliver those files?

Mr. HIGLEY. I have them here; but I have a statement I would like to read.

Mr. HADLICK. You have a prepared statement?

Mr. HIGLEY. A prepared—

Mr. HADLICK. Do you have extra copies?

Mr. HIGLEY. Yes.

Mr. HADLICK. You may proceed.

Mr. HIGLEY. Mr. Chairman, gentlemen, I am glad to respond to your invitation to appear this afternoon and in compliance with your subpoena I have brought with me files pertaining to the individuals identified in the subpoena and concerning whom the Veterans' Administration has information.

I am prepared to turn over to the committee copies of the standard forms 57 or other application form and copies of the service histories relating to these individuals and these are those forms which I have here. I might say that there are only 48 here, sir, because 1 name on the list has never been an employee of the Veterans' Administration.

I must, however, respectfully decline to submit any other portions of the files to the subcommittee. My action in this respect is based upon the constitutional and administrative principles related by President Eisenhower in his letter of May 17, 1954, to the Secretary of Defense directing that the request of the Committee on Government Operations for the production of certain documents be denied.

President Eisenhower's letter points out that 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 that it is not in the public interest that any conversations or communications or any documents or reproductions concerning such advice be disclosed.

These files also contain reports of investigations and confidential information furnished by the Federal Bureau of Investigation, the Civil Service Commission, and other investigative agencies in the executive branch.

In view of the fact that the files which you have requested are in that category I have no alternative but to respectfully refuse your request.

## H

(Excerpt from hearing of September 27, 1955, p. 872 of the record:)

TESTIMONY OF THOMAS J. DONEGAN, CHAIRMAN, PERSONNEL SECURITY ADVISORY COMMITTEE

Mr. HADLICK. Mr. Donegan, will you give your name and title to the reporter?

Mr. DONEGAN. My name is Thomas J. Donegan. I am Chairman of the Personnel Security Advisory Committee.

Mr. HADLICK. You were served with a subpoena to appear here?

Mr. DONEGAN. I was.

Mr. HADLICK. Are you prepared to deliver the documents requested?

Mr. DONEGAN. I have with me documents which I think come within the category named in the subpoena duces tecum.

I must express my regrets to this subcommittee that I cannot turn these documents over to the subcommittee.

In order to save the time of the subcommittee, references have been made to President Eisenhower's letter to Secretary Wilson, I believe it is May 17, 1954. It is within the scope of that instruction of the President that I must respectfully decline to turn these documents over to the subcommittee.

I would also like to call the subcommittee's attention to the fact that the Personnel Security Advisory Committee is informally attached to the Executive Office of the President.

I have in my possession the minutes of the meetings of the Personnel Security Advisory Committee. In these minutes there are discussions with reference to personnel security cases and other matters related thereto which come before this Committee of which I am Chairman.

Mr. HADLICK. May the record show the service of the subpoena on Mr. Donegan.

Senator NEELY. It will be shown by the record.

(The above-mentioned document is as follows:)

## UNITED STATES OF AMERICA

## CONGRESS OF THE UNITED STATES

To Mr. THOMAS J. DONEGAN, *Chairman, President's Committee on Security Problems, or Chairman of the Interdepartmental Committee on Internal Security, Administrative Offices, The White House, Washington, D. C.*, Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Government Employees' Security Subcommittee of the Committee on Post Office and Civil Service of the Senate of the United States, on Tuesday, September 27, 1955, at 2 p. m., at the Senate caucus room, room 318, Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and to bring with you for submission to the subcommittee for its study all files, correspondence, documents, records, etc., in your possession relating to the operation of the Government employees' loyalty and security program under Executive Order 10450, including minutes of any meetings held with security officers or the heads of the various executive agencies.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Joseph C. Duke, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 16th day of September, in the year of our Lord 1955.

OLIN D. JOHNSTON,

*Chairman, Committee on Post Office and Civil Service.*

## I

(Excerpt from the record of the hearings of Sept. 28, 1955, pp. 899, 900:)

**TESTIMONY OF FREDERICK W. BAUMANN, JR., ACTING SECURITY OFFICER, GOVERNMENT PRINTING OFFICE, WASHINGTON, D. C.**

Mr. HADLICK. Mr. Baumann, are you appearing here pursuant to subpoena?

Mr. BAUMANN. I am, sir.

Mr. HADLICK. Are you prepared to deliver the file that was requested?

Mr. BAUMANN. No, sir; I am not.

Mr. HADLICK. For the purpose of the record I would like to have the subpoena appear in the record.

Senator NEELY. It will be inserted.

(The above-mentioned document is as follows:)

## UNITED STATES OF AMERICA

## CONGRESS OF THE UNITED STATES

To Mr. FREDERICK W. BAUMANN, Jr., *Acting Security Officer, Government Printing Office, Washington, D. C.*, Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Government Employees' Security Subcommittee of the Committee on Post Office and Civil Service of the Senate of the United States, on Monday, September 26, 1955, at 2 p. m., at the Senate caucus room, room 318, Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and to bring with you for submission to the subcommittee for its study all files, correspondence, documents, records, etc., in your possession or the possession of the Government Printing Office relating to Mr. Edward Roy Dixon and with reference to any and all employees or former employees who have been suspended by the Government Printing Office pursuant to Executive Order 10450.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Joseph C. Duke, Sergeant at Arms of the Senate of the United States, to serve and return.

Given under my hand, by order of the committee, this 16th day of September, in the year of our Lord 1955.

OLIN D. JOHNSTON,

*Chairman, Committee on Post Office and Civil Service.*

UNITED STATES SENATE,  
 COMMITTEE ON POST OFFICE AND CIVIL SERVICE,  
*June 14, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR: I am writing in reply to your letter of May 29, in which you ask whether the Subcommittee on Retirement, Senate Committee on Post Office and Civil Service, has been denied access to information by any Government agency since May 17, 1954.

I am advised by the subcommittee staff that there have been no instances of such withholding of requested information by Government agencies.

With all good wishes, I am

Sincerely,

W. KERR SCOTT.

UNITED STATES SENATE,  
 COMMITTEE ON PUBLIC WORKS,  
*June 5, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington D. C.*

DEAR SENATOR HENNINGS: Receipt is acknowledged of your letter dated May 29, 1956, concerning the study presently being conducted by the Subcommittee on Constitutional Rights on the withholding of information from Congress by various executive departments and independent agencies.

I am pleased to inform you that the Public Works Committee has nothing on record of any occasion on which any executive department or executive officer or any independent agency ever having refused to give information to this committee since May 17, 1954, or at any time previous to that date.

Sincerely yours,

DENNIS CHAVEZ, *Chairman.*

UNITED STATES SENATE,  
*Washington, D. C., June 2, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate.*

DEAR TOM: This will acknowledge receipt of your letter of May 29, addressed to me as chairman of the Subcommittee on Flood Control-Rivers and Harbors, in which you ask me to furnish specific instances, if any, where the executive departments or executive officer, or any independent agency has refused to give information to our committee since May 17, 1954.

I do not recall a single instance when our committee has requested information from any of the executive departments which has not been supplied.

With kindest regards, I am

Sincerely yours,

ROBERT S. KERR.

UNITED STATES SENATE,  
 COMMITTEE ON PUBLIC WORKS,  
*June 21, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: I have your letter of May 29. During the period of time I have served as chairman of the Public Roads Subcommittee of the Senate Public Works Committee, and the Privileges and Elections Subcommittee of the Senate Rules Committee, there have been no instances in which officials of the executive branch of the Government have declined to supply pertinent information requested by these subcommittees.

Sincerely yours,

ALBERT GORE.

UNITED STATES SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION,  
*June 1, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This refers to your letters of May 29, 1956, written to me as chairman of the Committee on Rules and Administration, and as chairman of the subcommittees of this Committee on the Standing Rules of the Senate, the Library, and on Printing concerning your study of information withheld from Congress by the executive branch.

The Committee on Rules and Administration has not since May 17, 1954, requested any information or papers of any executive department, officer, or independent agency which has been refused. Contacts between the full committee and the executive branch, in that time, I may add, were practically limited to letters which this committee wrote to agency heads soliciting comments on pending legislation.

In the same period of time no executive department or office refused information to any of the three subcommittees of which I am chairman. The Standing Rules of the Senate subcommittee held one hearing during the period (concerning Senate committee investigative procedures), at which no executive personnel appeared to testify. The Library and Printing Subcommittees held no hearings.

Yours sincerely,

THEODORE FRANCIS GREEN, *Chairman.*

UNITED STATES SENATE,  
SELECT COMMITTEE ON SMALL BUSINESS,  
*June 18, 1956.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR TOM: You asked in your letter of May 29 about any difficulties the committee has encountered in securing information from executive agencies. Senators Humphrey and Smathers, chairmen of the Subcommittees on Retailing, Distribution and Fair Trade Practices, and Government Procurement, respectively, have asked that I also respond on their behalf.

I can recall only one such incident since May 17, 1954. This occurred when I, as chairman of the committee, requested security clearance for one of the staff members. I was informed, on an unofficial basis, that the best interests of all concerned would be served by the withdrawal of my request. When I sought information from the Department of Defense which would justify a denial of the security clearance, my office was informed that this information could not be given in view of the Executive order.

Conferences were held between staff members of the Senate Small Business Committee and responsible staff members of the Department of Defense in an effort to elicit some further information about the staff member for whom I was seeking clearance. These conferences were to no avail and we were able to get no information whatsoever from the Department of Defense. The Department of Defense had advised us that if the clearance were denied, it would be because of suitability rather than loyalty.

After several conferences with the staff member involved and such other information as the staff could get "through the back door," it was decided that we would insist that the Department of Defense either grant or deny the clearance.

Shortly after the Department was notified to process the application a security clearance was granted.

You will be interested to know that the application for clearance was submitted to the Department of Defense on or about October 15, 1955, and the clearance was granted on February 6, 1956.

The problems encountered in this matter and the long delay involved created a very difficult situation and could have very well impaired the work of the committee.

With best personal wishes, I am

Sincerely yours,

JOHN SPARKMAN, *Chairman.*

## APPENDIX EXHIBIT 16 (D)

Senator Hennings, as chairman of the Subcommittee on Constitutional Rights, addressed the following letter to the heads of a selected group of agencies and executive departments:

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

*April 2, 1957.*

DEAR \_\_\_\_: The Subcommittee on Constitutional Rights has a continuing interest in the free flow of information to Congress and the public from a constitutional point of view. It would be very helpful, therefore, if you would give us the answers to the following questions.

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?
2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?
3. On what basis was the information withheld, in each instance?

Your cooperation in giving us this information as soon as possible will be greatly appreciated.

Sincerely yours,

THOMAS C. HENNINGS, Jr., *Chairman.*

## EXHIBIT 16 (E). REPLIES FROM AGENCIES AND EXECUTIVE DEPARTMENTS

THE AMERICAN BATTLE MONUMENTS COMMISSION,  
*Washington, D. C. April 3, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary, United States Senate.*

DEAR SENATOR HENNINGS: In reply to your letter of April 2, 1957, to the Chairman of this Commission, I am happy to advise you that there has been no occasion since May 17, 1954, or before, that the Commission has declined to furnish information to Members of the Congress or to congressional committees.

Faithfully yours,

THOMAS NORTH,  
*Brigadier General, U. S. A., Secretary.*

ATOMIC ENERGY COMMISSION,  
*Washington, D. C., June 4, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary, United States Senate.*

DEAR SENATOR HENNINGS: This is in reply to your letter of April 2, 1957, requesting certain information concerning instances in which the Atomic Energy Commission has refused information to Congressmen or congressional committees.

Our files have disclosed six instances since May 17, 1954, in which the Commission has found itself in a position that it could not comply with a written congressional request precisely in the form in which it was made. These instances are set forth below. However, in all but two instances, the substantive information was made available.

We have not attempted to include such instances as may have occurred where a member of the Commission or its staff refused information upon oral request at a congressional committee hearing and there was no further written communication concerning the request. To supply any accurate survey of any such refusals would require a review of the numerous congressional hearings at which we have appeared.

1. The Joint Committee on Atomic Energy on May 16, 1955, requested that the committee be supplied with copies of certain National Security Council documents which were referred to in a memorandum from the Commission to the joint committee entitled "Sequence of Events With Regard to the Nuclear Powered Merchant Ship." On May 19, 1955, the Commission sent a letter to the Chairman of the Joint Committee on Atomic Energy advising that in view of the privileged character of deliberations and the elements entering into executive determinations, the Commission is not authorized to furnish the NSC documents requested. However, the Commission did provide the joint committee with a statement as to Presidential approved policies contained in the documents requested which were relevant to the hearings being held by the joint committee on the proposed nuclear-powered merchant ship.

2. On April 19, 1955, we received a letter from the executive director of the Joint Committee on Atomic Energy requesting a copy of a letter from the Atomic Energy Commission to the Department of Defense dated March 22, 1955, to the authority of the Commission under the Atomic Energy Act to exchange certain information with other countries under agreements for cooperation. On May 16, the General Manager wrote to the executive director of the Joint Committee informing him of the content of the letter of March 22, 1955. On May 27, 1955, the executive director of the Joint Committee requested a copy of an opinion of the AEC General Counsel on the legality of exchanging certain information under agreements of cooperation and again requested a copy of the letter of March 22, as well as a copy of another letter from AEC to the Department of Defense dated May 12, 1955. On June 9, 1955, we informed the chairman of the Joint Committee on Atomic Energy that the documents in question were internal communications within the executive branch of the Government and considered privileged under the doctrine of separation of powers, but that the Commission waived the privilege with regard to the March 22 letter and the opinion of the General Counsel because they serve to explain a position which the Commission has already taken. As to the May 12 letter, the Commission stated that it did not believe it appropriate to reveal comments and suggestions made by the AEC in this letter to the Department of Defense, since the executive branch had not yet taken a policy position on the subject matter concerned.

3. On July 18, 1955, the Commission received a request from Senator Kefauver, Chairman of Subcommittee on Antitrust and Monopoly Legislation of the Judiciary Committee concerning certain information regarding the Mississippi Valley Generating Co. contract. The letter requested any prior drafts of an AEC chronology published in August 1954 regarding the MVGC matter, any memoranda relating to this chronology, and any reports made either to the Commission or any individual Commissioner with respect to the MVGC matter. Senator Kefauver stated that in connection with these documents, he was specifically interested in any documents including the names of Adolphe Wenzell and Paul Miller or the First Boston Corp. On July 21, 1955, the Commission replied to Senator Kefauver, supplying him with information concerning visits by Wenzell and Miller to the Commission. The Commission did not, however, furnish the documents requested by Senator Kefauver, for the reason that they constitute internal working papers of the Commission and reflect staff discussions prior to final action. The Commission stated that such documents do not constitute official actions by a Government agency or a Government official, and therefore are privileged communications within the executive branch under the well-recognized doctrine of separation of powers.

4. On October 16, 1956, the Commission received a request from the Chairman of the Joint Committee for reports of the Advisory Committee on Reactor Safeguards and AEC staff reports and analyses summarizing considerations affecting application for those construction permits issued up to that time. On January 2, 1957, the Commission replied to Senator Anderson's request making available copies of the Advisory Committee's letters to the General Manager referred to in Senator Anderson's request of October 16. The Commission did, however, respectfully decline to make available AEC staff reports and analyses. The Commission did transmit documents stating the principal factors considered by the Commission and its staff on the issuance of three construction permits. The Commission further stated that it would prepare and send to the Committee similar reports on the other construction permits that had been issued. The basis for refusing to make certain of the documents requested available was the fact that they were working papers prepared for internal use of the Commission and containing the views and opinions of the members of the Commission's staff and its advisers.

5. On July 20, 1954, Senator Johnson forwarded a letter from a constituent requesting information about construction moneys to be spent in Texas in the following fiscal year. On July 30, 1954, the Commission responded that due to security implications concerning the type of construction to be performed for the particular fiscal year, the Commission would be unable to furnish the Senator with the desired information for transmittal to a third party.

6. On November 29, 1954, the Commission received a request from Mr. Price forwarding a letter from a constituent who wanted copies of press summaries prepared by the AEC for its own use and for the Joint Committee. In replying on January 13, 1955, the Commission stated that it has not been our practice to make these press summaries, prepared for the use of AEC's staff, available to persons outside the atomic-energy program.

Sincerely yours,

K. E. FIELDS, *General Manager.*

CENTRAL INTELLIGENCE AGENCY,  
*Washington, D. C., May 2, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Senate Committee on  
the Judiciary, Washington, D. C.*

DEAR MR. CHAIRMAN: I refer to your letter of April 2, 1957, requesting a report from this Agency on occasions since May 17, 1954, when we have refused information to Congressmen or congressional committees.

By way of background, it may be useful to refer to the laws and regulations which govern the disclosure or withholding of information by this Agency. Section 102 (d) (3) of the National Security Act of 1947 (Public Law 253, 80th Cong.), as amended, provides in part "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Section 7 of the Central Intelligence Agency Act of 1949 (Public Law 110, 81st Cong.), as amended, provides as follows:

"In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 102 (d) (3) of the National Security Act of 1947 (Public Law 253, Eightieth Congress, first session) that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2, chapter 795 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U. S. C. 654), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided*, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 607, title VI, chapter 212 of the Act of June 30, 1945, as amended (5 U. S. C. 947 (b))."

Within this legislative framework, we are governed by the provisions of the various Executive orders pertaining to the protection of security information.

The following is a summary description of the occasions on which this Agency has declined to furnish information to Congressmen or to congressional committees, together with the reasons therefor. Names have been omitted for reasons I am sure you will appreciate.

(a) On January 29, 1955, the chairman of the Senate Committee on Government Operations was informed by letter that we would be unable to furnish information regarding numbers and categories of personnel for inclusion in an unclassified report being prepared by the committee, citing the appropriate provisions of section 7 of the Central Intelligence Agency Act of 1949. The committee accepted our conclusions that such information should not be released, as they had in connection with previous reports.

(b) In April 1955, we indicated to a member of the staff of the Senate Permanent Investigations Subcommittee that we would be unable to furnish certain classified information on railroad systems within the U. S. S. R. This involved the protection of sources and methods, as provided in section 102 (d) (3) of the National Security Act of 1947.

(c) On May 5, 1955, a letter was sent to a Senator, declining to furnish a photostat of a personal history statement submitted by a candidate for employment with this Agency, unless the individual concerned authorized us to do so in writing, because the statement contained highly personal and confidential medical data.

(d) On May 9, 1955, the administrative assistant of a Senator was informed that we would be unable to furnish a letter to an ex-employee giving the reasons for the resignation of that individual. The administrative assistant was advised that such a procedure was contrary to Agency policy. He was further informed, however, that the director of personnel had advised the ex-employee that if any prospective employer contacted the Agency, he would be told that the resignation was solely for medical reasons. There were no security considerations involved in this case.

(e) On June 14, 1955, a letter was sent to the counsel of the Subcommittee on Government Employees' Security Program of the Senate Committee on Post Office and Civil Service, informing him that we would be unable to answer questions relating to the number and names of personnel engaged in a certain program activity, together with grades, duties, titles, and salaries. The authority of this action was section 7 of the CIA Act of 1949.

(f) In August 1955 a member of the staff of the Senate Permanent Investigations Subcommittee was informed that we could not furnish him with the name of a certain official in Europe as a contact on the subject of East-West trade. This again involved a problem of the protection of sources and methods, and the staff member was advised to deal directly with United States diplomatic representatives.

(g) On August 27, 1955, a letter was sent to the chairman of the House Committee on Government Operations indicating that we could not furnish the names of certain consultants with this Agency. It was explained that these individuals were engaged in highly classified projects, the security of which would be compromised if their association were known. The Acting Director offered to discuss individual cases orally with the chairman if he so desired, and other pertinent information requested by the committee was furnished.

(h) On September 8, 1955, a letter was sent to the counsel of the Subcommittee on Government Employees' Security Program of the Senate Committee on Post Office and Civil Service, informing him that we would be unable to comply with a request that we furnish information on the number of sensitive positions in the Central Intelligence Agency. It was explained that we could not comply with the request due to the fact that all regular Agency positions were considered as "sensitive" within the meaning of Executive Order 10450, and that accordingly the publication of the number of employees would fall within the inhibitions of section 7 of the CIA Act of 1949.

(i) On June 14, 1956, a letter was sent to the chairman of the Intergovernmental Relations Subcommittee of the House Committee on Government Operations explaining why we were unable to release to the subcommittee certain classified information which had been originated by other agencies of the Government. It was pointed out that the authority for the release of such information rested solely with the responsible agencies concerned.

The foregoing are the only cases in our records of any failure to furnish information requested by Congressmen or congressional committees within the time period referred to in your letter. In each case the reasons for our inability to furnish the information were explained fully to the requesting officials, and to the best of our knowledge they were found to be reasonable in the light of our statutory responsibilities.

The Director of Central Intelligence appears regularly before established subcommittees of the Armed Services and Appropriations Committees of the Senate and of the House, and makes available to these subcommittees complete information on Agency activities, personnel, and expenditures. No information has ever been denied to these subcommittees. The Director also regularly briefs the Joint Committee on Atomic Energy on matters which fall within the committee's sphere of interest. This Agency maintains contacts with a number of other committees and Members of the Congress, and, apart from the instances cited above, has complied with requests for information, classified or unclassified. The only exceptions to the general rule are cases where the requesting official, after discussion with Agency officials, has agreed that the nature of the information originally requested was such that its release would be detrimental to the security interests of the United States.

I trust that this information is responsive to your inquiry. We wish to cooperate with your subcommittee in every way possible, and if further information is desired, we will do our best to furnish it.

Sincerely,

ALLEN W. DULLES, *Director.*

UNITED STATES CIVIL SERVICE COMMISSION,  
Washington, D. C., May 27, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate.*

DEAR SENATOR HENNINGS: Further reference is made to your letter of April 2, 1957, requesting information concerning the free flow of information to Congress and the public from a constitutional point of view.

The Commission has no way of ascertaining the number of times it has refused information to Congressmen or congressional committees. Our filing system does not lend itself to locating such information. The correspondence file is so voluminous, it would be an insurmountable task to search for such information. Inquiries have been made of these persons in the Commission who would have occasion to entertain a question of refusal, consequently, our answers to your questions are based on memory of such incidents. Undoubtedly, since May 17, 1954, there have been refusals that have escaped the memory of those who were concerned at the time in the determination to furnish the requested information on the specific occasion.

The answers to your questions are as follows:

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?

A. Five times.

2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occasions?

A. A subpoena was issued by Senator Olin D. Johnston, chairman of the Committee on Post Office and Civil Service, and served upon the Chairman of the Civil Service Commission requesting him to produce all files, correspondence, documents, records, etc., in the possession of the Civil Service Commission relating to Mr. George V. McDavitt, William J. Houston, and Alice M. Cooney before the committee on the 28th day of July 1955, at the hour of 10 a. m.

In response to this subpoena, the chairman declined to produce the files.

B. On or about May 13, 1955, a Senator requested a copy of the Commission's minutes in the case of Cleo O. Smith, postmaster, Carthage, Miss. The Commission declined to release the minutes, because traditionally the minutes of the Commission have not been published, and for the further reason that the minutes contain only a bare sketch of facts and are primarily for the purpose of recording the vote taken in a given case. While the Commission refused to release the minutes on these grounds, the Commission did, on June 3, 1955, by letter, convey all the pertinent information and facts surrounding the minutes.

C. A Senator on March 22, 1955, requested the Commission to furnish him with information concerning certain former Federal employees, his request was: "Will you please advise me whether or not there is anything in the files of the following individuals which would be interpreted as of sufficient detrimental nature to prohibit their reemployment by the United States Government."

The Commission declined to make such determination, stating:

"The Commission cannot prejudice the material in a file of an individual who is not now before it for a determination as to eligibility for employment. If and when any of the persons mentioned in your letter again apply for Federal employment, the then existing applicable rules and determination as to eligibility will be adhered to and a determination made accordingly. Until this event takes place, the Commission is not in a position to interpret matters in the files of the individuals."

D. On October 13, 1955, the chief clerk of the Committee on Un-American Activities of the House of Representatives requested of the Commission that he or an investigator of the committee be permitted to review the files personally.

The Commission refused to permit the investigator of the committee to personally review the files.

E. A Congressman requested the Commission to furnish to him the names and pay rates of all employees filling Federal positions in his State. This information was declined.

3. On what basis was the information withheld, in each instance?

A. The declination was based on the principle laid down by President Eisenhower in his letter of May 17, 1954, to the Secretary of Defense.

B. The reason for declining to furnish the minutes of the Commission was "traditionally the minutes of the Commission have not been published. They contain only a bare sketch of facts and are primarily for the purpose of recording the notes in a given case."

C. The reason for declining to furnish the requested information was based on the Commission's rules and regulations, which provide that when a person enters or reenters the Federal service, a determination shall be made as to the person's fitness for employment. Prior to the determination, the applicant is informed of derogatory information and given an opportunity to refute or explain the derogatory information, if any, before such determination is made.

D. The Commission refused to permit the committee investigator to personally review the files because in many instances the files contain information of a confidential and investigative nature that can be made available only to those officials in the executive branch of the government who have need for the information in the performance of their official duties.

E. The Commission declined to furnish the Congressmen this information for the simple reason that such information could not be compiled from the records in the office of the Commission. It would be necessary to request such information from each and every agency having employees in the State. The Commission furnished the information with respect to its own employees in the State.

Sincerely.

CHRISTOPHER H. PHILLIPS,  
*Acting Chairman.*

THE CHAIRMAN OF THE COUNCIL OF ECONOMIC ADVISERS,  
*Washington, April 8, 1957.*

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

DEAR SENATOR HENNINGS: I have your letter of April 2 regarding policies and practices with respect to the provision of information to Congressmen or congressional committees, referring particularly to the period since May 17, 1954.

The Chairman of the Council of Economic Advisers appears annually before the Joint Economic Committee of the Congress to discuss with that committee the Economic Report of the President. We also appear before Appropriations Committees of the House of Representatives and the Senate on matters having to do with the budget of the Council of Economic Advisers. However, in view of the Council's advisory relationship with the President, we have sought to confine our appearances before congressional committees to these specific occasions. Accordingly, although we have never refused information to a congressional committee or to a Member of Congress, we have on several occasions asked to be excused from appearing before congressional committees and to the best of my knowledge these requests have always been granted.

Sincerely yours,

RAYMOND J. SAULNIER.

DEPARTMENT OF AGRICULTURE,  
*Washington, May 22, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary, United States Senate.*

DEAR SENATOR HENNINGS: This is with further reference to your two letters of April 2, 1957, requesting certain data with respect to the withholding of information from Congressmen and congressional committees.

Under the Department of Agriculture Organic Act of 1862 (5 U. S. C. 511), the Department is charged with the responsibility of acquiring and diffusing among the people of the United States information on subjects connected with agriculture in the most general and comprehensive sense of that word. Therefore, the Department has for years followed the policy of making all information possible available, particularly to congressional committees and Members of Congress, except where legislative restriction or regulations forbid. Information

which is confidential is generally made available to congressional committees with the request that the committee treat the material in confidence.

We can find only a few instances where the Department has been unable to make information available to Congressmen or congressional committees. There have been a few other instances where the Department has asked for time to study a request for information or has indicated that, for reasons given, the information could not be made available at the particular time.

Among those cases is one where a copy of an audit report was not released to Members of Congress pursuant to title 1 of the administrative regulations of the Department (ch. 9, par. 535, copy attached), but was made available to a congressional committee. The minutes of the meetings of the National Agricultural Advisory Commission, the members of which are appointed by the President, have not been made available to congressional committees. Also, information of a security nature was not made available to a congressional committee under applicable Executive orders and long-standing executive policies. The Department also has declined to reveal information to a congressional committee that was received from a private individual on a confidential basis.

One instance has been found of temporary withholding from a congressional committee of security information on international negotiations under title I, Public Law 480, but basic information later was available to the committee in the President's message, House Document No. 216. A request from a congressional committee for a copy of the letter of charges issued to an employee was declined because the charges presented only one side of the case. In another instance, a congressional committee was informed that a working file requested by the committee contained documents classified by other Government departments and that it would be necessary to obtain the consent of those departments before release.

This will also serve as a response to your letter of April 2, 1957, to the Chief, Forest Service, of this Department. None of the above-cited instances involved the Forest Service.

Sincerely yours,

TRUE D. MORSE, *Under Secretary.*

**ITEM 2. AVAILABILITY OF MINUTES OF ADVISORY COMMITTEES TO CONGRESSIONAL COMMITTEES AND INDIVIDUAL CONGRESSMEN**

Question: Would minutes of Department of Agriculture Advisory Committees be available to House Committee on Government Operations and to individual Congressmen?

Answer: The minutes would normally be available to the committee and individual Congressmen with the exception of the minutes of (1) the National Agricultural Advisory Commission, and (2) other advisory committees where disclosure is not in the public interest.

Discussion: The National Agricultural Advisory Commission is appointed by the President pursuant to Executive Order 12472, July 20, 1953 (5 U. S. C., 511, note, 1952 ed., Supp. II), to advise with the Secretary of Agriculture respecting the policies and administration of farm programs. The Secretary frequently discusses the advice by the Commission to him with the President. Under the President's letter of May 17, 1954, to the Secretary of Defense, prohibiting the disclosure of advice on official matters within the executive branch, the minutes of this Commission are deemed to be privileged from disclosure.

The authorities relating to access to records of the Department are title 5, United States Code, section 22, authorizing regulations for the conduct of the Department's work, title 5, United States Code, section 516, giving custody of departmental records to the Secretary, and title 5, United States Code, section 1002 (c) (sec. 3 of the Administrative Procedure Act), requiring good cause to be shown for restricting the availability of information. Pursuant to these authorities, the Department has designated certain records as confidential and certain other records as of limited availability.

With respect to all other records, paragraph 535d of title I, departmental administrative regulations, provides as follows:

"All other records of the Department and of corporations under the administrative supervision of the Department shall be made available if so determined by the administrative head of the agency, bureau, branch, or corporation having custody of same, to persons properly and directly concerned, and in making his determination he shall be guided by the following considerations:

(1) Whether the release of the record will jeopardize future Government access to information.

(2) Whether the release of the record at the time is premature and will improperly affect a pending action.

(3) Whether the disclosure of the record will have the effect of hindering free administrative decisions in the same or similar matters in the future.

(4) Whether the purpose for which the record is sought is prejudicial to the public interest.

(5) Whether the record is already otherwise made public, such as reports of public hearings and conferences, recorded maps, plats, and documents, records published for the information of the public, and material of a similar public nature."

The criteria for making a determination as to whether it is in the public interest to disclose the minutes of the other advisory committees to a congressional committee or an individual Congressman are set forth in the above-quoted paragraph 535d. Most of the criteria are self-explanatory. It would, for example, be prejudicial to the public interest to make the minutes of the Advisory Committee available if the disclosure of their contents might have an undue effect upon market prices for agricultural commodities. In such an instance the minutes might have to be withheld until such time as the release of such information would not have such an effect.

With these exceptions, the Department believes the public interest is generally served in making available the minutes to appropriate congressional committees and individual Congressmen for such assistance they may be in the performance of their legislative functions.

(Following are the departmental regulations submitted with the reply of the Agriculture Department:)

#### TITLE 1. GENERAL

##### SECTION 7. AVAILABILITY OF INFORMATION AND RECORDS

534. GENERAL POLICY. a. *Public Records.* (S)→Most records of the Department are "Public Records" and are therefore available to the public for inspection. However, in some cases, legal restrictions prohibit the Department from making records available for public use. In other instances, where open inspection of the records would be harmful to the public interest, Departmental policy is similarly restrictive. This regulation indicates the records that are not available for public inspection and cites limited conditions under which other records may be made available. These rules are to guide employees in ascertaining which records may not be freely opened for inspection. Should an employee not know the policy on the release of any record, the matter should be submitted to the head of the agency.

b. *Information.* In general, the same rules apply to any information not considered "records," as stated in paragraph 535e.

c. *Denying Access to Records.* When it is necessary to deny access to any of the Department's records, employees should make special efforts to explain fully the reasons for such restrictions so that the person denied will recognize that his Government is dealing properly and justly with him, and that it is contrary to law or public interest to open the record. Denials of access to records in the course of proceedings shall be handled as provided for in paragraph 535h.

535. RESTRICTIONS ON AVAILABILITY. The following rules shall govern the availability for examination, or the furnishing of copies, of matters of official record of the Department, including those on file with the National Archives.

a. *Confidential Records.* The following records are confidential and shall not be subject to examination, nor shall copies thereof be furnished upon any request except in proper cases from Federal official sources:

(1) All records and reports required by statutes to be held confidential by the Department.

(2) Blueprints of meat-slaughtering or meat, poultry, or dairy products processing plants and establishments.

(3) Producers' referendum ballots.

(4) Minutes of meetings (except resolutions extracted therefrom) of boards of directors of corporations under administrative supervision of the Department of Agriculture or any of its agencies, State Production and Marketing Administration Committees, and county agricultural conservation committees.

(5) Records of audits, other than information with respect thereto authorized by the Secretary of Agriculture or the boards of directors of corporations to be made available and other than records of audits included under subparagraph b (2) (e) below.

(6) Reports furnished the Department confidentially by dealers, manufacturers, or associations thereof covering quantities of commodities processed, purchased, or sold during prescribed periods and the price paid therefor.

(7) Documents, photographs, or maps of other Government agencies required to be held confidential under regulations or orders of the other Governmental agency.

(8) Personnel investigative reports. \*→ or investigative data of any type, whether relating to loyalty or other aspects of an individual's record, shall not be furnished to any person, committee, or agency outside the Department, but the contents of such reports may be discussed with, or examined by those persons in the Executive Branch who are entitled thereto by reason of their official duties.

(9) Investigative or accounting reports (including such reports involving fiscal activities of employees) made to determine compliance with law or regulations, or reports of inspection operations. ←\*

(10) Records of research, experimentation and physical analysis of samples and other materials in the course of investigations, including patent records, prior to publication, release, or use of the results thereof.

(11) Records, reports, and estimates of crops for consideration and release by Crop Reporting Board prior to formal release.

(12) Charges, complaints, and other processes in adjudicative proceedings prior to publication or use.

b. *Records of Limited Availability.* The records enumerated below are of limited availability and information contained therein shall not be disclosed, nor shall a copy thereof be furnished, except in proper cases upon requests from Federal official sources or as specifically provided:

(1) Reports and records which by statute may be made available only in suits or administrative proceedings will be available only under the conditions provided for in the statute.

(2) Upon approval of the head of the agency, bureau, or branch concerned, based upon the considerations prescribed in subparagraph d below, the following records shall be available as indicated:

(a) Applications, reports, and like records, together with supporting data and documents, other than those under subparagraphs a, b(1), b(2)(c), or b(2)(d) of this paragraph, submitted by an applicant for relief, license, certificate, use, loan, grant, or other benefit provided by law or by regulations authorized by law, shall be made available to the person who furnished the record, and also under compulsory process.

(b) Contractual records and other agreement records, together with supporting data, shall be available to the contractor or person supplying the record, and also under compulsory process.

(c) Reports and applications acquired from farmers and handlers of agricultural products, equipment and supplies in connection with conservation programs formulated under section 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act (1936), as amended (16 U. S. C. 590g 590q), and in connection with control or adjustment programs developed under prior acts of Congress shall be available to the person who furnished the record and also to other persons properly and directly concerned. When such records are to be used in court or administrative proceedings, an authorized representative of the head of the branch or bureau having custody of the records shall appear and produce such records only if the records remain in the custody of such representative at all times.

(d) Records, reports, and applications submitted to central and field offices of the Production and Marketing Administration by farmers, handlers, and processors of the commodities wheat, corn, cotton, tobacco, rice, and peanuts in connection with commodity loan, parity payment, and marketing quota programs pursuant to Title III of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. 1301-1393), shall be available to the person supplying the data, and also, to the extent deemed relevant by the administrative head of the Production and Marketing Administration branch concerned, in any suit or administrative hearing under Title III of the above-named act.

(e) Records and reports of audits, parts thereof, or information with respect thereto in connection with contractual relations under the jurisdiction of the Production and Marketing Administration may be made available to the contractor or person whose activities form the basis of the audit and in the case of adults in connection with the National School Lunch Program may be made available also to State educational agencies.

(3) Inspection certificates of grade, quality, or condition shall be available for examination in accordance with the applicable regulations governing such inspection, and copies thereof may be obtained upon the payment of fees, if any, prescribed therefor (7 C. F. R. Subtitle B, Ch. I).

(4) Records obtained pursuant to Section 4 of the Federal Reports Act of 1942 shall be released only with the approval of agency from which the information is obtained.

(5) Reports received under the Commodity Exchange Act or information contained in such reports are only available where relevant to any suit or administrative proceeding pursuant to subpoena.

(6) Records of the Farm Credit Administration and of the various corporations under its supervision that are declared confidential in regulations issued by the Farm Credit Administration (6 C. F. R., Part 4) shall be made available to the persons and in the circumstances specified in said regulations.

(7) Personnel records shall not be available except upon the authorization of the Director of Personnel given with due regard for the welfare of the employee concerned and in accordance with the considerations prescribed in subparagraph d below.

(8) Records relating to the business or property of any handler or any person furnished by, or obtained from, such handler or person pursuant to any marketing agreement or marketing order are available as prescribed in 7 C. F. R. 900,200.

(9) Records relating to the business and property of any person obtained pursuant to the requirements of the Perishable Agricultural Commodities Act of 1930, as amended, are available as prescribed in 7 C. F. R., Part 46.

c. *Records in Adjudications and Formal Rulemaking Proceedings.* Records in adjudications and formal rulemaking proceedings are on file in the Office of the Hearing Clerk, Office of the Solicitor, and shall be made available to persons having a proper interest therein.

d. *Records Available to Properly Interested Persons.* All other records of the Department and of corporations under the administrative supervision of the Department shall be made available if so determined by the administrative head of the agency, bureau, branch, or corporation having custody of same, to persons properly and directly concerned, and in making his determination he shall be guided by the following considerations:

(1) Whether the release of the record will jeopardize future Government access to information.

(2) Whether the release of the record at the time is premature and will improperly affect a pending action.

(3) Whether the disclosure of the record will have the effect of hindering free administrative decisions in the same or similar matters in the future.

(4) Whether the purpose for which the record is sought is prejudicial to the public interest.

(5) Whether the record is already otherwise made public, such as reports of public hearings and conferences, recorded maps, plats, and documents, records published for the information of the public, and material of a similar public nature.

e. *Other Information.* Any other information expressly or impliedly obtained or received in confidence, or relating to pending cases, or dealing with studies, inspections, or investigations of the Department or its collaborators, or otherwise confidential, shall not be available unless the head of the agency, bureau, or branch concerned otherwise determines on the basis of the considerations prescribed in subparagraph d of this section.

f. *Application for Examination or Copy of Records.* Except as otherwise provided herein, application for examination of a record or for a copy thereof shall be made to the administrative head of the agency, bureau, or branch administering the program relating to the same. Examination of records, where examination is permitted, shall be at times and places convenient to the public

business, and copies, when obtainable, shall be furnished at rates established therefor.

g. *Authenticated Copies.* When a request is received for an authenticated copy of a record of the Department which is otherwise available under these rules to the party requesting same, for use as evidence in litigation or otherwise, the administrative head of the agency having custody thereof shall cause a correct copy to be prepared and sent to the<sup>\*→</sup> Office of the General Counsel for certification and to have the seal of the Department affixed. (See 1 AR 194 for officers of the Office of the General Counsel authorized to certify documents.) ←\*

h. *Denial of Access to Record.* The administrative head of the agency, bureau, or branch having custody of the record shall give prompt written notice of a denial, in whole or in part, of any written application, petition, or other request of an interested party when made in the course of a Departmental proceeding, and shall set forth a simple statement of the grounds for such refusal. In any other case, the reasons for refusal shall be available to the applicant. ←(S)

i. *Compulsory Process.* Where it is sought to require by subpena duces tecum or other compulsory process the production of any record of the Department enumerated under subparagraph a of this section, or any record enumerated under subparagraph 2 of this section which subordinate officers of the Department have no discretion thereunder to disclose, the record shall not be disclosed except where it is determined by the Secretary that such disclosure will not be prejudicial to the public interest. Where the production of any record or other information within the purview of subparagraphs c, d, or e of this section or any record enumerated in subparagraph b of this section not covered by the first sentence of this paragraph is required by subpena duces tecum or other compulsory process, it may be made available by the administrative head of the bureau, agency, branch, or corporation having custody, upon making the determination prescribed in such paragraph; however, he must immediately notify the Secretary of the issuance of the subpena and of the documents being disclosed. If the administrative head of the bureau, agency, or branch determines that the production of the record under such process should not be made, he will forward a full report of the matter promptly to the Secretary, and no disclosure shall be made except upon the determination of the Secretary. In any case of service of such compulsory process upon an officer or employee of the Department where the determination by the Secretary is required by this subparagraph, such officer or employee will appear in answer thereto and, unless otherwise expressly directed by the Secretary, respectfully decline to produce the records or information specified therein on the ground that the disclosure is prohibited by this regulation.

j. *Authority for Redelegation.* The authority vested in the head of a bureau, agency, branch, or corporation under paragraph 535b through 535i may be redelegated by such head to an official reporting directly to him. ←(S)

k. *Records in Custody of Department.* Records, medical and other reports, statements of witnesses, and other papers relating to the disability or death of a civil employee of the United States or other person entitled to compensation benefits from the United States under the Federal Employees Compensation Act of September 7, 1916, as amended, are the official records of the Bureau of Employees Compensation, Department of Labor, and disclosure of information from or pertaining thereto is governed by regulations of that Bureau as set forth in 20 CFR 1.21.

#### SECTION 8. RELEASE OF SCIENTIFIC AND TECHNICAL INFORMATION WITHHELD FROM PUBLICATION FOR PURPOSES OF NATIONAL MILITARY SECURITY

541. *AUTHORITY.* a. *General Policy.* (S)→Executive Order 9568, issued June 8, 1945, \*→Executive Order 9604, issued August 25, 1945, and Executive Order 9809, issued December 12, 1946, provide for the release for publication, insofar as it may be done without prejudice to the public interest, of scientific and technical information. ←\*

**DEPARTMENT OF COMMERCE,  
CIVIL AERONAUTICS ADMINISTRATION,  
Washington, April 19, 1957.**

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

DEAR MR. CHAIRMAN: This will acknowledge receipt of your letter of April 2, inquiring as to the number of times since May 17, 1954, this agency has refused information to Congressmen or congressional committees.

An examination of our records indicates that there has been no instance where the Civil Aeronautics Administration has finally refused to release information to Congress or its Members. However, there have been instances where information has been withheld temporarily pending determinations with respect to CAA programs and budget matters which have not, at the time of the requests, received necessary approval within the Department of Commerce or other appropriate agency of the executive branch.

If you wish any further information please let me know.

Sincerely yours,

**JAMES T. PYLE, Administrator.**

**DEPARTMENT OF COMMERCE,  
BUREAU OF PUBLIC ROADS,  
Washington, April 4, 1957.**

**Hon. THOMAS C. HENNINGS, Jr.,**  
*Chairman, Subcommittee on Constitutional Rights,  
Senate Committee on the Judiciary, Washington, D. C.*

DEAR SENATOR HENNINGS: In reply to your letter of April 2 relative to free flow of information to Congress and the public, I know of no instance whatever of the Bureau of Public Roads refusing information to any Member of Congress or to congressional committees. It has always been our policy to freely supply available information on requests from Members of Congress.

Sincerely yours,

**C. D. CURTISS,  
Commissioner of Public Roads.**

**OFFICE OF THE SECRETARY OF DEFENSE,  
Washington, D. C., May 27, 1957.**

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

DEAR SENATOR HENNINGS: This is in reply to your letter to the Secretary of Defense of April 2, 1957, requesting information with respect to instances, occurring after May 17, 1954, when the Defense Department and the military services have refused information to Congress.

Since no special records are maintained by the Department recording denials of congressional requests for information, there may have been occasions when information was refused which are not recited here, but the known instances in which information was refused to a Member of Congress acting in his legislative capacity are as follows:

September 6, 1954: The Army denied the request of Senator Jenner, chairman, Senate Internal Security Subcommittee, for a document described as "Research Material for Political Intelligence Problem," pursuant to the Department's responsibility to safeguard (1) information relating to intelligence techniques, (2) information revealing the specific objects of intelligence activity, (3) information as to the identity of confidential informants and information furnished by them in confidence, and (4) interdepartmental communications of an advisory and preliminary nature.

February 8, 1955: Upon the request of Senator McClellan, chairman, Senate Permanent Investigations Subcommittee, for an inspector general's report on Irving Peress, the Army submitted a detailed summary of all actions taken by the Army in the Peress case. The inspector general's report itself was withheld, pursuant to the Department's responsibility to safeguard (1) information revealing investigative techniques, (2) information as to the identity of confidential informants and information furnished by them in confidence, (3) incomplete

information which might unjustly discredit an innocent person, and (4) intradepartmental communications of an advisory and preliminary nature.

September 2-6, 1955: The Army denied the requests of the House Appropriations Committee for inspector general's reports and auditor general's reports pursuant to the Department's responsibility to safeguard information in investigative reports for the reasons stated above. In lieu of the investigative reports, the Army furnished, as requested, detailed summaries of all actions taken in connection with the contracts under investigation.

September 16, 1955: The Air Force denied the request of Senator Johnson, chairman, Senate Preparedness Investigating Subcommittee for material derived from an inspector general's report, pursuant to the Department's responsibility to safeguard information in investigative reports.

January 17, 1956: The Air Force denied the request of Senator Magnuson, chairman, Senate Committee on Interstate and Foreign Commerce, for information concerning the discharge of a serviceman, pursuant to the Department's responsibility not to release an individual's personnel records without his consent so as not to unjustly or unnecessarily discredit him or disclose information received in confidence.

February 2, 1956: The Air Force denied the request of the House Appropriations Committee for inspector general's reports and auditor general's reports pursuant to the Department's responsibility to safeguard information contained in investigative reports.

February 20, 1956: The Secretary of Defense joined with the Acting Secretary of State, the Secretary of Commerce, and the Director of International Cooperation Administration in denying the request of the Senate Permanent Investigations Subcommittee for certain information relating to East-West trade controls. The executive branch was prepared through responsible officials to specify the items deleted from the international list of controlled items in open session, and to specify the items regraded or added in executive session, but declined to furnish the International List of controlled items and documents relating to East-West trade controls in the nature of "discussions and communications of an advisory nature among the officials and employees of the executive branch, highly sensitive intelligence information, and communications with our delegation and other representatives abroad containing recommendations, information regarding the position of other governments, and comments thereon."

The Secretary of Defense also instructed Department of Defense personnel who might be called to testify before the Senate Permanent Investigations Subcommittee inquiring into East-West trade controls to refuse to testify with respect to any advice, recommendations, discussion, and communications within the executive branch respecting any course of action in regard to East-West controls, or as to any information regarding international negotiations with the countries cooperating in East-West trade controls \* \* \*." Proceeding under this directive Defense Department witnesses declined to give certain testimony requested by the subcommittee during its hearings on East-West trade controls.

November 12, 1956: The Defense Department denied the request of Congressman Moss, chairman, House Subcommittee on Public Information, for a memorandum of the Under Secretary of the Navy relating to a discussion with an Assistant Secretary of Defense pursuant to the Department's responsibility to safeguard intradepartmental communications of an advisory and preliminary nature.

July 1956: The Army denied the request of Congressman Hébert, chairman, House Armed Services Committee, for intradepartmental communications pertaining to an officer's status, pursuant to the Department's responsibility to safeguard intradepartmental communications of an advisory and preliminary nature. The subcommittee was furnished a complete statement of the basis for the final decision in the matter.

January 12, 1957: The Army denied the request of Congressman Moss, chairman, House Subcommittee on Public Information, for an investigative file compiled in connection with charges of disloyalty and subversion at the Signal Corps Intelligence Agency, pursuant to the Department's responsibility to safeguard investigative reports.

January 25, 1957: The Air Force denied the request of Congressman Murray, chairman, House Committee on Post Office and Civil Service, for an inspector general report concerning employment conditions at Okinawa, pursuant to the Department's responsibility to safeguard investigative reports. However, the subcommittee was furnished a summary of the findings contained in the report.

April 4, 1957: The Defense Department affirmed its earlier refusals of the

request of Congressman Moss, chairman, House Subcommittee on Public Information, for recommendations and documents relating to a meeting of the Defense Department Research and Development Policy Council. The subcommittee was advised that the requested documents did not embody recommendations of the Research and Development Policy Council, but related to a proposal with respect to the classification of technical information and preliminary comments thereon, which would be withheld pursuant to the Department's responsibility to safeguard intradepartmental communications of an advisory and preliminary nature.

April 13, 1957: The Defense Department denied the request of Congressman Moss, chairman, House Subcommittee on Public Information, for investigative memoranda and a report of conversations between the Department and newsmen, pursuant to the Department's responsibility to safeguard investigative reports and information received in confidence.

This list of the relatively rare instances when information has been withheld from Congress is seen in proper perspective only when considered with the more than 100,000 annual inquiries from Congress which are answered by the Defense Department and the military services.

The interest and responsibility that you and your committee have in the free flow of information to Congress and to the public is appreciated. The Defense Department is likewise conscious of its duties and responsibilities in this area. It is the policy and practice of the Department to make the maximum information available consistent with national security and the effective operation of the Department under law and the Constitution.

Sincerely yours,

C. J. HAUCK, Jr.,  
*Assistant to the Secretary.*

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,  
*Washington, April 23, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Reference is made to your letter of April 2, 1957, regarding the free flow of information to Congress and the public from a constitutional point of view. I am informed that identical letters were received by Dr. L. E. Burney, Surgeon General; Dr. J. W. Cronin, Chief, Bureau of Medical Services; Dr. Otis L. Anderson, Chief, Bureau of State Services, Public Health Service; and Mr. George P. Lerrick, Commissioner of Food and Drugs, Food and Drug Administration.

It is my understanding that the general counsel of your subcommittee, Mr. Charles Slayman, has agreed with the General Counsel of this Department that at least as of now it is sufficient answer to all of these letters to refer you to the document styled "committee print," 84th Congress, first session, House of Representatives, November 1, 1955, printed for the use of the Committee on Government Operations. This document is entitled "Replies From Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the Committee on Government Operations," and the answers of the Department of Health, Education, and Welfare will be found on pages 239-251, inclusive.

We trust that the information which you will find in the above-mentioned document will be sufficient for your purposes, but if there is further information required, we will endeavor to furnish it.

Sincerely yours,

JOHN A. PERKINS,  
*Acting Secretary.*

UNITED STATES DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., May 2, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Your letter of April 2 requests certain information with respect to refusals of requests for information made by Congressmen or congressional committees. We do not keep central files or actual records of

this type of communication. However, we have checked with employees of this Department who would normally be concerned with requests for information from Congress. These individuals are aware of three instances in which requests of committees have been refused since May 17, 1954. These instances are described and the basis for the refusals explained in the copies of the following letters which are enclosed:

Letter dated May 5, 1955, from the Administrative Assistant Secretary of the Interior to Congressman William L. Dawson;

Letter dated May 12, 1955, from the Administrative Assistant Secretary to Mr. Arthur Perlman;

Letter dated February 3, 1956, from the Acting Secretary of the Interior to Congressman Emanuel Celler.

There is also an instance in which the Department did not furnish information from its own files, but supplied it from another source. There is enclosed a copy of the letter dated February 25, from the Acting Secretary of the Interior to Congressman John E. Moss, that deals with this matter.

We know of no refusal of information to an individual Congressman during the period mentioned in your letter, other than a "preliminary" refusal appearing in the copy of a letter, dated April 4, from an Assistant Secretary to Senator Morse, which is enclosed.

Please consider this letter as a response to the letters you addressed to the Secretary, the Bureau of Land Management, and the Bureau of Reclamation. We note that the Bureau of Indian Affairs and the Bureau of Mines replied to you directly.

Sincerely yours,

D. OTIS BEASLEY,  
*Administrative Assistant, Secretary of the Interior.*

Enclosures.

(The letters enclosed are as follows:)

UNITED STATES DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., May 5, 1955.*

Hon. WILLIAM L. DAWSON,  
*Chairman, Committee on Government Operations,  
House of Representatives, Washington, D. C.*

MY DEAR MR. DAWSON : The Department is in receipt of a letter dated April 30, 1955, from the staff director, Public Works and Resources Subcommittee, requesting that there be delivered to the subcommittee by 5 p. m., May 3, 1955, certain specified documents and certain other material not identified specifically.

Among the documents requested are the surnamed file copies of an amendment to title 43, Code of Federal Regulations, part 244, signed by the Acting Secretary of the Interior on August 11, 1954, and of the Solicitor's memorandum of August 9, 1954, transmitting the regulations to the Secretary.

It is the Department's desire to cooperate with the Congress in achieving its legislative purposes and to furnish upon the request of a congressional committee information relating to any matter within the jurisdiction of the committee. The Department understands that the documents requested above are in possession of the subcommittee except for the fact that they are not the surnamed file copies. To our knowledge the Department has never been called upon to make available surnamed file copies to any source outside the executive branch. Surnamed file copies of documents and other papers have heretofore been considered to be related solely to the internal operations of the Department, and therefore not for use outside of the Department. Without attempting to pass upon the question of whether or not surnamed copies of documents fall within the category of documents heretofore not sought by a congressional committee because of being within the constitutional framework of proper separation of powers between the executive and legislative branches of the Government, it would be appreciated if the subcommittee would consider whether official copies of the documents themselves would not serve the legislative purpose in mind.

The Department is making available the transcript of a hearing held by the Solicitor on April 25, 1949, relating to title 43, Code of Federal Regulations, section 245.21 (v). It should be understood that this transcript was prepared for the companies represented at the hearing. Contact with a representative of the companies has disclosed that there is no objection to making this transcript available to the subcommittee. While two copies of the transcript were made available

to the Department, the copy made available to the subcommittee is the only one we have been able to locate at this time. It is hoped that the subcommittee will extend to the Department the privilege of having access to the copy in the event it should become necessary in discussing the matter with the subcommittee or the staff of the subcommittee.

The Department is also making available to the subcommittee the exhibits filed at the hearing for which the transcript was prepared. Since the copies made available are the only ones found in our files, it is again hoped that the Department may have access to them if there is a need.

In addition to the above described documents, the subcommittee has indicated a need for "every memorandum, letter, note, and other document of every kind in any file of the Department or of its component agencies relating to the adoption of paragraph (V) of former regulation title 43, Code of Federal Regulations, section 245.21, on October 14, 1948 (13 F. R. 6214) and to its amendment on July 18, 1949 (14 F. R. 4620)." Again, the Department desires to cooperate in every way possible with the work of the subcommittee in achieving its legislative purpose. However, it is the view of the Department that the subcommittee should give further consideration to this request. It would be difficult, if not impossible, to locate every document falling within the purview of the request. Also, the request raises the same question as to the authority of the Department to make such documents available as that raised in the third paragraph of this letter. On the other hand, the Department is completely agreeable to making available to the Congress copies of any papers which are recognized as officially related to an action taken by the Department provided the Department is not otherwise restrained from disclosing the contents of such papers, as is rarely the case. Insofar as the instant request is concerned, there are transmitted at this time copies of certain papers found in the file relating to the regulation referred to in the letter making the request. A further review of the files is being made and in the event additional related papers are found, copies will be forwarded promptly.

Please be assured that the Department will be as diligent as possible in assisting the Congress in achieving its legislative purposes. It is hoped that any action considered by the Department as necessary in recognizing the proper separation of powers between the executive and legislative branches of the Government will not be construed as an unwillingness to cooperate with the Congress.

Sincerely yours,

D. OTIS BEASLEY,  
*Administrative Assistant, Secretary of the Interior.*

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, May 12, 1955.

MR. AETHUR PERLMAN,

*Staff Director, Public Works and Resources Subcommittee of the Committee on Government Operations, House of Representatives.*

MY DEAR MR. PERLMAN: In your letter of May 2 you request copies of certain orders, statements, correspondence, and internal communications of the Department relating to Departmental Order No. 2753. There are transmitted herewith three copies of Order No. 2753 as well as all other orders which Order No. 2753, expressly or impliedly, modified, superseded, or repealed.

Among the material specifically requested are:

1. Memorandum with attachments of March 17, 1954, from the Bonneville Power Administrator to Mr. E. D. Frye.
2. The inquiry from Mr. Frye to the Administrator to which the March 17 1954, memorandum replied.
3. A teletype from Bonneville Power Administration to the Solicitor (or Secretary) raising problems regarding the effect of Order 2753 on the standard contract authorization clause used by Bonneville Power Administration.
4. The reply to this teletype.

A careful review of these documents reveals that they are internal working papers and are not recognized as officially a part of the order, nor a part of the official record of the Department's action in approving the order. Under the circumstances, it is concluded that they should not be made available for use outside the executive branch of the Government.

A part of the teletype in item 3 is related to an official view of the Department as to the wording of a recital of authority and an operative clause to be incor-

porated in power contracts executed pursuant to Order No. 2753. So much of the teletype as relates to these matters is reflected in the enclosed copy of an extract from that teletype. Also enclosed is a copy of the Department's reply to that teletype.

Sincerely yours,

D. OTIS BEASLEY,  
*Administrative Assistant, Secretary of the Interior.*

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., February 3, 1956.*

Hon. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

MY DEAR MR. CELLER: This is in reply to your letter of January 18 in which you state that staff members of the Antitrust Subcommittee are ready to examine certain files of the National Petroleum Council.

The Department is anxious to cooperate in every way possible with you in the study of the National Petroleum Council and will make available to the subcommittee all papers and documents of a character which have historically been furnished by the executive branch to the legislative branch. The files which you ask permission for members of your staff to examine contain papers that are not available to the legislative branch under a long-established policy in the executive branch. While the papers contain no information that we would be unwilling to make available to your subcommittee or others, we must honor the principle which has been followed from the beginning of our Government.

In addition, the files which you wish to have examined contain data made available to the National Petroleum Council with the distinct understanding that such data would be used by the Government only for the purpose of making a special study and that it would not be made available to any other party inasmuch as the data contained information that could possibly result in the loss of a competitive position by an individual company. The data were of a nature that the Government was not otherwise entitled to obtain and it would be inconsistent with the understanding under which the data were received to violate that understanding.

It is believed that the appointment files can be made available for examination by your staff and we will be glad to arrange the availability of such files when convenient to your staff. In regard to the other files identified in your letter, as already stated, we want to make them available to the fullest extent possible. Where they contain no papers or information falling within the scope of those which cannot be made available, we will gladly arrange for their examination by your staff. When the file does include papers or information not generally available, we will be pleased to arrange for the examination of all other papers and documents contained in the file.

It is hoped that in making requests upon the Department, the subcommittee will be specific as to the subject on which an examination of the files is desired.

Sincerely yours,

FRED G. AANDAHL,  
*Acting Secretary of the Interior.*

UNITED STATES DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., February 25, 1957.*

Hon. JOHN E. MOSS,  
*Chairman, Government Information Subcommittee,  
Committee on Government Operations,  
House of Representatives, Washington, D. C.*

DEAR MR. MOSS: When Mr. Stewart responded to the inquiry referred to in your letter of February 12 respecting information on companies importing Venezuelan crude oil, he had in mind title 18, United States Code, section 1905 and section 4 of the Federal Reports Act of 1942 (5 U. S. C. 139b). However, as your letter indicates, Mr. Stewart also said that such information was available from the published reports of the Texas Railroad Commission. The Office of

Oil and Gas is compiling the information from this source and will shortly submit it to the Committee on Interstate and Foreign Commerce.

Sincerely yours,

FRED G. AANDAHL,  
*Acting Secretary of the Interior.*

UNITED STATES DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D. C., April 4, 1957.

Hon. WAYNE MORSE,  
*United States Senate,  
Washington, D. C.*

DEAR SENATOR MORSE: Because I am deeply concerned with the numerous and complex problems in our domestic fisheries industry today, it was most gratifying to receive your letter of March 7 expressing your interest in the matter. I know you will agree with me that the advice and assistance of the American Fisheries Advisory Committee, if freely given and properly utilized, can be of real value to the United States Fish and Wildlife Service in seeking a solution to these problems.

I have given your request for the complete transcript of the first three meetings of the committee very serious consideration, and it is with reluctance indeed that I must advise you that I do not feel presently authorized to comply with it. At the first two meetings, only summary minutes were kept and these, you inform me, have been made available to you. At the third meeting on May 1 and 2 of last year, a verbatim transcript was prepared, and I would be pleased to make this available to you if I felt at liberty to do so. However, the summary minutes of the first meeting disclose that the committee members were assured that they might speak their minds freely and that their statements would not be disclosed. I am sure that you will agree that it would be, therefore, improper for me to release this transcript without first obtaining the consent of the individual members. While I feel reasonably certain that the committee would consent to the release of the transcript, I think the members should be given an opportunity to review it and edit or correct the remarks attributed to them. This, of course, would take a considerable amount of time as there were 15 members of the committee present at the 1956 meeting.

I wonder if it would be possible for me to provide you with the information you seek without imposing this added task upon the members of the committee. I assure you that any of the information contained in the transcript will be made available to you upon request and I or any of my representatives in the Department will be pleased to discuss this subject with you or with a member of your staff.

Sincerely yours,

ROSS LEFFLER,  
*Assistant Secretary of the Interior.*

UNITED STATES DEPARTMENT OF THE INTERIOR,  
BUREAU OF INDIAN AFFAIRS,  
Washington, D. C., April 18, 1957.

Hon. THOMAS C. HENNINGES, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGES: This is in response to your inquiry of April 2 concerning your committee's interest in the free flow of information to Congress and the public.

In answer to your first question we are glad to inform you that the Bureau of Indian Affairs has never at any time, insofar as we know, refused information to Congressmen or congressional committees.

Because of this, questions 2 and 3, of course, are not applicable to the Bureau. If we can provide you with further information we hope you will call on us.

Sincerely yours,

GLENN L. EMMONS, *Commissioner.*

**UNITED STATES DEPARTMENT OF THE INTERIOR,  
BUREAU OF MINES,  
Washington, D. C., April 5, 1957.**

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

**DEAR SENATOR HENNINGS:** A review of the record has been made in response to the questions presented in your letter of April 2.

According to the record and to our knowledge the Bureau of Mines has not refused information to Congressmen or congressional committees in any instance since May 17, 1954.

We shall be pleased to cooperate with your committee at any time.

Sincerely yours,

**MARLING J. ANKENY, Director.**

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**UNITED STATES DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D. C., May 16, 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 identical letters to the Attorney General and the Commissioner of Immigration and Naturalization dated April 2, 1957, requesting answers to three questions concerning the furnishing of information by the Department of Justice and the Immigration and Naturalization Service to Members of Congress and congressional committees.

Complete answers to the questions put by your letter were furnished in response to a questionnaire of the Special Committee on Government Information of the House Committee on Government Operations of the 84th Congress. A copy of the committee's print of November 1, 1955, entitled "Replies From Federal Agencies to Questionnaire Submitted by the Special Committee on Government Information of the Committee on Government Operations" is enclosed for your convenience. Answers to your particular questions are supplied at pages 310-314 and pages 316-317. I should also like to refer you to my letter of April 10, 1957, in reply to your letter dated March 13, 1957, which furnishes additional information on this subject.

The Department makes every effort to promptly supply information to individual Members of Congress and congressional committees consistent with the principles referred to above. There may have been instances in which we were unable to comply with a particular request, but the records of the Department are not maintained in such a way as to disclose any such instances.

Sincerely,

**WILLIAM P. ROGERS, Deputy Attorney General.**

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**DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, April 9, 1957.**

**Hon. THOMAS C. HENNINGS, Jr.,**  
*United States Senate, Washington, D. C.*

**MY DEAR SENATOR:** I refer to your letter of April 2, 1957, to the Chairman, Board of Immigration Appeals, seeking certain data in regard to refusal of information to Congressmen or congressional committees since May 17, 1954.

Your first inquiry is: How many times since May 17, 1954, has the Board of Immigration Appeals refused information to Congressmen or congressional committees? You are informed that there have been no such occasions. This being so, the other two questions are inapplicable.

Sincerely yours,

**WILLIAM P. ROGERS, Deputy Attorney General.**

UNITED STATES DEPARTMENT OF JUSTICE,  
BUREAU OF PRISONS,  
*Washington, April 5, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: This is in response to your letter of April 2, 1957, making certain inquiries for the Subcommittee on Constitutional Rights.

You request how many times since May 17, 1954, our agency has refused information to Congress or congressional committees. So far as I know, we have not declined during that time to furnish information to any Congressman or congressional committee calling upon us. As a matter of fact, I cannot recall when we have ever declined to furnish any data that was within our capacity to obtain or produce.

With kind personal regards,  
Sincerely yours,

JAMES V. BENNETT, *Director.*

UNITED STATES DEPARTMENT OF JUSTICE,  
UNITED STATES BOARD OF PAROLE,  
*Washington, April 4, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: This is to acknowledge your letter of April 2, 1957, in which you presented questions regarding the policy of the United States Board of Parole with respect to the provision of information to Members of Congress or congressional committees. We note that your letter is presented in connection with the work of the Subcommittee on Constitutional Rights of which you are chairman.

Speaking for the Members of the United States Board of Parole I can state that we know of no instance in which our Board has refused information to Members of Congress or congressional committees when requested to do so. To the contrary, it has been our policy to endeavor to provide requested information as promptly and factually as possible. Our intention is to continue that policy in the future.

Yours sincerely,

SCOVEL RICHARDSON,  
*Chairman.*

UNITED STATES DEPARTMENT OF LABOR,  
OFFICE OF THE SECRETARY,  
*Washington, April 18, 1957.*

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

DEAR SENATOR HENNINGS: This is in further reply to your recent letters concerning congressional requests for information.

A search has been made of the files of this Department back to May 17, 1954, the date mentioned in your letter. It failed to disclose any instance in which the Department has refused information to Congressmen or congressional committees. I might point out that the regulations of the Department require that congressional requests for copies of union organizational statements and financial reports filed pursuant to sections 9 (f) and (g) of the Labor Management Relations Act be made through the chairmen of the respective Labor Committees. This requirement is based on the congressional intent in this regard as clearly shown by the legislative history of these sections. There have been a few occasions on which Members of Congress, after making inquiry concerning these reports, have been advised of this requirement.

Sincerely yours,

JAMES T. O'CONNELL,  
*Acting Secretary of Labor.*

DEPARTMENT OF STATE,  
Washington, April 26, 1957.

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

DEAR SENATOR HENNINGS: Secretary Dulles has asked me to reply to your letter of April 2 concerning the availability of information to congressional committees.

As you know, it is the policy of the Department to cooperate with the Members and committees of Congress by providing the information they require. This policy finds expression in many formal appearances of officers of the Department before committees of Congress, as well as in numerous informal contacts with individual Congressmen. In addition, daily correspondence is carried on and many detailed reports and memorandums are provided to the various committees of Congress.

The Department's policies and practices regarding the provision of information and documents to congressional committees are more fully described in its response to a questionnaire submitted by the Government Information Subcommittee of the House Government Operations Committee. The Department's answers to this questionnaire are on pages 458-480 of the report of the House committee dated November 1, 1955.

As is indicated in the above report of the House Government Operations Committee, the Department does not maintain a special record of specific instances in which information has not been provided on request to congressional committees. While I cannot, therefore, provide a detailed and exhaustive reply to your specific questions, certain recent cases come to mind in which the Department has not been in a position to provide to congressional committees materials which have been requested. With the thought that it might be useful to your subcommittee, I have set forth below some cases, drawn from the memories of officers presently in the Department, which are illustrative of the problems involved.

In 1955, the Department considered that it would be improper to accede to a congressional request for certain informal field notes, consisting of the personal opinions and comments of members of the Department and the Foreign Service, which were compiled by a management consulting firm in preparing a management survey report. Since these employees had been assured that the privacy of their comments would be respected, the Department took the position that the notes should not be examined by anyone other than those who prepared the survey.

In another case in 1955, the Department declined to provide records of conversations between employees of the executive branch regarding the qualifications of Mr. Noel Field for a particular position. It was considered that employees of the executive branch would not be able to consult with one another candidly on such matters unless they could have some assurance that their conversations or communications would not be disclosed to others.

Also in 1955, on the ground that personnel investigative reports may not be disseminated beyond the executive branch, the Department refused to provide to a congressional committee the personnel and security files of Mr. Wolf Ladejinsky.

In the same year, the Department declined to comply with a request for copies of agreements between the oil companies participating in the Iranian Consortium as well as copies of arrangements ancillary to the Consortium agreement with Iran. The United States was not a party to these agreements or arrangements and there were strong objections on the part of other friendly foreign governments to their disclosure. It was determined that disclosure would be contrary to the interest of the United States since it would affect adversely United States foreign relations.

In 1956, the Department declined to reveal publicly the international list for East-West trade controls negotiated on a voluntary basis by the United States and various friendly nations. Disclosure of the list would have constituted a breach of trust on the part of the United States and, by jeopardizing the voluntary basis on which the program rests, might have endangered our national security. The Department did offer to provide the list on a classified basis and to discuss revisions in executive session, but refused to provide the information in public session. The Department also declined to provide to the subcommittee internal memorandums and records of discussion regarding the international

list or information regarding the positions adopted by other governments with respect to the list.

I hope the above information will be of assistance to you and the other members of the Subcommittee on Constitutional Rights.

Sincerely yours,

ROBERT C. HILL, Assistant Secretary.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY,  
*Washington, D. C., April 4, 1957.*

Hon. THOMAS C. HENNINGS, Jr.

*United States Senate,  
Washington, D. C.*

DEAR SENATOR HENNINGS: At no time since May 17, 1954, has our Agency refused information to Congressmen or congressional committees.

I trust this is the information you require.

Sincerely yours,

JOHN A. REMON, Chairman.

EXECUTIVE OFFICE OF THE PRESIDENT,  
BUREAU OF THE BUDGET,  
*Washington, D. C., May 8, 1957.*

Hon. THOMAS C. HENNINGS, Jr.

*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary,  
United States Senate, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in answer to your inquiry of April 2, 1957, about refusals by the Bureau of the Budget of requests for information from Congressmen or congressional committees since May 17, 1954.

Two instances of this kind have occurred, which are covered in the letters of the then Director of the Bureau of the Budget to the chairman of the Internal Security Subcommittee of the Senate Committee of the Judiciary, dated July 13, 1954, and March 3, 1955, respectively.

A third instance of this kind occurred when the then Director of the Bureau informed the Subcommittee on Antimonopoly of the Senate Committee on the Judiciary by letter of June 28, 1955, that, after discussion with the President, he was declining to furnish certain records of the Bureau regarding a contract with the Mississippi Valley Generating Co. However, the requested information was supplied at hearings held by the subcommittee later in the same year.

Under paragraphs 3 and 4 of the Bureau of the Budget Circular No. A-10, issued by direction of the President, all executive agencies are required to keep in confidence matters involving the President's decisions in preparation of the budget, pending formal transmission of the budget to the Congress by the President. Although information on such matters is requested occasionally by Members of Congress prior to the transmittal of the budget document, no record is kept of such requests and they are usually answered by reference to the provisions of the circular. A copy of the circular is attached.

We trust that this is the information which your subcommittee desires.

Sincerely yours,

ROBERT E. MERRIAM, Assistant Director.

(The Bureau of the Budget circular referred to is as follows:)

EXECUTIVE OFFICE OF THE PRESIDENT,  
BUREAU OF THE BUDGET,  
*Washington, D. C., April 15, 1954.*

CIRCULAR NO. A-10—REVISED

*To the Heads of Executive Departments and Establishments.*

Subject: Responsibilities with respect to the budget.

1. *Purpose.* This circular brings up to date Budget Circular No. A-10, dated August 1, 1943, and restates for the guidance of the executive branch certain responsibilities with respect to the executive budget.

2. *Responsibility of the President.* The Budget and Accounting Act provides that there shall be presented to Congress for its consideration and action an

executive budget for which the President is responsible. The budget represents the judgment of the President with respect to the financial requirements for all parts of the Government except the legislative branch and the judiciary.

3. *Restrictions on disclosure of agency estimates.* All budget estimates and supporting materials submitted to the Bureau of the Budget are privileged communications. Their confidential nature must be maintained, since they are the basic data and worksheets in the process by which the President resolves budget problems and arrives at conclusions with respect to his recommendations to the Congress. The head of each agency is responsible for preventing disclosure of such information except on request in formal appropriation hearings and when requested by Members of the Congress in connection with their consideration of the budget after its transmittal.

4. *Restrictions on premature disclosure of Presidential recommendations.* The decisions of the President as to his budget recommendations and estimates are administratively confidential until made public through formal transmittal of the budget to the Congress. The head of each agency is responsible for preventing premature disclosure of such information. This rule does not apply, however, to the presentation of data on the President's budget to the Appropriations Committees, pursuant to arrangements made in specific instances by the Bureau of the Budget, in connection with formal hearings on the budget prior to the actual transmittal of the recommendations of the President.

5. *Agency letters and testimony on proposed appropriations.* The Budget and Accounting Act of 1921 provides in part that:

"No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request \* \* \* shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress" (31 U. S. C. 15).

The 1948 revision of Title 18 of the United States Code provides that:

"No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, *through the proper official channels*, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business." (18 U. S. C. 1913, emphasis supplied. This section also provides penalties for its violation or attempted violation.)

In answering questions about appropriations and budgetary matters care must be taken to avoid conflict with the terms of the Acts mentioned above.

6. *Applicability to appropriation language and limitations.* The provisions of this Circular are applicable not only to the amount of each appropriation, but to the language of the appropriation estimate and to any limitations contained within it. If an agency desires to propose changes in appropriation language or limitations recommended by the President, such proposals are to be presented to the Bureau of the Budget for appropriate clearance.

7. *Reduction in estimates prior to enactment of appropriations.* Whenever it is found possible to reduce a request for appropriations before action thereon has been taken by either Appropriations Committee, the head of the agency concerned shall promptly inform the Bureau of the Budget.

8. *Reductions made in appropriation bills.* The final authority for appropriations rest with the Congress. Its action is based on extended hearings and recommendations by the Appropriations Committees and is taken only after consideration by each body as a whole. Any decision by an agency head to request restoration of a reduction should be carefully considered, taking into account the reasons for the reduction, the circumstances under which it was made, its significance from the standpoint of the President's program, and other factors which may be relevant.

9. *Control of expenditures.* The processing and implementation of the budget falls under the terms of the Budget and Accounting Act, 1921, as amended (31 U. S. C. 1-24), and of the Antideficiency Act (section 3679 of the Revised Statutes, as amended). The requirements of these Acts should be familiar to all departmental and agency officials whose duties are related to budget preparation, submission, and implementation.

Particular attention is directed to the report of the House Committee on Appropriations on the General Appropriation Bill of 1951 (House Report 1797, 81st Congress) which contains the reenactment of the Antideficiency Act and indicates the intent of the Congress. This report states, in part:

"Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity. The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for rendering all necessary service with the smallest amount possible within the ceiling figure fixed by the Congress. Every official of the Government who has responsibility for administration of a program \* \* \* [has] responsibility to so control and administer the activities under his jurisdiction as to expend as little as possible under the funds appropriated."

By direction of the President:

JOSEPH M. DODGE, Director.

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF DEFENSE MOBILIZATION,  
*Washington, D. C., April 10, 1957.*

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

DEAR SENATOR HENNINGS: This will reply to your letter of April 2 concerning Congressional requests for information from the Office of Defense Mobilization.

This agency has consistently made every effort to meet all requests for information from individual Congressmen as well as from the committees. I know of only 1 general area in which we have not responded to requests by individual Congressmen for information and of only 3 specific cases in which we were unable to comply with a committee request.

In carrying out the responsibilities assigned to us under section 168 of the Internal Revenue Code we are authorized to approve for income-tax purposes the rapid amortization of the cost of new or expanded facilities which we find to be necessary to the national defense. In order to evaluate the defense necessity of such facilities it is, of course, necessary to acquire considerable detailed information concerning productive capacity, contractual relationships and other matters affecting the business operations of the concern. Our application forms necessarily require submission to the Government of this kind of information, most of which by its very nature would not be otherwise publicly released by the owner of the facility. Because of this it has been our unvarying policy to treat the information contained in those applications as "business confidential." We have consistently refused to divulge their contents to private parties and to other Government agencies. Congressional committees, of course, are given ready access to them in connection with their investigations, but requests from individual Congressmen not engaged in committee work have been denied on a number of occasions. It is my understanding that the necessity for the policy has been uniformly appreciated by the Congress.

Two of the specific cases arose from requests from the Military Operations Subcommittee of the House Committee on Government Operations for copies of the official proclamations used in Operation Alert 1956. Our reply of July 27, 1956, pointed out that in addition to having a security classification of "Secret" the documents represented experimental planning on the part of the President and his advisers which did not reflect any firm conclusions on the part of the Government and that the release of such documents could cause serious misunderstandings both here and abroad. Our letter of December 26, 1956, on the second request for those documents reaffirmed our earlier position and pointed out that because the proclamations used during Operation Alert 1956 no longer reflected current thinking in many details the possibility of misunderstanding would be even greater than in July.

The third case involved a request from a Senator for copies of a task force report to the Presidential Advisory Committee on Energy Supplies and Resources Policy. Our letter of March 28, 1955, pointed out that the report was a part of the working papers of a Cabinet level group and, as such, fell within the category of privileged staff communications and advice. For this reason, under

the principles enunciated by the President in his letter of May 17, 1954, to Secretary of Defense Wilson, we could not accede to the Senator's request for copies of that report.

In the few instances referred to above, it has not been possible to provide the information sought, but we believe that we have responded fully to all requests for information from the Congress or its members whenever it has been possible for us to do so. This policy will continue. Please call on me if I can be of further assistance.

Sincerely yours,

GORDON GRAY, Director.

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**EXECUTIVE OFFICE OF THE PRESIDENT,  
PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT ORGANIZATION,  
Washington, D. C., April 11, 1957.**

Hon. THOMAS C. HENNINGS, Jr.

*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in reply to your letter of April 2, 1957, inquiring as to the number of times this committee has refused information to Congressmen or congressional committees.

As far as I know, since this committee was established on January 24, 1953, it has never had occasion to refuse information to Congressmen or congressional committees.

Sincerely,

NELSON A. ROCKEFELLER, *Chairman.*

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**EXPORT-IMPORT BANK OF WASHINGTON,  
Washington, D. C., April 5, 1957.**

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,*

*Committee on the Judiciary, House of Representatives.*

DEAR MR. CHAIRMAN: In response to your letter of April 2 you are advised that the Export-Import Bank of Washington has never refused to give information to a Member of Congress or a congressional committee.

Under the Export-Import Bank Act of 1945, as amended, this institution is required to report to the Congress semiannually. Such reports have been submitted regularly since the passage of the act and they have contained the details of all business transacted by the bank.

In addition to submission of semiannual reports the officers of the bank appear regularly before the Appropriation Committees of both Houses and also have appeared frequently during the past 11 years before the Banking and Currency Committees of both Houses with reference to proposed amendments to the Export-Import Bank Act under consideration before those committees.

Very sincerely,

SAMUEL C. WAUGH, *President.*

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**FARM CREDIT ADMINISTRATION,  
Washington, D. C., April 10, 1957.**

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,*

*Committee on the Judiciary, United States Senate.*

DEAR CHAIRMAN HENNINGS: This is in answer to your letter of April 2, 1957, as to how many times since May 17, 1954, the Farm Credit Administration may have refused information to Congressmen or congressional committee. I am glad to report that there have been no such occasions.

Very truly yours,

R. B. TOOTELL, *Governor.*

FEDERAL CIVIL DEFENSE ADMINISTRATION,  
Washington, D. C., April 29, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in reply to the questions submitted by the subcommittee relative to the free flow of information to the Congress and the public from a constitutional point of view.

The responses of the Federal Civil Defense Administration to the questions of the subcommittee are as follows:

Question: 1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?

Answer: No Member of Congress has been refused a request for information since May 17, 1954. On March 6, 1957, specific information relative to the shelter proposals of this administration under consideration in the executive branch of the Government was withheld from the Subcommittee on Military Operations of the House Government Operations Committee.

Question: 2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?

Answer: The chairman of the Subcommittee on Military Operations, of the House Committee on Government Operations, requested the shelter studies and proposals of FCDA in a letter dated February 27, 1957, in connection with hearings which the subcommittee had held on the reorganization of civil defense in the Federal Government. Th chairman of the subcommittee was advised by the Federal Civil Defense Administrator, in a letter dated March 6, that the Administrator was without authority to furnish the requested material.

Question: 3. On what basis was the information withheld, in each instance?

Answer: The information was withheld from the subcommittee on the basis that the Administrator was without authority to transmit at the time of the request the specific shelter proposals under consideration in the executive branch of the Government.

The foregoing is the only instance in which information has been withheld from a Member of Congress or a congressional committee.

Sincerely,

VAL PETERSON.

FEDERAL COAL MINE SAFETY BOARD OF REVIEW,  
Washington, D. C., April 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Subcommittee on Constitutional Rights, Committee on the Judiciary,  
United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: This will acknowledge your letter of April 2, 1957, addressed to Chairman Steidle. Our answers to the questions contained in your letter are as follows:

1. None.
2. In view of answer 1 no reply is necessary.
3. In view of answer 1 no reply is necessary.

Sincerely yours,

TROY L. BACK, Executive Secretary.

FEDERAL COMMUNICATIONS COMMISSION,  
Washington, D. C., August 1, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in further response to your letter of April 2, 1957, requesting information as to the number of times, if any, since May 17, 1954, that the Commission has refused information to Congressmen or congressional committees, the circumstances surrounding any such withholding of information, and the basis on which information was withheld. By its letter of April 29, 1957, the Commission indicated that it would need additional time to prepare its answer to these questions, inasmuch as the pertinent data bearing on these questions was not readily available.

Insofar as we have been able to determine, the Commission has at no time since May 17, 1954, unqualifiedly refused to furnish information to Congressmen or congressional committees, except in adjudicatory cases. Our answer on this point requires clarification.

First of all, there have been occasions where Congressmen or congressional committees have requested information regarding adjudicatory matters which were still pending before the Commission. In such cases the Commission has been willing to supply information as to the procedural stage to which such a proceeding had progressed (e. g., whether it was awaiting hearing, issuance of an initial decision, a final decision, or a decision on a petition for rehearing). However, we have refused to discuss the merits of such a pending case until such time as the proceeding has been finally disposed of on its merits. Our ground for refusing to supply information regarding the merits of such cases was that it would have been improper for us, in the exercise of our quasi-judicial functions, to discuss the merits of a pending adjudicatory proceeding, just as, by analogy, it would be improper for a court to discuss the merits of a proceeding pending before it. See also *Morgan v. United States* (313 U. S. 409, 422), wherein the Supreme Court indicated that just as the mental processes of a judge could not be examined, for the reason that such examination would be destructive of judicial responsibility, " \* \* \* so the integrity of the administrative process must be equally respected."

Second, with respect to matters other than pending adjudicatory cases, in one instance since May 17, 1954, the Commission temporarily deferred action on a request by the Senate Committee on Interstate and Foreign Commerce for certain information concerning the finances and network affiliations of individual television broadcast stations and networks. In view of the provisions of section 1905 of title 18, United States Code, the Commission, with approval of the chairman of the Senate committee, requested an opinion from the Attorney General as to the authority of the Commission to furnish the information requested. Upon receipt of the Attorney General's opinion, contained in a letter to the President, dated June 15, 1955, the Commission wrote a letter, dated July 17, 1955, to the chairman of the Senate committee setting forth the Commission's views with respect to furnishing this information. The information requested by the Senate committee was then made available to that congressional committee.

The basis for temporary deferral of supplying the information sought by Congress in that particular instance was the Commission's legitimate doubt (in light of the provisions of 18 U. S. C., sec. 1905) as to its legal power to make a disclosure of the information sought by the Senate committee.

As already stated, as far as we have been able to determine, this is the only instance in which information has been temporarily withheld from a congressional committee on a ground other than pendency of an adjudicatory proceeding.

As to the number of instances in which we have deferred supplying information because the merits of pending adjudicatory cases were involved, unfortunately, our files do not reflect such requests for information. Therefore, we do not have any count of the number of cases in which we have temporarily withheld information on this ground.

We hope this information has proved helpful to your subcommittee, and if we can be of any further assistance, please do not hesitate to write.

By direction of the commission:

JOHN C. DOERFER, Chairman.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
Washington, D. C., April 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.

MY DEAR SENATOR: In your letter of April 2, you inquire, as chairman of the Subcommittee on Constitutional Rights, concerning the continued free flow of information from the Corporation to Congress and to the public.

It has been the policy of the Corporation to provide Members of Congress and congressional committees with access to information concerning the functional operation of the Corporation and its fiscal policies, and to furnish detailed information concerning the records and data regarding closed banks. However, in reference to records pertaining to open banks, and particularly reports of investigation and reports of examination, it is necessary that the information from these sources remain confidential and privileged, in order for the Corporation to properly discharge its supervisory functions and to prohibit the disclosure of facts concerning customers of operating banks.

However, to the extent that the Corporation can make limited disclosures of information that will be of proper assistance to congressional committees and to individual Members of Congress, we have attempted to cooperate in making such data available. Within the period from May 17, 1954, mentioned in your letter, all requests for information have, in our opinion, been fully satisfied within the foregoing restrictions, and in a manner satisfactory both to the person making the request and to the Corporation.

With personal regards, I am

Sincerely yours,

H. E. COOK, *Chairman.*

FEDERAL HOME LOAN BANK BOARD,  
Washington, D. C., April 4, 1957.

Hon. T. C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Thank you for your letter of April 2 making inquiry concerning the free flow of information to the Congress and to the public.

We are pleased to report that a thorough search of our records and information provided by members of the staff who would have knowledge of such action, fails to disclose any instance since May 17, 1954, wherein the Federal Home Loan Bank Board refused information to any Congressman or congressional committee.

We trust that this is the information you desire. If we can be of further assistance do not hesitate to let us know, and we send you our best wishes.

Sincerely,

ALBERT J. ROBERTSON, *Chairman.*

FEDERAL MEDIATION AND CONCILIATION SERVICE,  
Washington, D. C., April 5, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
Committee on the Judiciary,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This will acknowledge your letter of April 2, inquiring as to whether this agency has withheld any information from Congressmen or congressional committees since May 17, 1954.

To my knowledge, this agency has never refused to comply with any requests for information from Members of the Congress or congressional committees. I can assure you that we desire at all times to cooperate with the Congress to the greatest extent possible, and any time that we can furnish you, or other Members of the Congress information as to our operations, we are very pleased to do so.

Sincerely,

JOSEPH F. FINNEGAN, *Director.*

FEDERAL POWER COMMISSION,  
Washington, April 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in response to your letter of April 2, 1957, inquiring as to how many times since May 17, 1954, this Commission has refused information to Congressmen or congressional committees.

The answer to your inquiry is that no requests of Congressmen or congressional committees for information have been refused by this commission.

Sincerely yours,

JEROME K. KUYKENDALL, *Chairman.*

BOARD OF GOVERNORS,  
OF THE FEDERAL RESERVE SYSTEM,  
*Washington, April 19, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in reply to your letter of April 2 inquiring whether there had been any instances since May 17, 1954, when the Board of Governors of the Federal Reserve System has refused information to Congressmen or to congressional committees.

The Board is not aware of any occasions during the period indicated by your letter where requested information has not been made available to Congressmen or congressional committees. In the interest of completeness, however, reference is made to the following instances which are borderline cases but which the Board regards as falling outside the scope of your inquiry.

In June 1955 the Board advised the Comptroller General that in the light of the provisions of section 10 of the Federal Reserve Act, the Budget and Accounting Act of 1921, and the legislative history of these and related statutes, the Board could not in the absence of an express directive from Congress lawfully acquiesce in a separate audit to be made by the Comptroller General pursuant to a request made to him by the House Committee on Government Operations. The Board stated, however, that it stands ready at all times to make reports of audits of its operations, as well as the reports of examinations of the Federal Reserve banks and audits of the Federal open market account, available to appropriate committees of the Congress.

Also, in June 1954 the Board had certain discussions and correspondence with Members of Congress with regard to the furnishing of reports of examination of the Federal Reserve banks and the report of audit of the Board's accounts. On June 14, 1954, the reports of examination of the 12 Federal Reserve banks for each of the years 1949 through 1953 were furnished to the House Committee on Banking and Currency, where they were available in confidence to Members of the Congress and the staff of that committee. The report of audit of the Board's accounts for 1953 had been previously furnished to that committee.

Finally, in August 1956 a staff member of the House Committee on Government Operations' Legal and Monetary Affairs Subcommittee requested information on gold held under earmark for foreign and international accounts at the Federal Reserve banks. Information requested was provided in totals, but the names of individual holders of earmarked gold and the amount held on individual accounts were not provided on the grounds that the System was not at liberty to reveal figures relating to individual accounts at Federal Reserve banks. The subcommittee appeared satisfied with this reply, and the chairman of the subcommittee, in a subsequent letter, expressed appreciation for the "responsive letter" and requested further information on other subjects without pressing the request for information on individual accounts.

It is the policy and practice of the Board of Governors to make available as far as possible information regarding the Board's activities requested by individual Congressmen and congressional committees.

Sincerely yours,

W.M. McC. MARTIN, Jr.

FEDERAL TRADE COMMISSION,  
*Washington, April 9, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR CHAIRMAN HENNINGS: Your letter of April 2 to Chairman Gwynne has been referred to me in his absence.

The Commission has adopted the policy of furnishing full and complete information in response to all congressional inquiries. This policy has been consistently followed so far as we can determine without exception since May 17, 1954.

Sincerely yours,

ROBERT T. SECREST,  
*Acting Chairman.*

FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES,  
*Washington, D. C., April 17, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate.*

DEAR SENATOR HENNINGS: We have your letter of April 2, 1957, concerning the availability of information to Congressmen and committees. Within my recollection the only declinations that have occurred are under one of two circumstances:

1. Requests for statistics immediately unavailable. I believe such requests have always been worked out by mutual agreement.

2. Requests for confidential information. We sometimes have information classified by other agencies for security purposes which we are prohibited by law to reveal. We presume your questions would then apply to such other agencies rather than to us. We have no authority to make such classifications ourselves and have therefore never refused information on that ground. Again we sometimes have information from claimants of such a nature that we are constrained to regard it as confidential. In such cases unless already indicated we request that the consent of claimants be obtained before revealing it. To the best of my knowledge all such requests have been satisfactorily worked out.

Subject to the foregoing the answer to each of your questions would be "none." It is our desire to cooperate with you and your committee in every particular and if the foregoing comments are in any degree inadequate by all means let us know.

Sincerely yours,

WHITNEY GILLILAND, *Chairman.*

GENERAL SERVICES ADMINISTRATION,  
*Washington, April 12, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judi-  
ciary, United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This is in further reference to your letter of April 2, 1957, in which you inquire how many times since May 17, 1954, this agency has refused information to Congressmen and congressional committees.

To the best of my knowledge, the only information refused during this period concerned certain documents that were secured by General Services Administration from Frederick Snare Corp. and Randall Cremer, vice president of that corporation. These documents were covered by a subpoena issued early in 1956 by the Special Activities Subcommittee, Committee on Government Operations, House of Representatives, Hon. Jack Brooks, chairman, and directed to our then Director of Compliance. They were also requested by the Honorable Paul Brown, chairman of the Joint Committee on Defense Production.

GSA declined to produce or furnish the documents because this material had been turned over to the Department of Justice and matters relating thereto were then under active investigation by that Department.

Sincerely yours,

FRANKLIN G. FLOETE, *Administrator.*

HOUSING AND HOME FINANCE AGENCY,  
*Washington, D. C., May 1, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judi-  
ciary, United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This will supplement my acknowledgment of April 15, responding to the letter of April 2 in which you requested answers to the following questions:

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?
2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?

3. On what basis was the information withheld, in each instance?

In checking the records of the entire Housing and Home Finance Agency, including the Office of the Administrator, Federal Housing Administration, Public Housing Administration, Federal National Mortgage Association, Community Facilities Administration, Urban Renewal Administration, and Federal Flood Indemnity Administration, we have been able to find only one instance in which information was refused a Congressman or congressional committee.

This instance arose in 1955 when a Congressman introduced a relief bill for damages allegedly occasioned by certain housing project contracts and requested material from our files regarding the matter. Inasmuch as there was pending in the Court of Claims a lawsuit seeking judicially the same relief as that covered by the bill, we advised the Congressman on March 28, 1956, and April 12, 1956, that, since the litigation was under the jurisdiction of the Department of Justice, it would appear inappropriate for us to respond to his questions.

Generally, it is the policy and practice of this Agency to respond to all congressional requests for information to the fullest extent, and this has been expressed in various correspondence, particularly with the House Committee on Government Operations.

If you should desire any further information along these lines, please let me know.

Sincerely yours,

WALKER MASON,  
*Acting Administrator.*

INDIAN CLAIMS COMMISSION,  
*Washington, D. C., April 4, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In the absence of the Chief Commissioner, I acknowledge receipt of your letter of April 2, 1957, inquiring whether, since May 17, 1954, this Commission has refused information to Congressmen or congressional committees.

I am glad to say that this Commission has not, since the date stated or at any time, refused information to Congressmen or congressional committees.

Sincerely yours,

LOUIS J. O'MARR,  
*Acting Chief Commissioner.*

INTERNATIONAL COOPERATION ADMINISTRATION,  
OFFICE OF THE DIRECTOR,  
*Washington, D. C., May 16, 1957.*

HON. THOMAS C. HENNINGS, JR.,

**I. THOMAS C. HENNINGES, JR.,**  
*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

**DEAR MR. CHAIRMAN:** This is in further reply to your letter of April 2, 1957, requesting certain information on the availability of information from this agency to congressional committees.

The basic policy of ICA is to provide Congress as full and complete information on the mutual security program as is possible. As is more fully brought out in our answer to the questionnaire submitted by the Government Information Subcommittee of the House Government Operations Committee (see pp. 287-301 of the committee compilation of agency replies dated November 1, 1955), in addition to responding to individual inquiries on various subjects, we are almost continuously before several congressional committees during each session of Congress explaining in great detail the full range of our activities.

The questionnaire of the Government Information Subcommittee sets forth, beginning at page 296 (attachment A), the two instances where information requested by Congressmen or congressional committees was withheld by the Foreign Operations Administration between the dates of May 17, 1954, and July 1, 1955.

On July 1, 1955, the International Cooperation Administration was formed and I was appointed Director. There has been only one occasion since that date where I have been unable to accede to a request from a committee of the Congress for certain information. This was in February 1956, when I did not com-

ply with the request of the Senate Permanent Subcommittee on Investigations for certain internal documents prepared by an interagency working group making recommendations to their superiors for the removal of various items from International Export Control. I attach hereto a copy of my statement to the subcommittee explaining the reasons for this action, which goes fully into the nature of the request and the detailed basis for my decision (attachment B).

The only other circumstance that I can recall during the period in question of possible relevance to your inquiry was the verbal request by a member of the staff of the Subcommittee on International Operations in January 1957 for the report of our Internal Audit Staff on Operations in Iran. It was my initial decision not to accede to this request on the ground that the document was an internal subordinate staff recommendation to superior officers, the revelation of which to others would in the future jeopardize the anonymity of the authors and objectivity of their reporting. Nevertheless, after conversations with the chairman of the subcommittee, I released the document in question to the committee notwithstanding my misgivings.

I hope that the above information will be of assistance to your subcommittee.

Yours very sincerely,

JOHN B. HOLLISTER.

(Following is the material submitted by Mr. Hollister to the Constitutional Rights Subcommittee :)

A. Excerpts from replies from Federal agencies to questionnaire submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations.

November 1, 1955.

Page 296:

\* \* \* \* \*

3. How many instances have there been between July 1, 1954, and July 1, 1955, of refusal of information by your agency to—

(a) Individual Congressmen on request?

Answer. We know of one instance only. The director of the agency declined to answer questions put by Congressman Williams of New Jersey as to the political affiliations of appointees within the agency. He subsequently gave his reasons for this action in testimony before the House Foreign Affairs Committee of which Mr. Williams is a member (hearings, Mutual Security Act 1955, p. 96, et seq.).

(b) Congressional committees on request? (c) Congressional committees upon subpoena?

Answer. (1) Request of Permanent Subcommittee on Investigations in March 1955 on 8 categories of information was refused on 3 of these categories. These were (a) Revised Battle Act lists which had been supplied to the six congressional committees named in the Battle Act; (b) information on illegal East-West trade, which included privileged inter-governmental communications, and information from several Government agencies acting in coordination under this program (cases properly cleared for disclosure were declassified and published in Battle Act reports to Congress); (c) Economic Defense Advisory Committee document interpreting National Security Council policy on East-West trade.

(2) In the spring of this year during the course of an investigation by the Senate permanent subcommittee as to the Pakistan grain-storage project, a disagreement arose between the agency and the subcommittee as to documents to be made available to the subcommittee during the course of public hearings. The agency had previously permitted the subcommittee investigator to review the internal files of the agency on this matter after assurance of the chairman of the subcommittee that the investigator was cleared for security, and upon agreement that the files would remain in the possession of the agency during this review. A request by the subcommittee staff for copies of certain documents in these files was refused.

Later, when the director of the agency reviewed the question with the subcommittee chairman, 16 of the 20 documents requested were made available. Of the remaining 4, 2 were supplied after deletions as to confidential sources were made, and 2 after they were shown to the chairman of the subcommittee and with his agreement, withheld from the public use because of the confidential information contained therein.

(3) In one instance, a Senate Foreign Relations Subcommittee staff member asked whether the agency would make available, if requested, the evaluation

reports prepared by teams composed of private citizens. He was advised that because the private citizens had been urged to state their views frankly in a confidential advisory capacity, it would not be proper to transmit them outside the executive branch. No committee request was received.

4. Please outline the instances listed in question 3 where the information was refused on the basis of the doctrine of executive communications.

Answer. On the requests for information on East-West trade, item (c) listed above in the answer to question 3(b) and (c) was withheld on the basis of the Presidential directive of May 17, 1954, on executive communications.

As to the requests for documents regarding the Pakistan grain-storage investigation, no information was withheld. The question involved there related to the public use of information contained in the documents requested.

\* \* \* \* \*

B. STATEMENT OF MR. JOHN B. HOLLISTER, DIRECTOR, INTERNATIONAL COOPERATION ADMINISTRATION, BEFORE SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, FEBRUARY 20, 1956

After full consideration I am sorry to say that I cannot accede to the subcommittee's request, and I hope that you will permit me to give my reasons.

The question of control of trade with the Communist bloc is a complicated one and is, as you know, one of great sensitivity as explained to you by Under-Secretary of State Hoover in executive session on February 14. The pressures to increase trade brought to bear by some of the countries with which we work in the control field is great, and it is obvious that there cannot be disclosed publicly the sources of a good deal of the information which affects the decision as to items which should be under control, nor all the reasons for finally making many of these decisions.

Aside, however, from the question of sensitivity which may affect our foreign relations and may also affect the accomplishment of the desired goals, there is presented in the request which your subcommittee has made the familiar question of the extent to which a legislative investigating body can inquire, without the consent of an executive, into the advisory processes on which an executive bases the decisions which he makes in the course of the performance of his duties.

May I summarize the machinery in operation when the controls were eliminated or downgraded during the summer of 1954, the period in which you are interested. There was in existence a so-called international list divided into three categories: (1) Items embargoed; (2) items under quantitative control; and (3) items under surveillance. These categories were generally observed by the other nations with whom we were in agreement. In cooperation with some of these other nations negotiations to review this list were carried on for some months beginning early in 1954 and culminating in a meeting in Paris in August 1954 of the so-called consultative group which establishes the international list. The final end result was the removal of certain items from the different lists or perhaps downgrading from one category to another.

International trade control is a matter of foreign relations and the negotiations relating to such control are the responsibility of the Department of State. However, the National Security Council has charged the Secretary of State and the Battle Act administrator with the responsibility for coordinating the country's economic defense program, which involves trade controls. In the spring and summer of 1954, Harold A. Stassen was Battle Act administrator, the position I now hold; Adm. W. S. DeLany was Governor Stassen's Deputy for Mutual Defense Assistance Control, a position he still holds.

The Economic Defense Advisory Committee (EDAC) was and still is an inter-agency committee of experts set up in 1952 as the coordinating and advisory organization to assist the Secretary of State and the Battle Act administrator in fulfilling their responsibilities in the economic defense field. Admiral DeLany is the Chairman of EDAC.

The Advisory Committee on Export Policy (ACEP) is a committee of experts of the Department of Commerce which advises the Secretary of Commerce as to his duties with respect to export controls.

The Joint Operating Committee, or JOC, on which there were representatives of the Departments of State, Defense, and Commerce and the Foreign Operations Administration, was a working group set up in January 1954 to service both the

EDAC and the ACEP.. It studied problems referred to it and recommended action.

At the beginning of the negotiations leading up to the list changes of 1954, which negotiations lasted for several months, a large amount of intensive study was made by the JOC of the items on the international list. After receiving, reviewing, and reconciling where possible the views of the different departments as presented by their respective members, the JOC made certain recommendations for removal of various items from controls. The list made up from these recommendations constituted the base from which the United States negotiators worked. I understand that it is this list which I have been requested to submit.

This list was the most important advisory information available to those in charge of the negotiations, but, of course, did not constitute all the factors which the negotiators were impelled to consider in reaching the final conclusions as to changes in the international list. It is not to be expected that every United States initial position will prevail in trade negotiations. The United States negotiators keep the Government advised of the positions of other countries, facts leading to reasons why the United States position will not prevail, reasons why concessions should be made, and similar matters. As negotiations proceeded, EDAC and JOC were requested to review new facts, reconsider the United States position in the light of these facts, and redetermine the United States position.

It is obvious that the subordinates of an executive must be free to advise their superior without being subject to questioning on the subject matter of the advice, otherwise there would be a natural reluctance on the part of an advisor to give his unbiased views to which his superior is entitled. The recommendations of the JOC are definitely in this category. It was the best advice which the group of experts were able to give to their superior in the area in which they operated. It would seem improper to force the disclosure of their joint conclusions or those of any of them individually.

I have been explaining the part which the JOC took in the negotiations leading up to the 1954 changes in the international list. As far as I am concerned, this is hearsay. Governor Stassen was the Director of the Foreign Operations Administration and was active in these negotiations. You have asked me for the reason why certain actions were taken by the negotiators. This is, of course, something on which I could not possibly testify. I would assume that the reasons for any such action should be the subject of questioning of those who had the responsibility for making the final decision and for taking the action under investigation.

INTERNATIONAL COOPERATION ADMINISTRATION,  
ADVISORY COMMITTEE ON VOLUNTARY FOREIGN AID,  
*Washington, D. C., May 8, 1957.*

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

DEAR MR. CHAIRMAN: Further reference is made to your letter of April 2, 1957, asking whether this committee has refused information requested by the Congress.

As you know, our committee, its function and staff, have been an integral part of ICA since July 1, 1953. Previous to that, we were attached to the Department of State. I am pleased to inform you that since the inception of the committee in May 1946 no request for information received from Congressmen or congressional committees on matters within this committee's competence has been refused.

I understand that a separate reply is being prepared to the inquiry which you addressed to Mr. Hollister.

Sincerely yours,

CHARLES P. TAFT, *Chairman.*

INTERNATIONAL DEVELOPMENT ADVISORY BOARD,  
*Washington, D. C., April 10, 1956.*

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

DEAR MR. CHAIRMAN: I have been away from the city for almost a week and therefore apologize for not having answered your letter of April 2 until now.

In the 5 years that I have been Chairman of the IDAB, there has been no instance in which the Board or any of its members has refused information to Congressmen or to congressional committees.

On the contrary, the members of our staff and of the staffs of the Foreign Relations and Foreign Affairs Committees of the Congress have maintained a close working relationship.

If I can be of any further service to your committee, please do not hesitate to call upon me.

Sincerely yours,

ERIC JOHNSTON.

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INTERSTATE COMMERCE COMMISSION,  
*Washington, April 15, 1957.*

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

DEAR CHAIRMAN HENNINGS: This is in reply to your letter of April 2, 1957, requesting answers to the following three questions:

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?
2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?
3. On what basis was the information withheld, in each instance?

I have presented your questions to the Commissioners and to the directors of bureaus and heads of offices of the Commission and no instance can be recalled when information was refused during the period since May 17, 1954. However, on rare occasions, requests have been made for the findings or decision of an examiner, a board, a division, or the Commission in proceedings pending before the Commission, in advance of the release thereof to the parties and the general public. In those instances, the inquirers were informed that they would be furnished copies of such decisions when they are released to the parties and to the public. The number of instances and the identity of those making the requests are not of record. The reasons for not making available such information in advance of the release thereof to the parties and to the public are apparent. In most instances, proceedings before this Commission involve the interests of a number of parties. As in any quasi-legislative or quasi-judicial proceeding, no one interested party is entitled to a special privilege which would be withheld from the other parties. Release of the contents of our decisions to all at the same time is the only lawful and equitable procedure.

This Commission makes every effort to furnish fully and promptly information requested by Congressmen and congressional committees. I trust that the above adequately replies to your questions. If anything further is desired, please call on me.

Sincerely yours,

OWEN CLARKE, *Chairman.*

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NATIONAL ADVISORY COMMITTEE FOR AERONAUTICS,  
*Washington, D. C., April 4, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Committee on the Judiciary,  
United States Senate, Washington, D. C.*

DEAR SIR: Your letter of April 2, 1957, requested data on the number of times since May 17, 1954, the National Advisory Committee for Aeronautics has refused information to Congressmen or congressional committees.

The National Advisory Committee for Aeronautics has never refused information to Congressmen or congressional committees since its establishment by the Congress as an independent agency by act of March 3, 1915 (38 Stat. 930).

Sincerely yours,

J. F. VICTORY, *Executive Secretary.*

NATIONAL CAPITAL HOUSING AUTHORITY,  
Washington, D. C., April 3, 1957.

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

DEAR SENATOR HENNINGS: In behalf of the Chairman of this Authority, the Honorable Robert E. McLaughlin, I submit the following reply to the questions contained in your letter of April 2:

This Authority has never refused information to Congressmen or to congressional committees.

Respectfully yours,

JAMES RING, *Executive Director.*

NATIONAL COMMITTEE FOR THE  
DEVELOPMENT OF SCIENTISTS AND ENGINEERS,  
Washington, D. C., April 4, 1957.

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

DEAR SENATOR HENNINGS: I have your letter of April 2 asking whether the National Committee for the Development of Scientists and Engineers has refused information to Congressmen or congressional committees.

Our committee has refused to give information to no committee and to no Congressmen. We were asked to appear only before the Subcommittee on Economic Stabilization of the Joint Economic Committee. On December 12, 1956, I appeared for our committee before that body and made the statement of which I enclose a copy.

Respectfully,

HOWARD L. BEVIS, *Chairman.*

(The statement referred to follows:)

STATEMENT BY DR. HOWARD L. BEVIS, CHAIRMAN OF THE NATIONAL COMMITTEE FOR THE DEVELOPMENT OF SCIENTISTS AND ENGINEERS, BEFORE THE SUBCOMMITTEE ON ECONOMIC STABILIZATION OF THE JOINT ECONOMIC COMMITTEE, DECEMBER 12, 1956

My name is Howard L. Bevis. For 16½ years I was president of Ohio State University. I am now retired as president emeritus. I appear here today as Chairman of the President's National Committee for the Development of Scientists and Engineers. The creation of this committee was due, I believe in part, to the work of your subcommittee which last year held extended hearings on the general subject of automation and technological change, and in part, to the interest of the Price subcommittee on research and development needs with respect to scientists and engineers.

The President appointed the committee to improve our situation with regard to the education and utilization of highly qualified scientists and engineers. The President recognized that although the Government has a responsibility for increasing the supply and improving the quality of our technological personnel, the chief responsibility for solution of the problem lies in the concerted action of citizens and citizens' groups.

To show the variety of groups represented on our Committee, I shall name them—

American Society for Engineering Education

American Council on Education

American Association of Land-Grant Colleges and State Universities

Engineers Joint Council

National Education Association  
National Science Teachers Association  
National Association of Secondary School Principals  
National Association of Manufacturers  
United States Chamber of Commerce  
AFL-CIO  
Governor's Conference, Council of State Governments  
United States Conference of Mayors  
Council of Chief State School Officers  
Social Science Research Council  
American Council of Learned Societies  
American Association for the Advancement of Science  
National Academy of Sciences

Each group is represented on our Committee through its president or other chief officer.

I understand that your committee is to review developments in the general area of automation and technological change which have occurred since hearings on this subject were held a year ago.

Dr. Detlev W. Bronk, who is President of the National Academy of Sciences, and in that capacity a member of our Committee, is to testify tomorrow on the need for trained scientists as research workers. In view of this, I shall only briefly mention the problem of need. Primarily, I want to indicate who we are, and what we are trying to do, and how much progress we have made in doing it.

The role of engineers and scientists in our economy is well recognized. Technology plays an all-important role in maintaining a rising standard of living for our country and in our efforts to remain strong in terms of national security. Because of this role of scientists and engineers we believe the work of the National Committee to be of prime importance.

Expanding technology and an expanding economy are constantly producing increasing demands for highly qualified scientists and engineers. It is not enough to plan for presently estimated needs, for the demand for scientists and engineers will accelerate as new discoveries open up areas for further exploration and application.

The supply of many types of scientists and engineers is insufficient to meet current and future requirements, both civilian and military. In America, the indispensable combination of qualitatively superior military and civilian technology can come only through free, voluntary research. Such research requires men and women possessing highly developed professional skills with the opportunity and incentive to use those skills.

In approaching the task given us by the President we are faced with a number of basic facts.

Because of low birthrates during the depression, the number of college-age youth has been at a low ebb during the past few years. We are now in a period where college enrollments are rising—the number of teachers is still being adversely affected by this period of low birthrates. We must wait for those now in college to graduate before we can count on a real increase in the number of teachers.

The rise in college enrollments is due not only to the fact that we are leaving the period when enrollments were being held down by low birthrates, but, also, because more and more young persons desire a college education. Increased family income also enables more young people to go to college.

Added enrollments in the years ahead will put more strain on existing teacher shortages. In many schools, faculties, and facilities already are inadequate for handling present enrollments.

This Committee is specifically charged with the responsibility for increasing the supply of engineers and scientists. Nevertheless it is important to increase the supply of highly qualified persons in all fields. We do not want to create an imbalance in education.

The President in creating our Committee stated that it was an action group. He asked specifically that we do four things:

1. Assist the Federal Government in identifying the problems associated with the development of more highly qualified scientists and engineers.
2. Enlist the cooperation of all interested individuals and groups in analyzing the problem and developing programs to deal with it, and to take the lead in coordination of interested organizations outside the Federal Government.

3. Make available to all interested organizations information on effective ways of overcoming the obstacles to the training of more qualified scientists and engineers.

4. Publicize the problem and possible solutions in order to stimulate widespread public understanding and support.

Our first job was to identify the scope and character of our problems. It quickly became apparent that the problems were too many, and to diverse, for us to approach them all simultaneously. We had to set some priorities.

We have tried to stimulate action by local private groups. I have already pointed out the wide representation on our committee. Because of this membership, we have been able to get help—effective help, very quickly. In addition, because of the national interest in our problems, many local, State, and National groups have voluntarily offered their assistance. This has been invaluable. Some groups, for example, have helped to publicize our problems and our efforts. One valuable form of cooperation has been for specific groups to lend us highly qualified persons.

It is in the area of local action that we believe we can make the most significant contributions. There are at present a number of efforts at the State and local levels that show what can be done when local groups—educators, industry, labor, government—attack a problem. A notable example is found in Oklahoma. In this State a foundation has been established, called Frontiers of Science, to raise the level of scientific knowledge and to increase the supply of competent scientific personnel. I met with this group recently and was impressed by the wide scope and the effectiveness of their program. Other areas getting started along similar lines include North Carolina, New Jersey, Detroit, Cleveland, New Orleans, Pittsburgh, Boston, and Milwaukee.

The problems being attacked by these local groups include :

1. Improving facilities for teaching.
2. Providing more science and mathematics teachers.
3. Improving the technical training of such teachers.
4. Providing summer employment to enable teachers to acquire additional experience and increased earnings.
5. Upgrading teachers.
6. Improving teaching methods.
7. Stimulating student interest in science and mathematics.
8. Counseling students.
9. Improving curriculums.

Stimulating State and local groups in getting started is a significant part of the work we are doing.

Such local action groups need help—particularly in the form of ideas and organizational guidance. We are documenting experiences and ideas that have proved effective. These we are passing on to other local groups and organizations.

As the committee has come to grips with its problems, it has become apparent that we need to know more about the occupations and areas where shortages now exist and the future outlook. In cooperation with the Department of Labor and the National Science Foundation, programs are now going forward that will provide on a continuing basis the kind of labor market data that we need. A representative of the Department of Labor recently met with the national committee to present an appraisal of the existing situation and of anticipated future developments. This material will be available in printed form in a few days. If this subcommittee so desires, I should be pleased to submit it as soon as it is ready.

It takes time to train an engineer or a scientist. About the only way to do something constructive immediately to ease existing shortages is to make more effective use of what we have.

One of our committee's first acts was to appoint a task force to study the fuller use of technical aides to scientists and engineers. This group, after careful study and analysis, has developed a program to assist industry in utilizing technical aides. As a result of this work we now have another task force working on the problem of improving the curriculums of technical schools.

Similar efforts are now being directed toward two other problems:

1. The adequacy of salary levels for scientists and engineers, and
2. The improved utilization of scientists and engineers.

In both of these cases the work is exploratory—designed primarily to ascertain whether it might be fruitful to set up task forces.

We also have a task force on the problem of improving science and mathematics education in elementary and secondary schools. A proposed program of

action has been developed. Primarily action must come from the States and communities, but the program developed by this task force will be helpful to them.

A fundamental requirement for the committee's success is the achievement of public understanding. Support and cooperation are necessary from industry, labor, scientists and engineers, teachers, parents and students, as well as from the general public.

Efforts to secure this support through publicizing our programs is being directed to individual citizen through his local organizations. Direct participation of individual citizens and local organizations will generate local news and community interest. The committee's function in this area, we believe, is to supply the basic information with which others can carry out the major publicizing activity through established facilities and channels.

I hope that this brief statement will give you some idea of our problems and how we are approaching them.

I want to express my appreciation to this subcommittee for giving me the opportunity to tell you about the national committee and the work that we are trying to do. I shall, of course, be glad to respond to any questions.

NATIONAL LABOR RELATIONS BOARD,  
Washington, D. C., April 11, 1957.

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

DEAR SENATOR HENNINGS: This is in reply to your letter of April 2, 1957, requesting answers from this agency to questions as set forth in that letter.

On May 17, 1954, President Eisenhower released a letter he transmitted to the Secretary of Defense in which the President, among other things, stated that "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." That letter and the Attorney General's memorandum may be found on page 1981 of a document published by the subcommittee of the Committee on Government Operations, House of Representatives, 84th Congress, 2d session, entitled "Availability of Information From Federal Departments and Agencies, Part 7, Department of Defense, Second Section." It is our understanding that the procedures set forth in the President's foregoing letter are to be used in guiding other executive agencies in their relations with the Legislature.

We have endeavored to comply fully with the President's pronouncement described above. On the basis of the standards announced in such directive, your questions may be answered as follows:

1. This agency has not at any time since May 17, 1954, refused information to Congressmen or congressional committees in violation of the letter or spirit of the President's foregoing directive.

2 and 3. By reason of the answer to question No. 1, these questions have been rendered inapplicable.

BOYD LEEDOM, *Chairman.*

NATIONAL MEDIATION BOARD,  
Washington, D. C., April 4, 1957.

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

DEAR SENATOR: This is in response to your letter of April 2, 1957.

Our answer to the questions therein asked is that at no time since May 17, 1954, has this agency refused information to Congressmen or congressional committees.

Sincerely yours,

ROBERT O. BOYD, *Chairman.*

NATIONAL SCIENCE FOUNDATION,  
 OFFICE OF THE DIRECTOR,  
*Washington, D. C.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: This is in reply to your letter of April 2, in which you refer to the interest of the Subcommittee on Constitutional Rights in the free flow of information to the Congress and the public from a constitutional point of view.

You ask how many times since May 17, 1954, has the National Science Foundation refused information to Congressmen or congressional committees. The Foundation has never refused to give information to individual Congressmen or to congressional committees.

If there is any further information that I can supply, please don't hesitate to call on me.

Sincerely yours,

ALAN T. WATERMAN, *Director.*

NATIONAL SECURITY TRAINING COMMISSION,  
*Washington, D. C., April 5, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: I have your letter of April 2, 1957, addressed to General Sarnoff, Chairman of the National Security Training Commission.

The National Security Training Commission has never withheld information of any kind from any Member of the Congress or from any congressional committee.

If there is any further information which you may desire, please do not hesitate to call upon us.

Sincerely,

MARGARET B. BUCHHOLZ,  
*Executive Officer.*

PANAMA CANAL COMPANY,  
*Washington, D. C., April 16, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: This is in response to your letter of April 2, 1957, regarding the interest of the subcommittee in the free flow of information to Congress and the public from a constitutional point of view.

To the best of our knowledge, the Panama Canal Company and Canal Zone Government have never refused information requested by Congressmen or congressional committees.

This response to your first question apparently makes unnecessary comment on the other questions contained in your letter.

Sincerely,

MERRILL WHITMAN,  
*Secretary.*

POST OFFICE DEPARTMENT,  
 BUREAU OF THE GENERAL COUNSEL,  
*Washington, D. C., May 14, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: This has further reference to your letter of April 2, 1957, and my response of April 4, 1957, concerning questions relating to the refusal to furnish information requested by Congressmen and congressional committees.

I am pleased to make the following answers:

Question 1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?

Answer. Once.

Question 2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?

Answer. During the 2d session of the 84th Congress as the then Solicitor of the Post Office Department, I declined to furnish to the Subcommittee on Legal and Monetary Affairs of the Committee on Government Operations of the House of Representatives an internal management document containing my opinion with respect to certain findings made in connection with a proposed contract for the purchase of motor vehicles.

Question 3. On what basis was the information withheld, in each instance?

Answer. The general basis for withholding this document was that it was an interdepartmental matter containing my opinions with respect to certain proposals then under consideration. It was an interim opinion rendered in the planning phase of a proposed program. My final opinion was given to the subcommittee. As such, it is an executive paper and I believed it was necessary to decline to disclose the text of the opinion.

In formulating the answers to these questions, I have asked each Assistant Postmaster General, the Chief Postal Inspector, and the Director of the Office of Research and Engineering to study their records as far back as May 17, 1954, and to make answer to me with respect to these three questions. In each instance, the officials have responded that their records fail to disclose any instance in which they have declined to furnish information in the possession of the Department when it was requested either by Congressmen or congressional committees. There have been a few instances in which our Bureau of Finance has declined to develop information not immediately available because the cost of developing the information would be prohibitive. This has happened on rare occasions and apparently without controversy.

Sincerely yours,

ABE McGREGOR GOFF, *General Counsel.*

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RAILROAD RETIREMENT BOARD,  
Chicago, Ill., April 19, 1957.

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

DEAR SENATOR HENNINGS: This will acknowledge receipt of your letter dated April 2, 1957, in which you state that the Subcommittee on Constitutional Rights has a continuing interest in the free flow of information to Congress and the public and inquire how many times since May 17, 1954, the Railroad Retirement Board has refused information to Congressmen or congressional committees.

So far as I have been able to ascertain, there has been no instance since May 17, 1954, in which the Railroad Retirement Board has refused information to a Congressman or congressional committee.

Sincerely yours,

HOWARD W. HABERMAYER, *Chairman.*

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THE RENEGOTIATION BOARD,  
Washington, D. C., April 4, 1957

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,*  
*Committee of the Judiciary,*  
*The United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: I have your letter of April 2, 1957, requesting an answer to three questions on the furnishing of information to Congressmen or congressional committees.

You ask, first, for the number of times since May 17, 1954, that this agency has refused information to Congressmen or congressional committees. In order to carry out its responsibilities under the Renegotiation Act of 1951, this Board must necessarily rely on defense contractors to submit information to the Board voluntarily. Much of this information is of a highly confidential nature involving intimate financial data, trade secrets, and other information which a company would be reluctant to furnish, unless it had assurance that the information would

be kept in the strictest confidence. Thus, the Board has adopted regulations governing the release of such information. Section 1480.2 of the Renegotiation Board regulations provides in part as follows.

"Renegotiation agreements, reports, records, files, correspondence, memorandums and all other data, documents and material (hereinafter referred to generally as "documents") which have been transferred to or have been prepared by the Board in connection with any renegotiation proceeding, are the property of the Government of the United States. They are in the legal custody of the Board and are subject to this part notwithstanding that they may be in the physical possession of another agency. They are not to be distributed, nor are their contents to be revealed to any person other than as provided in this part or as may be prescribed by the Board in any specific instance \* \* \*."

Regulations of this type have been in existence since the inception of renegotiation during World War II, without objection by the committee of either House having responsibility for such legislation. These regulations are also well known to other congressional committees.

The Board has never been asked by a Congressman or a congressional committee for information which it was unable to furnish because of the restrictions in these regulations, nor has the Board had occasion to decline to furnish information on other grounds.

In view of the above, the other questions in your letter become inapplicable to this Board.

Sincerely yours,

THOMAS COGESHALL,  
*Chairman.*

SECURITIES AND EXCHANGE COMMISSION,  
*Washington, D. C., May 27, 1957.*

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

DEAR SENATOR HENNINGS: In reply to your request of April 2, 1957, the General Counsel of the Commission has prepared a memorandum answering the questions you posed in your letter. This memorandum is enclosed.

If the Commission can be of assistance at any future time, please do not hesitate to inform us.

Sincerely yours,

J. SINCLAIR ARMSTRONG,  
*Chairman.*

MEMORANDUM PREPARED BY THE GENERAL COUNSEL'S OFFICE OF THE SECURITIES AND EXCHANGE COMMISSION IN RESPONSE TO INQUIRY DATED APRIL 2, 1957, OF SENATOR THOMAS C. HENNINGS, JR., CHAIRMAN, SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

Senator Thomas C. Hennings, Jr., chairman of the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, requested in a letter dated April 2, 1957, that the Commission furnish answers to the following three questions:

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?
2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?
3. On what basis was the information withheld, in each instance?

It has always been the policy of the Commission to cooperate to the fullest extent possible in making information available to Members of Congress and congressional committees. The Commission, however, is entrusted with the performance of law-enforcement functions similar to those performed by the FBI, Secret Service, and other Federal law-enforcement agencies. Indeed, the courts have equated the Commission's investigative functions to those performed by a grand jury. The Commission also performs quasi-judicial functions under the various statutes administered by it. Accordingly, it is not always possible for the Commission to make available at a particular time all information requested in the detail that might ordinarily be supplied where similar statutory

duties are not involved. In these circumstances, the Commission always has endeavored to make an arrangement to supply the requested information at a later date or in such form so that it would not interfere with or impede the performance of these important functions. Thus, on November 4, 1955, in response to a request for information from the Commission's current investigative files involving "spectacular" types of fraud, including the names of the companies and principals involved, which the subcommittee might expose at hearings, the Chairman of the Commission advised Congressman John B. Bennett of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, in part as follows:

"\* \* \* Our staffs in Denver, Washington, and New York were instructed to cooperate to the fullest extent in providing the subcommittee with appropriate material from its files, and to that end and at the request of your staff, we have provided memoranda on cases that are illustrative of conditions the Commission has uncovered in its study of filings under its regulations A and D. We have also furnished Commission opinions and releases and copies of offering circulars of such cases, and have prepared and made available various statistical studies."

\* \* \* \* \*

"The requested information concerns material contained in the pending investigation files of the Commission. These are not public at the present time. For the Commission to release such information in our pending investigation files for use in a public hearing of a congressional committee before our investigation has been completed might prejudice the prosecution of the matters in the event that the cases might later be referred to the Department of Justice for criminal prosecution, and might destroy the value of any civil or administrative remedies that might be instituted by the Commission and the parties in the particular cases. Also, if testimony and statements elicited from witnesses on the understanding that the Commission would treat the information as confidential, were made public, the ability of the Commission to obtain the cooperation of the public in our investigations of violations of the Securities Acts would have the opposite effect which you so correctly say is the joint objective of your committee, as the legislative agency, and our Commission, as the administrative agency charged by the Congress with enforcing the law, namely, 'to find means, if possible, to give the investor better protection.'"

Similarly, on November 10, 1955, the Commission advised Senator Lehman of the Senate Committee on Banking and Currency with respect to two Commission files which he had requested, in part as follows:

"With respect to Russell McPhail, this investigation is still open and in progress. It has been the consistent policy of the Commission not to release its pending investigation files. It has been our belief that such release might impair the integrity of the Commission's investigation process and seriously interfere with the Commission's responsibility of appropriate enforcement action, in case this becomes necessary. Our staff would however, be happy to discuss the McPhail investigation with Mr. Feldman. We do not at present know what information he would desire on this subject but it may well be that we can provide him with sufficient material in the form of summaries or otherwise to meet his needs. A similar procedure was followed this spring in connection with information about certain investigations which was desired by your committee in connection with certain phases of the stock market study with mutually satisfactory results."

"With respect to your request to see our files in the Libby, McNeill & Libby proxy contest, we have been served by the defendants in *S. E. C. v. Mitchell May, Jr., et al.*, litigation arising out of that contest, with a notice of appeal in the Court of Appeals for the Second Circuit from the entry of a secondary injunction obtained in that case. Since this matter is still in litigation, it is the Commission's view, with which I am sure you will agree, that it would be inappropriate to disclose those files or discuss this case outside the court. Immediately upon the termination of the litigation, we will, of course, welcome your committee's review of our files."

So far as we are aware, on only one occasion since May 17, 1954, has the Commission been unable to release information insisted upon by a Congressman or congressional committee. This instance occurred in connection with testimony being given before the Anti-Monopoly Subcommittee of the Senate Committee on the Judiciary. In July of 1955 the Chairman of the Commission in testifying before this committee was asked certain questions about conferences and communications relative to quasi-judicial proceedings under the Public Utility Holding Company Act of 1935, one aspect of which was pending before the

Commission and another aspect of which was pending on appeal. In accordance with advice of Attorney General Brownell received through the Office of the President, the Chairman took the position that during the pendency of such proceedings he was not free to respond to the subcommittee's inquiry. However, also in accordance with the advice of Attorney General Brownell and in the light of developments indicating that the quasi-judicial proceedings would presently be terminated by reason of a substantial change in circumstances, the Commission determined that these conferences and communications should be made fully available to the subcommittee pursuant to its request. Chairman Armstrong thereafter testified with respect thereto. Similarly, in November 1954, the Commission gave the Antimonopoly Subcommittee all the information that it requested relating to a completed phase of a related matter, although it had declined to supply such information previously while the matter was pending.

Chairman Armstrong was also asked questions by the subcommittee about a conversation with Sherman Adams, assistant to the President, on July 18, 1955. As the record shows (hearings before the Subcommittee on Antitrust and Monopoly Legislation of the Committee on the Judiciary, on S. Res. 61, pt. 2, pp. 751-752, and 987) he advised the subcommittee that the conversation related solely to his responsibilities under the principles expressed in President Eisenhower's letter of May 17, 1954, to the Secretary of Defense (hearing id., pt. 1, pp. 331-332) which was made applicable to these hearings by Attorney General Brownell's letter of July 12, 1955, to Chairman Armstrong and instructions from the President's special counsel (hearings id., pt. 1, pp. 378-379, pt. 2, p. 756) and further that the conversation did not relate to the Commission's quasi-judicial proceedings under the Public Utility Holding Company Act.

With respect to the above, it should be emphasized that the Chairman of the Commission was specifically instructed by the Attorney General through the President's special Counsel that he was not to testify concerning this particular conversation, since it was within the executive privilege of the executive branch of the Government. Accordingly, it was impossible for the Chairman to testify as to this matter, since the privilege belonged to and could only be waived by the Executive himself.

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SMALL BUSINESS ADMINISTRATION,  
Washington, D. C. April 5, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In response to your inquiry of April 2, 1957, the answer is "none" to your question: "1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?" The answers to questions 2 and 3 therefore are in the negative.

Sincerely yours,

WENDELL B. BARNES, Administrator.

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SMITHSONIAN INSTITUTION,  
Washington, D. C., April 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In reply to your letter of April 3, 1957, I am pleased to report that the Smithsonian Institution has never refused to give information to Congressmen and congressional committees.

Sincerely yours,

LEONARD CARMICHAEL, Secretary.

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SUBVERSIVE ACTIVITIES CONTROL BOARD,  
Washington, D. C., April 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

MY DEAR SENATOR HENNINGS: This refers to your letter of April 2, 1957, which submits questions concerning the flow of information to Congress.

In reply to the substantive question propounded, there has been no instance, to the Board's knowledge, when it has declined to submit information to Congressmen or congressional committees since May 17, 1954, or at any time before that date.

Being a purely quasi-judicial agency, all Board action and proceedings before it are a matter of public record. This, of course, excludes its deliberations.

Sincerely yours,

DOROTHY McCULLOUGH LEE, *Chairman.*

UNITED STATES TARIFF COMMISSION,  
*Washington, D. C., April 9, 1957.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Committee on the Judiciary,  
United States Senate.*

DEAR SENATOR HENNINGS: In reply to your letter of April 2, 1957, I am glad to advise you that, so far as the Commission is aware, no instance has arisen since May 17, 1954, in which the Commission has refused to furnish information requested by Members or committees of Congress.

Please be assured of our desire to furnish any further information which may be available and to cooperate fully with your committee.

Sincerely yours,

EDGAR B. BROSSARD, *Chairman.*

THE SECRETARY OF THE TREASURY,  
*Washington, D. C., May 28, 1957.*

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

DEAR MR. CHAIRMAN: Further reference is made to your identical letters of April 2, 1957, addressed to various officials of this Department, concerning the furnishing or refusal to furnish information to Members of Congress or congressional committees.

You know of the many constituent bureaus and offices in this Department. In checking with them we find that in the 3 years covered by your inquiries scores of officials have testified before almost as many committees and their testimony covers many hundreds of pages. It has not been possible to review this testimony in detail. We also find that there have been many hundreds of requests from individual Congressmen, most of these addressed to the Internal Revenue Service.

We have not required either testimony or correspondence to be routed through a single office. For this reason we do not have available the records and information which would enable us to provide with certainty the information which you have requested.

The current check of the constituent bureaus and offices of this Department has not brought a report of any instance in which information has been refused to Members of Congress or congressional committees, except where disclosure was prohibited by law, as in the case of information from tax returns.

In a few cases requests have been resolved as the result of discussions with the Members or committees making them, upon explanation of the nature of the information involved and the problems within the Department. For example, when testifying before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, the Comptroller of the Currency was asked whether he could indicate what bank mergers had been disapproved merely on the grounds of their competitive effect; when the Comptroller explained that it was desired to keep that information confidential for the sake of the banks, the matter was dropped.

It is our desire to cooperate with Members and committees in supplying them with information they need, and we believe that our objectives in this direction have in large part been achieved.

Sincerely yours,

FRED C. SCRIBNER, Jr.,  
*Acting Secretary of the Treasury.*

TENNESSEE VALLEY AUTHORITY,  
Knoxville, Tenn., April 26, 1957.

Hon. THOMAS C. HENNINGS Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, Senate Office Building, Washington, D. C.*

DEAR SENATOR HENNINGS: In response to your request of April 2, I am glad to report that TVA has examined its files and finds no instance in which this agency has refused information to Congressmen or congressional committees since May 17, 1954, the date you specify.

Sincerely,

HERBERT D. VOGEL, *Chairman of the Board.*

VETERANS' ADMINISTRATION,  
Washington, D. C., May 8, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights, Committee on the  
Judiciary, United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Further reference is made to your letter of April 2, 1957, regarding the disclosure of information to Congressmen or congressional committees.

Upon receipt of your request a survey among Department heads and top staff officials in Central Office was conducted for the purpose of securing information upon which to answer the questions set forth in your letter. The attached answers are based on that survey.

I trust that the answers prove helpful to the subcommittee in its consideration of this matter.

Sincerely yours,

JOHN S. PATTERSON, *Deputy Administrator*  
(For and in the absence of H. V. Higley, Administrator).

#### EXHIBIT A

##### QUESTIONS AND ANSWERS

1. How many times since May 17, 1954, has your agency refused information to Congressmen or congressional committees?

Answer. No statistical data are maintained. However, there have been identified in Central Office some 11 instances since May 17, 1954, which are considered to come within the scope of this inquiry.

2. If there have been instances when information has been withheld, when did each occur, and what were the circumstances surrounding such occurrences?

Answer. (a) There were received 8 requests during the period May 6, 1955-July 29, 1955, from a subcommittee of the Committee on Post Office and Civil Service, United States Senate, for the personnel and security files, including all correspondence, documents, and records in connection with the employment of certain individuals in the Veterans' Administration. The requests for the files were not acceded to by the Veterans' Administration; however, in each case a detailed summary of all personnel action was furnished the subcommittee.

(b) At hearings before a subcommittee of the Committee on Post Office and Civil Service, United States Senate, August 31, 1955, Mr. D. F. Peterson, of this agency, in the course of his testimony before that committee (hearings on S. Res. 20, 84th Cong., pt. I, pp. 605-616) declined (pp. 611-612) to furnish information concerning certain internal actions in a security case.

In the course of his testimony before that subcommittee on September 27, 1955 (hearings on S. Res. 20, 84th Cong., pt. I, pp. 858-872), the Administrator of Veterans' Affairs declined (p. 859) to furnish portions of individual security files.

(c) In a letter to the chairman, Committee on Government Operations, Senate Permanent Subcommittee on Investigations, United States Senate, dated September 23, 1955, the Veterans' Administration advised the committee that it could not release copies of numerous internal memorandums, notes, and other papers in the Veterans' Administration files, all pertaining to certain named schools or institutions approved by the appropriate agencies of various States for the training of veterans under title II of the Servicemen's Readjustment Act of 1944 (58 Stat. 287) as amended (38 U. S. C., ch. 12A) and the Veterans' Readjustment Assistance Act of 1952 (66 Stat. 663) as amended (38 U. S. C., 901 et

seq.). However, after consultation with committee counsel, certain papers identified as capable of release were furnished to comply with the committee's expressed needs.

3. On what basis was the information withheld, in each instance?

Answer. (a) The authority for the denial of information in 2 (a) above, was based on Executive Order No. 10450, April 27, 1953, "Security Requirements for Government Employment" (3 C. F. R., 1953 Supp., p. 72), as amended.

Executive Order No. 10501, November 5, 1953, "Safeguarding Official Information in the Interests of the Defense of the United States" (3 C. F. R., 1953 Supp., p. 115).

Doctrine of separation of powers between executive and legislative branches of the Government. (See memorandum of the Attorney General forwarded by the President to the Secretary of Defense and White House press release dated May 17, 1954 (vol. 100, pt. 5, Congressional Record, pp. 6621-6623)).

Veterans' Administration Regulations 700-717, copies enclosed.

(b) The authority for the denial of information in 2 (b) above, is the same as 3 (a) above.

(c) The authority for the denial of information in 2 (c) above, was based on doctrine of separation of powers between executive and legislative branches of the Government. (See the mentioned memorandum of the Attorney General.)

#### EXHIBIT B

(The following regulations were submitted to the Constitutional Rights Subcommittee by the Veterans' Administration:)

#### THE SECURITY PROGRAM OF THE VETERANS' ADMINISTRATION PURSUANT TO EXECUTIVE ORDER 10450 [AS AMENDED]

700. PURPOSE.—The purpose of the regulations governing the security program of the VA is to more nearly define the responsibilities and duties of VA personnel under Executive Order 10450, [as amended by Executive Order 10491, 10548, and 10550], and to generally implement such Executive orders to assure proper execution thereof. (September 20, 1955.)

#### EMPLOYMENT AND RETENTION IN EMPLOYMENT

701. DEFINITIONS.—For the purpose of the VA security regulations the following definitions apply:

(A) The term "national security" relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all other illegal acts designed to weaken or destroy the United States. (July 21, 1953.)

(B) The term "sensitive position" shall mean any position in the VA the occupant of which could bring about, because of the nature of the position, a material adverse effect on the national security. Such positions shall include, but shall not be limited to, any position the occupant of which (1) may have access to [classified defense information bearing the classification of "Top Secret," "Secret," or "Confidential,"] or any other information or material having a direct bearing on the national security, and (2) may have opportunity to commit acts directly or indirectly adversely affecting the national security. (September 20, 1955.)

702. POLICY.—It is the policy of the VA, pursuant to Executive Order 10450, [as amended], to employ and to retain in employment only those persons whose employment or retention in employment is found to be clearly consistent with the interests of the national security. (September 20, 1955.)

#### 703. SECURITY STANDARDS.

(A) No person shall be employed, or retained as an employee, in the VA unless the employment of such person is clearly consistent with the interests of the national security. (July 21, 1953.)

(B) Information regarding an applicant for employment, or an employee, in the VA which may preclude a finding that his employment or retention in employment is clearly consistent with the interests of the national security shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(a) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(b) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(c) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion. (July 21, 1953.)

(d) [Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.] (September 20, 1955.)

(e) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with a espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United states, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States. (July 21, 1953.)

[8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.] (September 20, 1955.)

#### 704. SECURITY INVESTIGATIONS.

(A) Security investigations conducted pursuant to [Executive Order 10450, as amended, and] the regulations governing the security program of the VA shall be designed to develop information as to whether employment or retention in employment by the VA of the person being investigated is clearly consistent with the interests of the national security. (September 20, 1955.)

(B) Every appointment made within the VA shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools and colleges attended by the person under investigation: Provided, That to the extent authorized by the Civil Service Commission a less investigation may suffice with respect to per diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should information develop at any stage of investigation indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall

be sufficient to enable the Administrator of Veterans' Affairs to determine whether retention of such person is clearly consistent with the interests of the national security. (July 21, 1953.)

(C) Any person requiring limited security clearance for access to "Confidential" defense information or material under the provisions of VA Regulation 715 (D) will be subject to investigation to include an up-to-date national agency check and replies to written inquiries.] (September 20, 1955.)

[(D)] No sensitive position in the VA shall be filled or occupied by any person with respect to whom a full field investigation has not been conducted: Provided, That a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of the regulations governing the security program of the VA: And provided further, That in case of emergency a sensitive position may be filled for a limited period of time by a person with respect to whom a full field preappointment investigation has not been completed if the Administrator of Veterans Affairs finds that such action is necessary in the national interest. Such finding shall be made a part of the record of the person concerned. (September 20, 1955.)

[(E)] Whenever a security investigation being conducted with respect to an employee of the VA develops information relating to any of the matters described in VA Regulation 703 (B) (2) through [(8)], or indicates that an employee [may be subjected] to coercion, influence, or pressure [which may cause him] to act contrary to the interests of the national security, the matter shall be referred to the Federal Bureau of Investigation for a full field investigation. (September 20, 1955.)

[(F)] Investigation reports received from the Civil Service Commission or the Federal Bureau of Investigation shall be evaluated by the Director of Security of the VA [(hereinafter referred to as the Director).] (September 20, 1955.)

#### 705. SUSPENSION AND TERMINATION.

(A) Suspensions made under the authority conferred by the act of August 26, 1950, 64 Stat. 476 [(PL 733, 81st Cong., 5 U. S. C. 22-1),] will be made by the Administrator or [the Deputy Administrator.] (September 20, 1955.)

(B) Upon receipt of an investigative report containing apparently derogatory information relating to any of the matters described in VA Regulation 703 (B), the Director [ ] will immediately evaluate the report from the standpoint of the national security. [In addition to the security standards set forth in VA Regulation 703 (B),] factors that will be taken into consideration in making the determination [ ] will include, but will not be limited to: (1) the seriousness of the derogatory information developed; (2) possible access, authorized or unauthorized, of the employee to [classified defense] information or material; and (3) opportunity by reason of the nature of the position for committing acts adversely affecting the national security. (September 20, 1955.)

[(C)(1)] If the Director determines that the information is not derogatory or that, within the contemplation of the [act of August 26, 1950, 64 Stat. 476] (PL 733, 81st Cong., 5 U. S. C. 22-1), Executive Order 10450, [as amended] and these regulations, the retention in employment of the employee is clearly consistent with the interests of the national security, he will make a written certificate to that effect and forward it to the Personnel Officer concerned.

[(2)] If the Director is of the opinion that the information is derogatory to the extent that retention of the employee [may] not [be] clearly consistent with the [interests of the] national security, he will refer the case to the [General Counsel (hereinafter called the Legal Officer) or his designee.]

[(3)] If the Legal Officer concurs, the [case will be forwarded to the Deputy Administrator for consideration under VA Regulation 705 (A) supra.] (September 20, 1955.)

[(D)(1)] If the Legal Officer is in disagreement with the Director and if the clearance of the employee cannot be resolved after consultation by the Legal Officer and the Director, the entire case will then be reviewed by a three-man committee composed of high-level management or administrative personnel of the VA. Selection of the three-man committee will be made by the Deputy Administrator from a panel of VA employees designated by the Administrator. This committee will consider the entire record in the case and freely consult with both the Legal Officer and the Director or his staff. Where the decision to clear or suspend the employee may possibly be resolved by an informal conference with the employee, such conference by the committee should be held.

[(2)] This committee is empowered to [conclude that the continued em-

ployment of the individual is] clearly consistent with the interests of the national security, [and if, by majority vote the committee so decides, the Director will issue the necessary certificate of clearance.]

[(3)] When by majority decision the committee determines that the employee's retention [may] not [be] clearly consistent with the interests of [the] national security, [the committee's decision, together with the complete record of the case, including investigative reports, will be forwarded to the Deputy Administrator for consideration under VA Regulation 705 (A) supra]. (September 20, 1955.)

[(E)] The decision of the committee will be in writing, including a statement of the basic reasons for the conclusion reached, and will be signed by all members of the committee. If there be a dissent from the decision of the committee, the dissenting member will indicate before his signature the phase "I dissent" and will prepare and submit a separate statement of reasons, showing wherein he disagrees with the majority decision.] (September 20, 1955.)

[(F)] In case the employee is suspended, [he will be so notified immediately] by the Director in writing [which shall include the reasons for his suspension and a statement of charges.] Such notice will be as specific and detailed as security considerations, including the need for protecting confidential sources of information, permit. [The letter of reasons for suspension and charges shall be subject to amendment within 30 days of issuance. An employee entitled to a hearing shall be informed in the statement of charges of his right (1) to a hearing, if desired, (2) to be represented by counsel of his choice, (3) to present witnesses and offer other evidence in his own behalf and in refutation of the charges brought against him, and (4) to cross-examine any witness offered in support of the charges.] (September 20, 1955.)

[(G)] A suspended employee shall have the right to submit to the Director within 30 days after receipt of notice of his suspension [and charges, or within 30 days after receipt of any amendment thereto, his answer refuting or explaining the stated reasons for suspension and charges, together with statements, affidavits and other documentary evidence in support thereof. His answer, together with such statements or other evidence submitted in support of the answer,] shall be considered jointly for sufficiency by the Legal Officer or his designee and the Director. At this point, if the Legal Officer and the Director agree, a certificate of clearance will be issued by the Director. If, however, in the opinion of either or both the [Legal Officer or the Director, the answer does not refute the charges as issued, and if the employee is not entitled to a hearing, or irrespective of entitlement to a hearing should the employee fail within the specified period to answer the letter of suspension and charges, their individual recommendations or a joint recommendation, as indicated, will be submitted to the Administrator through the Deputy Administrator for disposition of the case.] (September 20, 1955.)

[(H)] If, in the opinion of either or both the Legal Officer or the Director, the answer does not refute the charges as issued or if no answer is received within the specified period and if the employee is a] citizen of the United States and a permanent or indefinite appointee who has completed his probationary or trial period [and has timely submitted a request for a hearing,] a hearing board composed of at least three impartial, disinterested persons will be selected in accordance with the procedure set forth in VA Regulation 708. The hearing board will be selected and set up, if at all possible, within 45 days of the date of the employee's suspension. [If the employee does not within the specified time submit a request for a hearing or a statement expressly waiving a hearing, the case will proceed without hearing to final determination in accordance with VA Regulation 705 (H) on the basis of the evidence and information currently of record.] (September 20, 1955.)

[(I)(1)] The hearing shall be conducted in accordance with the procedure set forth in VA Regulation 709. The Administrator will be represented during the hearing by a legal representative designated by the Legal Officer. The function of the legal representative shall be to see that the whole case is presented impartially to the board; to give legal advice and assistance to the board as required; [and to advise the employee, if he is not represented by counsel, as to his rights under the act of August 26, 1950, Executive Order 10450, as amended, and the pertinent regulations.] The decision of the hearing board shall be in writing and shall be signed by all members of the board. The original and all copies of the decision shall be sent to the Director.

(2) The Director will forward the recommendation of the board to the Deputy Administrator. If the recommendation is favorable to the employee and the

Deputy Administrator concurs, he may direct that a certificate of clearance be issued to the employee by the Director. If he does not concur, or in any case wherein the recommendation of the board is adverse to the employee, the Deputy Administrator shall refer the file to the Administrator who will decide the matter upon the entire record, including such comment or recommendation as he may request. The Administrator will make his determination of the case as follows:

(a) If he finds that reinstatement of the suspended employee in the position from which he has been suspended is clearly consistent with the interests of the national security, he will direct that a certificate of clearance be issued by the Director.

(b) If he does not find that reinstatement in the position from which he has been suspended will be clearly consistent with the interests of the national security, but that employment of the suspended employee in another position in the VA is clearly consistent with the interests of the national security, he may direct that the employee be restored to duty in such other position.

(c) If he finds that reinstatement of the suspended employee to any position in the VA is clearly inconsistent with the interests of the national security, he will direct that the employment of the employee be terminated.

(3) Whenever the recommendations are adverse with respect to a person who has been cleared previously under Executive Order 10450, as amended, by the head of another agency, the case will be returned to the Director for immediate consultation with appropriate representatives of the agency involved to make certain that all relevant information has been given consideration and that the security standards have been properly applied. The results of this consultation will be approved in writing by the Administrator and recorded in the files of the Security Service. If the consultation discloses a conflict in evaluation which cannot be resolved, the assistance of the Division of Internal Security, Department of Justice, will be solicited and if, after further consultation, the conflicting evaluation cannot be resolved, the Administrator will be so informed in order that he may consult with the head of the agency concerned. (September 20, 1955.)

(4) The final decision made by the Administrator [if adverse,] shall consist in findings of fact based upon all the evidence in the file and the recommendations of the board and the officials hereinbefore specified, the specific conclusions that consequently the continued employment of the suspended person would be inconsistent with the national security, and that his appointment is terminated. [If the facts indicate also that the suspended person is a member or has been a member during the period of his Federal employment of an organization which may come within the purview of either section 9A of the Hatch Act, 53 Stat. 1148, or any appropriation act restriction, the Director, Security Service, will upon receipt of the Administrator's Decision, refer the case to the Legal Officer for his consideration as to violation of any statute or appropriation act. If the Legal Officer is of the opinion that a statute or appropriation act has been violated, the case will again be referred to the Administrator and if the Administrator determines that the employee did in fact violate any such statute or appropriation act, his decision will so state and also direct that no further payment of salary shall be made contrary to the provisions of the Hatch Act, or that no further payment of salary shall be made and recovery shall be had of any salary paid contrary to the provisions of the applicable appropriation act.] (December 14, 1955.)

(5) The employee will be furnished a written statement, including the basic reasons for the conclusion reached, of the decision of the Administrator. (September 20, 1955)

(J) Copies of all notices of personnel action taken in security cases shall be supplied at once by the Personnel Officer to the Civil Service Commission. (September 20, 1955)

706. READJUDICAMENT OF CERTAIN CASES.—The Director will review all cases of employees of the VA with respect to whom there has been conducted a full field investigation under Executive Order 9835 of March 21, 1947. After such further investigation as may be appropriate, such of those cases as have not been adjudicated under a security standard commensurate with that established by Executive Order 10450 of April 27, 1953, and the regulations governing the security program of the VA will be readjudicated in accordance with the said act of August 26, 1950, and the VA security regulations. (July 21, 1953)

707. REEMPLOYMENT OF EMPLOYEES WHOSE EMPLOYMENT HAS BEEN TERMINATED.—No person whose employment has been terminated by any department or agency other than the VA under or pursuant to the provisions of the said act

of August 26, 1950, or pursuant to the said Executive Order 9835 or any other security or loyalty program shall be employed in the VA unless the Administrator finds that such employment is clearly consistent with the interest of the national security and unless the Civil Service Commission determines that such person is eligible for such employment. The finding of the Administrator and the determination of the Civil Service Commission will be made a part of the personnel record of the person concerned. (July 21, 1953)

708. SECURITY HEARING BOARDS.

(A) Security hearing boards of the VA will be composed of not less than three civilian officers or employees of the Federal Government, selected by the Administrator from rosters maintained for that purpose by the Civil Service Commission in Washington, D. C., and at regional offices of the Commission. (July 21, 1953)

(B) No officers or employee of the VA will serve as a member of a security hearing board hearing the case of an employee of the VA. (July 21, 1953)

(C) No person will serve as a member of a security hearing board hearing the case of an employee with whom he is acquainted. (July 21, 1953)

(D) The Administrator, on the recommendation of the Director, will nominate civilian officers or employees of the VA to the security hearing board rosters maintained by the Civil Service Commission. (September 20, 1955)

(E) Officers and employees nominated to security hearing board rosters maintained by the Civil Service Commission, both in and outside of Washington, D. C., will be persons of responsibility, unquestioned integrity, and sound judgment. Each such nominee shall have been the subject of a full field investigation, and his nomination shall be determined to be clearly consistent with the interests of the national security. (July 21, 1953)

(F) The Director and Managers of field stations shall, whenever appropriate, provide stenographic facilities to the security hearing boards of the VA when needed to provide an accurate stenographic transcript of the hearing. (July 21, 1953)

(G) The Director will be responsible for the preparation of the charges against the employee to be presented to the security hearing board. The Administrator will be represented at the hearing by a person designated by the Legal Officer. Such representative shall not act as prosecutor, but will aid the board in its determination as to procedure, and, if desired by an employee not represented by counsel, will advise the employee of his rights before the board. (September 20, 1955)

709. HEARING PROCEDURE.

(A) Hearings before security hearing boards will be conducted in an orderly manner, and in a serious, businesslike atmosphere of dignity and decorum, and will be expedited as much as possible. (July 21, 1953)

(B) Testimony before the hearing boards will be given under oath or affirmation. (July 21, 1953).

(C) The hearing board will take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee will be informed by the board of his right (1) to participate in the hearings, (2) to be represented by counsel of his choice, (3) to present witnesses and offer other evidence in his own behalf and in refutation of the charges brought against him, and (4) to cross-examine any witness offered in support of the charges (July 21, 1953).

(D) Hearings will be opened by the reading of the letter setting forth the charges against the employee, and the statements and affidavits by the employee in answer to such charges. (July 21, 1953)

(E) Both the VA and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence will not be binding on the board, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of matters considered, so that the hearings will not be unduly prolonged. If the employee is, or may be, handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board will take that fact into consideration. If a person who has made charges against the employee and who is not a confidential informant is called as a witness but does not appear, his failure to appear will be considered by the board in evaluating such charges, as well as the fact that there can be no payment for travel of witnesses (July 21, 1953).

(F) The employee or his counsel will have the right to control the sequence of witnesses called by him. Reasonable cross-examination of witnesses by the employee or his counsel will be permitted (July 21, 1953).

(G) The hearing board will give due consideration to documentary evidence developed by investigation, including party membership cards, petitions bearing the employee's signature, books, treatises, or articles written by the employee, and testimony by the employee before duly constituted authorities. The fact that such evidence has been considered will be made a part of the transcript of the hearing (July 21, 1953).

(H) Hearing boards may, in their discretion, invite any person to appear at the hearing and testify. However, a board will not be bound by the testimony of such witness by reason of having called him, and will have full right to cross-examine him (July 21, 1953).

(I) Hearing boards will conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources of methods (July 21, 1953).

(J) Complete verbatim stenographic transcript will be made of the hearing by qualified reporters, and the transcript will constitute a permanent part of the record. Upon request, the employee or his counsel will be furnished [ ] a copy of the transcript of the hearing (December 14, 1955).

(K) The board will reach its conclusion and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession. The board, in making its determination, will take into consideration the inability of the employee to meet charges of which he has not been advised, because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not appear. The decision of the board will be in writing and will be signed by all members of the board. The original and all copies of the decision of the board, together with the complete record of the case, including investigative reports, will be sent to the Director (Sept. 20, 1955).

(L) Hearings shall be private. There shall be present at the hearing only the members of the hearing board, the stenographer or stenographers, the employee, his counsel, agency employees concerned, and the witnesses. Witnesses shall be present at the hearing only when actually giving testimony (July 21, 1953).

710. VIOLATIONS OF LAW TO BE REPORTED TO DIVISION OF INTERNAL SECURITY, DEPARTMENT OF JUSTICE.—All violations of law as disclosed in the investigations or proceedings under the security program should be reported immediately through the General Counsel to the Division of Internal Security, Department of Justice (Sept. 20, 1955).

711. REPORT OF FINAL ACTION IN CASES INVOLVING FULL FIELD INVESTIGATIONS.—The Director will, as soon as possible and in no event later than 90 days after receipt of the final investigative report on an employee subject to a full field investigation under the provisions of this regulation and Executive Order 10450, as amended, advise the Commission as to the action taken with respect to such employee (Sept. 20, 1955).

712. SECURITY REGULATIONS DO NOT REPLACE DISCIPLINARY PROCEDURE.—Nothing contained in VA Regulations 700 to 712 inclusive, will supersede existing regulations or instructions governing disciplinary action, including dismissals from the service (Sept. 20, 1955).

#### SAFEGUARDING OFFICIAL INFORMATION

##### 715. SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES, EXECUTIVE ORDER 10501, NOVEMBER 5, 1953.

(A) Under the provisions of Executive Order 10501, official information which requires protection in the interests of national defense shall be limited to *three categories* of classification, which in descending order of importance shall carry one of the following designations: "Top Secret," "Secret," or "Confidential." No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. (August 19, 1954.)

(B) The purpose of these Regulations (VA Regulations 715-717) is to prescribe criteria for the safeguarding of classified defense information or material, in custody of the Veterans Administration, as an aid in the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action. (August 19, 1954.)

(C) The Criminal Code relating to Espionage and Censorship, 18 U. S. C. 793, provides:

"Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

Accordingly, each person employed by or serving in an official capacity with the Veterans' Administration, who has occasion to come into possession of classified information, is individually responsible for exercising vigilance and discretion in conforming with such act, Executive Order 10501, VA Regulation 703 (B) (6), and in applying the appropriate security regulations governing the use, handling, and safekeeping of classified information and material. (August 19, 1954.)

(D) All positions involving the handling of "Top Secret," "Secret," or "Confidential" classified defense material or information shall be designated as *sensitive*. No person will be entitled to knowledge or permitted to have possession of, or access to, classified defense information unless such person is the incumbent of a designated sensitive position and has been the subject of a full field investigation pursuant to VA Regulation 704 (C) and granted security clearance by the office of Director of Security: [Provided, That limited security clearance for access to "Confidential" defense information or material, may, if otherwise proper, be granted by the Director of Security on the basis of an up-to-date national agency check and replies to written inquiries to any person not the incumbent of a designated sensitive position who is required in the national interest to participate in emergency relocation and related planning.] In an emergency, a sensitive position may be filled for a limited period of time by a person with respect to whom a full field investigation *has not* been completed, if such action is believed to be necessary in the national interest. In such instances, a full statement of the emergent need will be given to the Director of Security for consideration and recommendation to the Administrator. (June 2, 1955.)

716. VETERANS' ADMINISTRATION AUTHORITY TO CLASSIFY ELIMINATED.—Section 2, Executive Order 10501, limits authority for the original classification of defense information or material to those departments and agencies of the executive branch having direct responsibility for national defense. The Veterans Administration is not one of such agencies. Therefore, there is no authority for the *original* classification of defense information or material by a VA official or employee. (August 19, 1954.)

#### 717. RESPONSIBILITIES.

##### (A) *Director of Security*.—

(1) The Director of Security [ ] is responsible for the overall implementation of Executive Order 10501 and the administration of the VA security program in accordance therewith, including the issuance of such additional instructions relative to the safeguarding of classified defense information as may be required to insure that classified defense information in custody of the Veterans Administration is properly safeguarded. (June 2, 1955.)

(2) The Director of Security is responsible for maintenance within the Veterans Administration of active training and orientation programs for employees concerned with classified defense information to insure that such personnel are cognizant of their individual responsibilities for exercising vigilance and care in complying with the provisions of Executive Order 10501.

(3) The Director of Security has overall responsibility for the protection and safeguarding of classified defense information in custody of the Veterans Administration, including supervision of security activities in Central Office and field stations and the inspection of facilities, equipment, and operations for compliance with VA regulations, standards, and procedures.

(4) The Director of Security is responsible for the establishment and maintenance of necessary controls to insure the proper handling and safeguarding of classified defense information or material transmitted to the Veterans' Administration by other Government departments and agencies, including the establishment and maintenance of direct channels of communication with Managers (Security Officers) of VA field stations on all matters arising in connection with

the VA security program as administered under Executive Order 10450, as amended by 10491 and 10531, and Executive Order 10501.] (August 19, 1954.)

[(B) *Department Heads, Assistant Administrators, and Comparable Officials in Central Office, and Managers (Security Officers) of VA Field Stations.*—

(1) The Chief Medical Director, Deputy Administrators, Assistant Administrators, and comparable officials in Central Office, and Managers (Security Officers) of VA field stations are responsible for the proper control, maintenance, and safeguarding of classified defense information and material in their possession or in the possession of those of their subordinates authorized to receive it in accordance with VA Regulation 715 (D).

(2) The Chief Medical Director, Deputy Administrators, Assistant Administrators, and comparable officials in Central Office, and Managers (Security Officers) of VA field stations, in cooperation with the Director of Security, will insure that all VA regulations, policies, and procedures governing the administration of the VA security program under Executive Order 10501 are invariably applied.] (August 19, 1954.)

[(C) *Individual Responsibility.*—Each individual authorized access to classified defense information is personally responsible for familiarizing himself with and adhering to these Regulations, Executive Order 10501, and any other applicable VA regulations or instructions pertaining to the protection and safeguarding of classified defense information.] (August 19, 1954.)

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VETERANS' EDUCATION APPEALS BOARD,  
Washington, D. C., April 19, 1957.

Hon. THOMAS C. HENNINGS, Jr.,

*Chairman, Subcommittee on Constitutional Rights,  
United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: Reference is made to your inquiry of April 2, 1957, regarding congressional requests for information from the Veterans' Education Appeals Board.

As you know, this Board conducts administrative adjudications pertaining to disputes arising out of educational contracts with the Veterans' Administration and we operate under sections 5 through 11 of the Administrative Procedure Act. As such, our records are open to public inspection at any time. Hence, it would be rare that an occasion would arise when information concerning the records or actions of the Board would be refused to anyone and especially to Members of Congress or congressional committees.

We know of no occasion before or since May 17, 1954, where Members of Congress have been refused requested information.

Sincerely yours,

E. L. ARPIN, *Member, Presiding.*

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## APPENDIX EXHIBIT 17

### SELECTED CASES IN WHICH INFORMATION HAS BEEN WITHHELD FROM CONGRESS BY THE EXECUTIVE DEPARTMENT

By Mary Louise Ramsey, Michael Daniels, American Law Division, the Library of Congress, Legislative Reference Service, October 21, 1955—Revised May 1, 1956

#### TABLE OF CONTENTS

- I. Information concerning conduct of foreign affairs.
- II. Charges of misconduct and investigative reports.
- III. Confidential information pertaining to members, actions, or deliberations of the executive departments.

#### I. INFORMATION CONCERNING CONDUCT OF FOREIGN AFFAIRS

February 26, 1794: In submitting to the Senate correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department, President Washington withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated" (1 Richardson, *Messages and Papers of the Presidents* (1896) 152). The resolution requesting the information was unqualified (Senate Journal, 3d Cong., 1st sess., 26).

March 30, 1796: President Washington refused to furnish to the House of Representatives 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 other documents relative to the treaty. By resolution the House had requested these papers, except such as any existing negotiations rendered improper to be disclosed. President Washington denied the right to demand and receive any of the papers, saying (1 Richardson, op. cit., supra, 194) :

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

"It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed. I repeat that I have no disposition to withhold any information which the duty of my station will permit or the public good shall require to be disclosed; and, in fact, all the papers affecting the negotiation with Great Britain were laid before the Senate when the treaty itself was communicated for their consideration and advice."

April 3, 1798: President John Adams transmitted to both Houses, in compliance with a request of the House of Representatives, certain instructions to and dispatches from the envoys extraordinary of the United States to the French Republic, but omitted "some names and a few expressions descriptive of the persons" (1 Richardson, op. cit., supra, 265). The resolution requesting the information was unqualified (Senate Journal, 5th Cong., 2d sess., 249).

December 28, 1832: The House of Representatives had requested the President to communicate to it, so far as in the President's opinion was consistent with the public interest, correspondence between the United States and the Republic of Buenos Ayres and instructions given to the United States charge d'affairs there. President Jackson replied that since negotiations with that country had only been suspended and not broken off, it would "not be consistent with the public interest to communicate the correspondence and instructions requested by the House so long as the negotiation shall be pending" (2 Richardson, op. cit. supra, 1172).

March 2, 1833: The Senate had requested the President to inform it, if not incompatible with the public interest, what negotiations had been carried on with Great Britain over the northeastern boundary, and what agreements had been made with the State of Maine with reference to such settlement. President Jackson informed the Senate that negotiations with Great Britain were in progress and that in the meantime it was not deemed compatible with the public interest to communicate the conditional arrangements made with the State of Maine (2 Richardson, op. cit., supra, 1200).

January 6, 1835: The House of Representatives requested information concerning negotiations for the settlement of the northeastern boundary, if not incompatible with the public interest (House Journal, 23d Cong., 2d sess. 135). President Jackson advised the House that it would be incompatible with the public interest to communicate it (2 Richardson, op. cit., supra, 1346). At the next session, he furnished this information to the Senate, declaring that "as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which that body has requested, submitting to them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed" (2 Richardson, op. cit., supra, 1449).

February 6, 1835: The House of Representatives had requested the President to communicate to it, if not incompatible with the public interest, certain correspondence with the Government of France, and dispatches from the United States Minister to Paris. President Jackson furnished extracts from certain dispatches, but "being of the opinion that the residue of the dispatches of that Minister cannot at the present be laid before the House consistently with the public interest" declined to transmit them (2 Richardson, op. cit., supra., 1348).

February 26, 1842: The House of Representatives had requested the President to communicate to it, if not incompatible with the public interest, the state of the negotiations with Great Britain in relation to the northeastern boundary and all correspondence on the subject not previously communicated. Tyler withheld the information, saying that "in my judgment no communication could be made by me at this time on the subject of its resolution without detriment or danger to the public interests" (3 Richardson, op. cit., supra, 1954).

June 20, 1842: The House of Representatives had requested the President to furnish "so far as may be compatible with the public interest" a copy of the quintuple treaty between the five powers of Europe for the suppression of the African slave trade and certain correspondence with respect to it. President Tyler replied that he had not received an authentic copy of the treaty and that "in regard to the other papers requested, although it is my hope and expectation that it will be proper and convenient at an early date to lay them before Congress, \* \* \* yet in my opinion a communication of them to the House of Representatives at this time would not be compatible with the public interest" (3. Richardson, op. cit., supra, 2011).

August 23, 1842: The Senate had requested the President to communicate, so far as he might deem it compatible with the public interests, what measures, if any, had been taken to obtain recognition by the Mexican Government of certain claims of American citizens. President Tyler replied that "In the present state of the correspondence and of the relations between the two governments on these important subjects, it is not deemed consistent with the public interest to communicate the information requested. The business engages earnest attention, and will be made the subject of a full communication to Congress at the earliest practicable period" (3 Richardson, op. cit. supra, 2032).

December 23, 1842: The Senate had received information concerning negotiations with Great Britain for settlement of the Northwest boundary, if not inconsistent with the public interest (Senate Journal, 27th Cong., 3d sess. 44). President Tyler replied that measures had been taken to settle the dispute and that "under the circumstances I do not deem it consistent with the public interest to make any communication on the subject" (3 Richardson, op. cit., supra, 2063).

to make any communication of the subject. (Richardson, op. cit., Sept. 14, 1863). May 18, 1844: The House of Representatives had requested the President to cause to be communicated copies of instructions given to the commanding officers of the squadron stipulated by the treaty with Great Britain to be kept off the coast of Africa for the suppression of the slave trade, and also copies of the instructions given by the British Government to their squadron stipulated by the same treaty. President Tyler informed the House that "in my opinion it would be incompatible with the public interests to communicate to that body at this time copies of the instructions referred to" (3 Richardson, op. cit. supra, 2173).

June 1844: The Senate had requested the President to lay before it confidentially a copy of the instructions to the American Minister to England concerning title to and occupation of Oregon, and a copy of correspondence between this Government and that of Great Britain on the subject, if not incompatible with the public interest. President Tyler declared that "in the present state of the subject-matter to which the resolution refers, it is deemed inexpedient to communicate the information requested by the Senate" (3 Richardson, op. cit., supra, 2180). The Senate renewed its request on December 11, 1844, but President Tyler again stated that "as the negotiation is still pending, the information sought for cannot be communicated without prejudice to the public service" (id. at 2214).

at 2214). April 20, 1846: The House of Representatives had requested the President to cause to be furnished an account of all payments made on President's certificates from the fund appropriated by law for contingent expenses of foreign intercourse from March 4, 1841, until the retirement of Daniel Webster from the Department of State. The only qualification stated in the resolution was the proviso that "no document or matter is requested to be furnished by the foregoing resolution which, in the opinion of the President, would improperly involve the citizen or subject of any foreign power" (House Journal, 29th Cong., 1st sess. 653). Polk declined to furnish the information. Citing the law which provided for private and confidential expenditures from such appropriation, he wrote (3 Richardson, op. cit. supra, 2281, 2282-2285):

\* \* \* The President in office at the time of the expenditure is made by the law the sole judge whether it shall be public or private.

"\* \* \* Under the direct authority of an existing law, he has exercised the power of placing these expenditures under the seal of confidence, and the whole matter was terminated before I came into 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 the 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. The law requires no other voucher but the President's certificate, and there is nothing in its provisions which requires any 'entries, receipts, letters, vouchers, memorandums, or other evidence of such payments' to be preserved in the executive department. The President who makes the 'certificate' 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 shall leave the evidence on which he acts and the items of the expenditures which make up the sum for which he has given his 'certificate' on the confidential files of one of the executive departments, they do not in any proper sense become thereby public records. They are never seen or examined by the accounting officers of the Treasury when they settle an account of the 'President's certificate.' \* \* \*

"It may be alleged that the power of impeachment belongs to the House of Representatives, and that, with a view to the exercise of this power, that House has the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the executive departments. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial and to testify on oath to all facts within their knowledge. But even in a case of that kind they would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interest, except so far as this might be necessary to accomplish the great ends of public justice. If the House of Representatives, at the grand inquest of the Nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation."

January 12, 1848: Without the usual qualification that information be furnished if compatible with the public interest, the House of Representatives had called upon the President to furnish the instructions and orders issued to Mr. Slidell prior to or subsequent to his departure for Mexico as Minister Plenipotentiary of the United States. President Polk refused to furnish the information saying (4 Richardson, op. cit., supra, 2415, 2417):

\*\*\* The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the Minister of the United States relate to the differences between the two countries out of which the war grew and the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled, and to comply with the call of the House would be to make public through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries.

"\* \* \* I regard it to be my constitutional right and my solemn duty under the circumstances of this case to decline a compliance with the request of the House contained in their resolution."

July 29, 1848: To a request from the House of Representatives that he communicate, if not inconsistent with the public interest, copies of instructions to commissioners appointed to conduct negotiations for ratification of the treaty with Mexico, as amended by the Senate, President Polk replied that "in my opinion it would be 'inconsistent with the public interests' to give publicity to

these instructions at the present time" (4 Richardson, op. cit., supra, 2452). At the next session the House again called for these documents and the President transmitted them on February 8, 1849 (Id. at 2529).

December 15, 1851: Upon receipt of a request from the Senate to furnish to the Senate, if not inconsistent with the public interest, information concerning the seizure of the American steamship *Prometheus* by a British vessel of war, and the measures taken to vindicate the honor of the country, the President transmitted extracts from a communication giving the facts of the case, but without the instructions given to the United States Minister in London. He declared that "Sufficient time has not elapsed for the return of any answer to this dispatch from him, and in my judgment it would at the present moment be inconsistent with the public interest to communicate these instructions. A communication, however, of all the correspondence will be made to the Senate at the earliest moment at which a proper regard to the public interest will permit" (4 Richardson, op. cit., supra, 2675).

May 29, 1852: The Senate had requested, without qualification, the papers and proofs on file in any of the executive department touching a claim of Samuel A. Bilden & Co. against the Mexican Government (Senate Journal, 32d Cong., 1st sess., 395). The President forwarded all the files of the State Department with respect to this claim except those of a diplomatic character. As to the latter President Fillmore wrote that "As the claim referred to as a subject of negotiation with the Mexican Government, it is not deemed expedient at this juncture to make public the documents which have been reserved" (4 Richardson, op. cit., supra, 2687).

August 14, 1852: The Senate had requested the President to inform it, if not incompatible with the public interests, whether any propositions had been made by the King of the Sandwich Islands to transfer the sovereignty of those islands to the United States. President Fillmore replied that on June 12 last, he had received a similar resolution from the Senate adopted in executive session, to which he had returned an answer stating that in his opinion a communication of the information requested at that juncture would not comport with the public interest. "Nothing has since transpired," he wrote, "to change my views on that subject and I therefore feel constrained again to decline giving the information asked" (4 Richardson, op. cit., supra, 2695).

January 14, 1863: The House of Representatives had requested the Secretary of State to communicate to it, if not in his judgment incompatible with the public interest, information concerning our relations with New Granada, and what negotiations, if any, had been had with General Herran of the country. President Lincoln replied to the resolution giving a résumé of developments in New Granada. However, with respect to official communications with General Herran, he stated that "No definitive measure or proceedings has resulted from these communications, and a communication of them at present would not, in my judgment, be compatible with the public interest" (5 Richardson, op. cit., supra, 3350).

January 26, 1866: The Senate had requested the President to communicate, if in his opinion not inconsistent with the public interest, communications from certain military officers "in regard to the present condition of affairs on the southeastern frontier of the United States, and especially in regard to any violation of neutrality on the part of the army now occupying the right bank of the Rio Grande." President Johnson withheld the requested papers, on the ground that the publication of the correspondence at that time was not consistent with the public interest (5 Richardson, op. cit., supra, 3575).

February 26, 1887: The Senate had requested information relative to the seizure and sale of the American schooner *Rebecca*, at Tampico, and the resignation of the Minister of the United States to Mexico, if not incompatible with the public interest (Senate Journal, 49th Cong., 2d sess., 185). President Cleveland replied that "It is not thought compatible with the public interests to publish the correspondence in either case at the present time" (7 Richardson, op. cit., supra, 5123).

April 26, 1892: The Senate had requested the President, if not incompatible with the public interest, to inform it what steps had been taken toward securing an international conference on the use of silver. President Harrison declared that "in my opinion, it would not be compatible with the public interest to lay before the Senate at this time the information requested, but that at the earliest moment after definite information can properly be given all the facts and any correspondence that may take place will be submitted to Congress" (8 Richardson, op. cit., supra, 5674).

February 11, 1898: The House of Representatives had directed the Secretary of State to communicate to it, if not inconsistent with the public interests, copies of all correspondence relating to affairs in Cuba since February 1895. President Cleveland transmitted a communication from the Secretary of State and such portions of the correspondence requested as he deemed it not inconsistent with the public interest to communicate (8 Richardson, op. cit., supra, 6098).

May 23, 1898. The Senate had requested the copy of a protocol with Spain and copies of certain correspondence with that country, if not incompatible with the public service (Senate Journal 54th Cong., 1st sess., 314). President Cleveland furnished a copy of the protocol, but refrained from sending the correspondence, saying that it would be incompatible with the public service to do so (8 Richardson, op. cit., supra, 6101).

July 11, 1930. The Senate had requested the President, if not incompatible with the public interest, to submit all letters, cablegrams, minutes, memorandums, instructions, dispatches, and all records, files, and other information touching the negotiation of the London Naval Treaty. President Hoover refused to send these papers to the Senate, saying (73 Congressional Record 108):

"This treaty, like all other international negotiations, has involved statements, reports, tentative and informal proposals as to subjects, persons, and governments given to me in confidence. The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must not allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust.

"I have no desire to withhold from the Senate any information having even the remotest bearing upon the negotiation of the treaty. 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. And I take this opportunity to repeat with the utmost emphasis that in these negotiations there were no secret or concealed understandings, premises, or interpretations, nor any commitments whatever except as appear in the treaty itself and in the interpretive exchange of notes recently suggested by your Committee on Foreign Affairs, all of which are now in the hands of the Senate.

"In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest."

## II. CHARGES OF MISCONDUCT AND INVESTIGATIVE REPORTS

January 22, 1807: The House of Representatives had requested the President to furnish information touching an illegal combination of private individuals against the peace and safety of the Union, except such as he deemed the public welfare to require not to be disclosed (House Journal, 9th Cong., 2d sess. 533). President Jefferson, in reply, detailed the activities of Aaron Burr, but did not mention the names of other alleged participants. This omission he explained as follows (1 Richardson, op. cit., supra, 412):

"\* \* \* The mass of what I have received in the course of these transactions is voluminous, but little has been given under 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."

January 10, 1825: The House of Representatives had requested the President to lay before Congress, so far as he deemed compatible with the public interest charges against certain naval officers (House Journal, 18th Cong., 2d sess. 102).

President Monroe refused to submit the documents. He explained (2 Richardson, op. cit., supra, 847) :

" \* \* \* In consequence of several charges which have been alleged against Commodore Stewart, touching his conduct while commanding the squadron of the United States on that sea, it has been deemed proper to suspend him from duty and to subject him to trial on those charges. It appearing also that some of those charges have been communicated to the Department by Mr. Prevost, political agent at this time of the United States at Peru, and heretofore at Buenos Ayres and Chile, and apparently with his sanction, and that charges have likewise been made against him by citizens of the United States engaged in commerce in that quarter, it has been thought equally just and proper that he should attend here, as well to furnish the evidence in his possession applicable to the charges exhibited against Commodore Stewart as to answer such as have been exhibited against himself.

"In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both. It is important that the public servants in every station should perform their duty with fidelity, according to the injunction of the law and the orders of the Executive in fulfillment thereof. It is peculiarly so that this should be done by the commanders of our squadrons, especially on distant seas, and by political agents who represent the United States with foreign powers, for reasons that are obvious in both instances. It is due to their rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned."

February 10, 1835 : The Senate had requested the President to inform it of the charges, if any, made against the official conduct of Gideon Fitz, which caused his removal from office as surveyor general south of the State of Tennessee. President Jackson took the position that the Senate's call for information was unconstitutional and refused to furnish it. He wrote (2 Richardson, op. cit., supra, 1351) :

"This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. 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. This course is especially due to the present resolution. The President in cases of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. If, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution. The suggestion that the charges a copy of which is requested by the Senate "may contain information necessary to their action" on a nomination now before them cannot vary the principle. There is no necessary connection between the two subjects, and even if there were the Senate have no right to call for that portion of these matters which appertains to the separate and independent action of the Executive. The intimation that these charges may also be necessary "to the investigation now in progress respecting frauds in the sales of public lands" is still more insufficient to authorize the present call. Those investigations were instituted and have thus far been conducted by the Senate in their legislative capacity, and with the view, it is presumed, to some legislative action. If the President has in his possession any information on the subject of such frauds, it is his duty to communicate it to Congress, and it may undoubtedly be called for by either House sitting in its legislative capacity, though even from such a call all matters properly belonging to the exclusive duties of the President must of necessity be exempted."

January 31, 1843: The House of Representatives adopted a resolution that the Secretary of War be required to communicate to it reports made to the Department by Lieutenant Colonel Hitchcock relative to alleged frauds of Indian agents. The Secretary of War did not furnish these reports. He stated (Congressional Globe, 27th Cong., 2d sess. 579) :

" \* \* \* The reports relating to the Cherokees contain information and suggestions in reference to the matters which it was supposed would become the subject of a negotiation between this Department and the delegates of the Cherokee Nation, who have been appointed to settle their claims, and all other matters of difference with the Government of the United States, and who have now arrived in this city. The nature and subject of the report, and the opinion of the President and of this department, render its publication, at this time, inconsistent with the public interest.

"The other report referred to in the resolution, relating to alleged frauds of Indian agents, contains such information as Lieutenant Colonel Hitchcock was enabled to obtain by ex parte inquiries of various persons, whose statements were necessarily without the sanction of an oath, and which the persons implicated have had no opportunity to contradict or explain. To promulgate these statements at this time, would be grossly unjust to these persons, and would be calculated to defeat, rather than promote, the objects of the inquiry. Sufficient opportunity has not been given to the Department to pursue the investigation, or to call upon the parties affected for explanations, or to determine on the measures proper to be adopted.

"It is hoped that these reasons will be satisfactory for not transmitting to the House at this time the reports referred to in its resolution."

Being dissatisfied with this reply the House adopted a further resolution insisting upon its right "to demand from the Executive or the heads of the departments such information as may be in his possession, relating to subjects of deliberations of the House and within the sphere of its legitimate powers." It requested, without qualification, that the President cause the information to be communicated to it (*id.* at 888). Tyler responded: "All the information communicated by Lieutenant Colonel Hitchcock respecting the Cherokees—their condition as a nation and their relations to other tribes—is herewith transmitted. But his suggestions and projects respecting the anticipated proportions of the delegates and his views of their personal characters cannot in any event aid the legislation of Congress, and in my opinion the promulgation of them would be unfair and unjust to him and inconsistent with the public interest and they are therefore not transmitted." He defended his right to withhold this information as follows (3 Richardson, *op. cit.*, *supra*, 2075) :

"If by the assertion of this claim of right to call upon the Executive for all the information in its possession relating to any subject of the deliberation of the House, and within the sphere of its legitimate powers, it is intended to assert also that the Executive is bound to comply with such call without the authority to exercise any discretion on its part in reference to the nature of the information required or to the interests of the country or of individuals to be affected by such compliance, then do I feel bound, in the discharge of the high duty imposed upon me 'to preserve, protect, and defend the Constitution of the United States,' declares in the most respectful manner my entire dissent from such a proposition. The instrument from which the several departments of the Government derive their authority makes each independent of the other in the discharge of their respective functions. 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 as to 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.

"Nor can it be a sound position that all papers, documents, and information of every description which may happen by any means to come into the possession

of the President or of the heads of Departments must necessarily be subject to the call of the House of Representatives *merely* because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of its legitimate powers. 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 Departments 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 derived of an important means of investigating the conduct of its agents."

January 11, 1859: The Senate had requested the President, if not incompatible with the public interest, to communicate information relating to the landing of the bark *Wandere* on the coast of Georgia with a cargo of slaves. Buchanan transmitted a report of the Attorney General which stated that the offense had been committed and that measures were being taken to enforce the law. However, he concurred with the opinion of the Attorney General that "it would be incompatible with the public interest at this time to communicate the correspondence with the officers of the Government at Savannah or the instructions which they have received" (4 Richardson, op. cit., supra, 3085).

July 27, 1861: The House of Representatives had requested the President to furnish, if in his judgment not incompatible with the public interest, the grounds, reasons, and evidence upon which the police commissioners of Baltimore were arrested and detained as prisoners at Fort McHenry (House Journal, 27th Cong., 1st sess., 188). President Lincoln replied that it was "judged to be incompatible with the public interest at this time to furnish the information called for by the resolution" (5 Richardson, op. cit., supra, 3234).

May 1, 1862: The Senate had requested any information not deemed incompatible with the public interest concerning the arrest of Brigadier General Stone (Senate Journal, 37th Cong., 2d sess., 413). President Lincoln informed the Senate that General Stone had been arrested and imprisoned "under my general authority and upon evidence which, whether he be guilty or innocent, required, as appears to one, such proceedings to be had against him for public safety." He added that "I deem it incompatible with the public interest, as also, perhaps, unjust to General Stone, to make a more particular statement of the evidence" (5 Richardson, op. cit., supra, 3275).

February 9, 1866: The House of Representatives had requested the President, if not incompatible with the public interest, to communicate any report of the Judge Advocate General or any other officer of the Government concerning the grounds, facts, or accusation upon which Jefferson Davis and others were held in confinement. President Johnson replied that "the publication of the papers called for by the resolution is not at the present time compatible with the public interest" (5 Richardson op. cit., supra, 3576).

May 2, 1866: The House of Representatives had without qualification requested a copy of the report made by General Smith and James T. Brady of investigations, at New Orleans (Congressional Globe, 38th Cong., 1st sess., 2130). Deeming it incompatible with the public interest, President Johnson did not furnish the report (5 Richardson, op. cit., supra, 3583).

January 3, 1901: The Senate had directed the Secretary of War to transmit the report of Abraham L. Laushe, giving in detail the result of his investigations, made under the direction of the War Department into the receipts and expenditures of Cuban funds. President McKinley informed the Senate that it was not deemed compatible with the public interest to transmit the report to the Senate at that time (9 Richardson, op. cit., supra, 6458).

April 27, 1904: The House of Representatives had requested the Attorney General, if not incompatible with the public interest, to inform the House whether any criminal prosecutions had been instituted against individuals in-

volved in the Northern Securities case (an antitrust case), "and to send to the House all papers and documents and other information bearing upon any prosecutions inaugurated or about to be inaugurated in that behalf (38 Congressional Record 5636). The Attorney General informed the House that no prosecutions had been initiated "and that further than this I do not deem it compatible with the public interest to comply with the resolution" (H. Doc. No. 704, 58th Cong., 2d sess., 1904).

April 13, 1908: The House of Representatives had requested the Attorney General to transmit, if not incompatible with the public service, documents and information in the possession of the Department of Justice concerning the International Paper Co. and other corporations engaged in the manufacture of wood-pulp or print paper (42 Congressional Record 4512). The Attorney General replied that no evidence had been obtained sufficient to justify the institution of legal proceedings, either civil or criminal against any alleged combination of woodpulp or print paper manufacturers but that a further investigation was in progress. He added that "It would be inexpedient at the present stage of the investigation to disclose to the public what steps have been taken, or what action is contemplated, by this Department with respect to matters mentioned in the said resolution" (H. Doc. No. 860, 60th Cong., 1st sess., 1).

January 6, 1909: The Senate had directed the Attorney General to inform it whether legal proceedings had been instituted against the United States Steel Corp. by reason of its absorption of the Tennessee Coal & Iron Co., and if not why not. President Theodore Roosevelt responded to the resolution by stating that he was responsible for the matter. He made a brief statement of the facts which led up to the absorption. He also stated that he had instructed the Attorney General not to respond to the call for a statement of his reasons for nonaction "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" (43 Congressional Record 840). Thereafter the Senate Judiciary Committee subpoenaed the Commissioner of Corporations to produce information which he had obtained pursuant to a statute which provided that "the information so obtained or as much thereof as the President may direct shall be made public" (32 Stat. 825, 828). The Attorney General advised the Commissioner to call the request to the attention of the President, submit to him the relevant documents and obtain his instructions as what part of the data, if any, was "suitable for publication by disclosure to the subcommittee of the Senate" (27 Op. Atty. Gen. 150, 158 (1909)). When the papers came into President Roosevelt's possession, he refused to turn them over to the committee (Letters of Archie Butt, Personal Guide to President Roosevelt, ed., Abbot, 305-306 (1925)).

March 19, 1912: The Senate had instructed the Attorney General to lay before it all correspondence, information, and reports of the Bureau of Corporations relative to the so-called Harvester Trust. The Attorney General answered that he was directed by the President to say that it was not compatible with the public interests to lay before the Senate the information demanded. "These are matters," he said, "pertaining entirely to business which is now pending and incomplete in this Department" (S. Doc. No. 454, 62d Cong., 2d sess., 1).

February 23, 1915: The Senate had directed the Attorney General to report to the Senate his findings and conclusions in the investigation conducted by the Department of Justice with respect to the Smelting Trust (52 Congressional Record 4089). The Attorney General expressed regret that he was compelled to reply that it would be incompatible with the public interest for him to comply with the request (*id.* at 4908).

May 6, 1932: The House of Representatives had requested all documents pertaining to an investigation by the Treasury Department of the importation of ammonium sulfate, if not incompatible with the public interest. The Secretary of the Treasury replied that (75 Congressional Record 11669) :

"In passing the antidumping Act the Congress decided to provide that the initial decisions as to the existence of dumping should be made by the Secretary of the Treasury in accordance with administrative procedure. It has been the practice of the Department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure. This practice is complete information concerning manufacturers' and importers' business transactions which it would be practically impossible to obtain if those furnishing the information did not understand it would be treated as confidential and not divulged without their consent.

"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."

April 30, 1941: The chairman of the House Committee on Naval Affairs had requested the Attorney General to furnish all FBI reports since June 1939, and all future reports, memorandums, and correspondence of the FBI or the Department of Justice in connection with investigations arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts. The Attorney General declined (40 Op. Atty. Gen. 45). He wrote:

"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."

July 9, 1943: A Select Committee of the House of Representatives To Investigate the Federal Communications Commission subpenaed the Director of the Bureau of the Budget to produce documents pertaining to the request of the War and Navy Departments to the President to sign an Executive order transferring the functions of the Radio Intelligence Division of the Federal Communications Commission to the Military Establishment. The Director of the Budget Bureau declined to furnish the information on the ground that "Proposals of this character relate directly to problems and activities of military concern which affect the national defense and conduct of the war, and the President has issued specific instructions that their contents should not be made public. The files of the Bureau relating thereto and its conclusions and recommendations thereon are considered to be confidential papers, and disclosure of them would not comport with the public interest" (House Select Committee To Investigate the Federal Communications Commission, 78th Cong. 1st sess. 37).

The committee also subpenaed the Chairman of the Federal Communications Commission to produce documents relating to a complaint made to the Board of War Communications against Mr. Neville Miller. He replied that he did not have custody of the documents and that the Board had determined that the documents should be withheld because production of them would adversely affect the national security or injure the national prestige" (id. at 46-51). The General Counsel of the Board, who had possession of the papers, also refused to produce them (id. at 54).

The committee had requested numerous documents from the War and Navy Departments concerning the foregoing and other matters. The heads of both departments replied that the President refused to allow the documents to be delivered to the committee as such delivery would be incompatible with the public interest (id. at 67-68).

October 15, 1947: A subcommittee of the House Committee on Expenditures in the Executive Departments investigated the operation of the United States Board of Parole in 1947 and 1948, with particular emphasis on alleged irregularities in parolees given to four alleged members of the "Capone mob." The committee, on September 30, 1947, requested J. Edgar Hoover to send a representative of the FBI with investigative files on the four paroles. Hoover replied, on October 2, that he was forwarding the request to the Attorney General. A letter from the committee chairman to Tom C. Clark, Attorney General, dated October 7, 1947, reiterated the request for the files. On October 9, Peyton Ford, Assistant Attorney General stated that the Department would contact the committee after the completion of the FBI investigation. A further reply, by Acting Attorney General Phillip B. Perlman, dated October 15, contained the first direct refusal:

"The substance of your letter is a request that the reports of investigating agencies of the executive departments be made available to your committee. Such reports have long been held to be of a confidential nature.

\* \* \* \* \*

"I feel certain that you can readily see the reasons why we cannot turn over to your committee the investigative reports or files you seek and also why we cannot advise the issuance of an Executive order to that end. \* \* \*"

Having been advised by the FBI that investigative reports had been sent to the Department of Justice, the committee requested, on November 17, "the information carried in these reports and in subsequent reports which may come

to the FBI," and added "it is not the purpose at this time to ask any information as to the confidential sources from which the information was obtained."

Justice, replying to this request, stated that the investigation was not complete. The previous letters were referred to and departmental files again refused. However, it was stated that summaries would be made of reports and information contained in the file for the committee's "confidential information and use." The resulting memorandums did not satisfy the committee. Peyton Ford testified that the report was made "consistent with information which it was necessary to keep confidential because it was being presented to a grand jury." (All of the above information and quotations are from hearings before a subcommittee of the Committee on Expenditures in the Executive Departments, 80th Cong., 2d sess., 1948, pp. 594-596).

The majority report states that the reason given for the refusal was that "the information was confidential" and that it was "in compliance with an Executive order issued by President Truman" (H. Rept. No. 2441, 80th Cong., 2d sess. 1948, p. 7). The "additional views" submitted by Hon. Porter Hardy, Jr., stated that "The Executive order issued by the President did not relate specifically to the instant case" (id. 21). The full text of the October 17 letter was not printed (hearings, 595), and a letter of December 22 which apparently also gave reasons for the refusal was not printed (id. 21). Congressman Hardy also defended the adequacy of the "confidential" summary supplied by the FBI (referred to supra).

March 4, 1948: A report of the Subcommittee on National Security of the House Committee on Un-American Activities, made to the full committee on March 1, 1948, stated that Dr. Edward U. Condon, on the basis of evidence before the committee was "one of the weakest links in our atomic security." The report further stated: "So serious have Dr. Condon's associations been, that on May 15, 1947, J. Edgar Hoover, Director of the Federal Bureau of Investigation, sent a confidential letter to W. Averell Harriman, Secretary of Commerce." The report then quoted part of the letter, which set forth information in FBI files on Condon's associations. (The report is printed in H. Rept. 1753, 80th Cong., 2d sess., 1948, appendix A.)

An investigator of the subcommittee had apparently been allowed to see the letter and had copied portions of it before he was requested to stop (Report 1753, op. cit., supra, pp. 4-5).

After publication of the subcommittee report the Department of Commerce announced that Condon had been cleared by the Department Loyalty Board. The full committee, on March 3, 1948, subpoenaed the secretary of the Commerce Loyalty Board. The subpoena specifically ordered him to produce the Hoover-Harriman letter, along with files, documents, records, transcripts, and other papers involved in the loyalty board proceeding in Condon's case (id., 5).

In a letter of March 4, Secretary Harriman informed the committee chairman that he had instructed the secretary of the loyalty board to appear, but not to produce the requested papers or to testify on the subject matter of the loyalty board hearings. Harriman stated:

"I am advised by the Attorney General that under traditional concepts of the separation of powers and responsibilities of the executive and legislative branches of our Government, the executive branch is not as a matter of law required to furnish information of this kind to a congressional committee, but on the contrary has the duty to exercise its own judgment in determining whether the furnishing of the information would be in the public interest.

"\* \* \* I have after careful consideration reached the conclusion that the release of the documents and information called for in this case would in fact be prejudicial to the public interest" (id., appendix B).

President Truman, on March 13 issued an Executive memorandum ordering all reports, records, and files relating to the loyalty program to be kept on a confidential basis and ordered officers and employees in the executive department to refuse to supply such material when requested, demanded, or subpoenaed by persons outside the executive branch. Such requests, demands, or subpoenas were to be referred to the President "for such response as the President may determine to be in the public interest in the particular case."

On April 22, 1948, the House passed House Resolution 522 (94 Congressional Record 4786) which "directed" the Secretary of Commerce "to transmit forthwith to the House of Representatives" the full text of the May 15 Hoover-Harriman letter (94 Congressional Record 4777). Replying to the resolution, by letter of April 24, the Commerce Department quoted the Presidential order of March 13, declined to furnish the letter and stated that the matter had been

referred to the President (94 Congressional Record 4879). President Truman, in a press conference made remarks to the effect that the House resolution was of no effect and that he could not be forced thereby to produce the letter (New York Times, April 23, 1: 1).

August 5, 1948: The Investigations Subcommittee, Committee on Expenditures in the Executive Departments, requested Attorney General Tom C. Clark, by letter of August 2, 1948, to furnish the committee with "any letter, memoranda, or other written notice which the Department of Justice may have furnished to any other departments, agencies, bureaus, or individuals in Government concerning William W. Remington after Miss Bentley spoke to the FBI in the fall of 1945." The letter stated that the reason the information was requested was to "determine what notice was given to the other executive branches of the Government concerning the possible espionage activities of Remington" so that the committee would then "be in a position to inquire as to who was responsible for allowing Remington to hold three important jobs of a highly confidential nature, at the same time you were conducting an investigation of him."

In his reply of August 5 the Attorney General refused to supply the material on the grounds that it fell within the President's directive of March 13 (see supra, discussion of Condon case), and stated that the request had been referred to the Office of the President. (The above letters are reprinted in Hearings Before Investigations Subcommittee, Committee on Expenditures in the Executive Departments on Export Policy and Loyalty, 80th Cong., 2d sess., 1948, pp. 383-384).

The committee report (S. Rept. No. 1775, 83d Cong., 2d sess.) submitted on September 4, 1948, does not indicate any action by the President. The report gives as a second basis for refusal "the protection of information relative to procedures employed by the Department of Justice in the handling of alleged espionage within the Government" (id. 20).

April 3, 1952: During hearings of the Senate Appropriations Committee on the Department of State appropriations for 1953 the Deputy Under Secretary had from time to time declined to furnish information requested by the committee concerning the status of loyalty-security cases, the names of persons who resigned or retired while under investigation, and specific information relating to them, information relating to the identity of State Department officers who sat as members of the Loyalty Security Board in particular cases, and how each member voted. Finally the Deputy Under Secretary requested the Secretary of State to obtain specific guidance from the President as to information to be furnished the committee. The President replied that:

"It would be a great mistake to release the names of State Department and other Federal personnel who have been subjected to loyalty investigations, and to divulge the specific steps and actions taken in the processing of individual loyalty-security cases. The FBI, which checks all Government employees, institutes full field investigations upon the basis of derogatory allegations, whether or not true, and questionable affiliations or associations, however innocent in fact they may prove to be. In the overwhelming majority of loyalty cases, thorough FBI investigation and careful loyalty-board inquiry establishes the employee's loyalty. To divulge the names of these loyal employees, and the specific steps taken in adjudicating their cases, would serve no useful purpose. In the hands of unscrupulous persons, however, this information could be distorted and used to subject the employees and their families to untold embarrassment and distress. My apprehension in this regard is not based upon idle fancy, as you well know.

"Nor would the public interest be served by releasing the names of individuals determined to be security risks. Persons discharged as security risks are in a distinctly different category from persons discharged on loyalty grounds. They usually are employees who cannot be trusted with classified information because they have had questionable associates, talk too much, are careless, or may be unduly susceptible to outside influence. In enacting Public Law 733, 81st Congress, providing for suspension of employees in the interest of national security, the Congress clearly recognized that a security risk may be a useful and suitable employee in nonsensitive Government positions not involving access to classified information. Similarly, he may be an entirely loyal citizen who will render excellent service in private employment. The reputations of these persons should not be besmirched unnecessarily by making their names public.

"Many Federal employees leave the service while under routine investigation or prior to the completion of their loyalty-security processing. In the case of the State Department, I understand that such employees have left for a variety of reasons, such as military service, pregnancy, poor health, and the acceptance

of employment in private business. In many instances, Government employees leave the service without being aware of the fact that they were under investigation. To protect the innocent from groundless accusations and unwarranted inferences, therefore, it is clear that these names should not be released in response to blanket request. All of the names, of course, are flagged for attention in case the individuals should seek to reenter Government service.

"There is no objection to making available the names of all members of an agency loyalty board, but it is entirely improper to divulge how individual board members voted in particular cases or to divulge the members who sat on particular cases. If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness, and impartiality of board members would be seriously prejudiced.

"Hereafter, no information regarding individual loyalty or security cases shall be provided in response to inquiries from outside the executive branch unless such inquiries are made in writing. Where proper inquiries are made in writing, replies will be confined to two categories of information as follows: (1) if an employee has been separated on loyalty grounds, advice to that effect may be given in response to a specific request for information concerning the particular individual; and (2) if an employee has been separated as a security risk, replies to requests for information about that individual may state only that he was separated for reasons relating to suitability for employment in the particular agency. No information shall be supplied as to any specific intermediate steps, proceedings, transcripts of hearings, or actions taken in processing an individual under loyalty or security programs.

"No exceptions shall be made to the above stated policy unless the agency head determines that it would be clearly in the public interest to make specified information available, as in instances where the employee involved properly asks that such action be taken for his own protection. In all such cases, the requested information shall be released only after obtaining the approval of my office (Senate Appropriations Committee Hearings on State, Justice, Commerce, and Judiciary Appropriations, 1953, 721-725)."

### III. CONFIDENTIAL INFORMATION PERTAINING TO MEMBERS, ACTIONS OR DELIBERATIONS OF THE EXECUTIVE DEPARTMENT

December 12, 1833: The Senate had, without qualifications, requested the President to communicate a copy of a paper read to the Cabinet relative to removal of deposits from the bank by the United States (Senate Journal, 23d Cong., 1st sess. 40). Jackson refused, saying (2 Richardson, op. cit., supra, 1255):

"The executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as a Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own."

March 28, 1842: The House of Representatives had, without qualification, requested the President and heads of departments to furnish the names of members of the 26th and 27th Congresses who had been applicants for office. President Tyler declined to furnish the information. He took the position (3 Richardson, op. cit., supra, 1958) that:

" \* \* \* applications for office, or letters respecting appointments, or conversations held with individuals on such subjects are not official proceedings, and cannot by any means be made to partake of the character of official proceedings unless after the nomination of such person so writing or conversing the President shall think proper to lay such correspondence or such conversations before the Senate. 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 cannot 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 cannot 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."

May 4, 1876: The House of Representatives had requested the President, if in his opinion it was not incompatible with the public interest to inform it, whether since March 4, 1869, any executive acts had been performed at a distance from the seat of government established by law (4 Congressional Record 2158).

President Grant, in his reply of May 4, 1876 (6 Richardson, op. cit., supra, 4315), declined to supply the information on constitutional grounds and not that such disclosure would be incompatible with the public interest.

His first argument was based on the separation of powers doctrine. He failed to find the authority in the Constitution for the House to require of the Executive, "an independent branch of the Government \* \* \* an account of his discharge of his appropriate and *purely* executive offices, acts and duties, either as to when, where, or how performed" (ibid., 4316). [Emphasis added.] Although the argument was not made directly, there is a suggestion that the fact that the House is only one branch of Congress is significant. President Grant further stated that:

"What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment."

He found that the instant inquiry did not "necessarily belong to the province of legislation," and further that "it does not profess to be asked for that object."

If the request for information was "in view or in aid of the impeachment power of the House," it was Grant's position that the inquiry was in derogation of the constitutional guaranty which protects every citizen, including the President, from being made a witness against himself.

March 1, 1886: The Senate had directed the Attorney General to transmit to the Senate copies of all documents and papers filed in the Department of Justice in relation to the management and conduct of the office of district attorney of the United States of the southern district of Alabama. The Attorney General replied that the President had directed him to say that the only papers mentioned in the resolution in the custody of the Department were those relating to the suspension by the President of George M. Duskin, late incumbent of the office in question and that "it is not considered that the public interest will be promoted by a compliance with said resolution \* \* \*." Interpreting this letter as a claim "that the Attorney General of the United States is the servant of the President and is to give or withhold copies of documents in his office according to the will of the Executive, and not otherwise;" the Senate Judiciary Committee reported a resolution condemning the refusal of the Attorney General to transmit the papers. Thereupon Cleveland sent a special message to the Senate in which he disclaimed the assumption that the Attorney General was the servant of the Executive and that he should give or withhold papers at the will of the Executive. Instead, he declared that "Against the transmission of such papers and documents I have interposed my advice and direction \* \* \* because I regard the papers and documents withheld and addressed to me as intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain." The Senate, however, adopted the resolution condemning the withholding of the papers (S. Misc Doc. 68, 52d Cong., 2d sess. 233-270).

January 21, 1944: J. Edgar Hoover, Director of the FBI, testifying before the House Select Committee To Investigate the Federal Communications Commission (hearings before above committee, 78th Cong., 1st sess., pursuant to H. Res. 21 (1944), pt. 2, hereinafter cited as "hearings") refused to answer questions "concerning fingerprint records, and concerning certain matters relating to activities at Pearl Harbor, and concerning certain operations of the Bureau." He stated that "the President has directed I should not testify to any matter or to any correspondence relating to internal security, and the Attorney

General has construed questions of this kind as falling within that category so I must decline to answer for that reason." The committee, informed that the President's directions were in writing, and that Hoover had a copy with him, asked him to produce them. On the advice of Hugh B. Cox, Assistant Solicitor General, who accompanied him, Hoover refused to produce the directions on the grounds that they were addressed to the Attorney General and could not be disclosed without his permission (hearings, 2304-2305).

The following day, January 21, 1944, Hoover refused to produce the directions, for reasons set forth in a letter from the Attorney General, Francis Biddle, to the chairman of the committee (hearings, 2337-2338). The letter (hearings, 2338-2339) reads in part:

"MY DEAR MR. CHAIRMAN: 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 Communication 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 positions taken by my predecessors.

"It could, moreover, open the door to detailed inquiries into the confidential and privileged relationship that exists between the President and the Attorney General, heretofore generally recognized by the Congress. I must therefore respectfully decline to produce before your committee the President's communication. Without waiving in any way the privilege, however, I believe that I can inform the committee that the President's direction states that because the transactions relate to the internal security of the country, it would not be in the public interest, at the present time, for Mr. Hoover or any officer of the Department to testify about them or to disclose any correspondence concerning them.

"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."

The subpoena issued to Mr. Hoover did not call for any documentary evidence (hearings, 2340).

Thereafter, Hoover refused to answer questions which in his and counsel's judgment were covered by the undisclosed Presidential directive.

March 9, 1948: A subcommittee of the House Committee on Education and Labor, inquiring into the administration of the Taft-Hartley Act, twice subpoenaed Presidential assistant, John R. Steelman to appear before the committee. Steelman replied by letter of March 9, 1948, as follows:

"I am returning to you herewith two subpoenas recently issued to me on behalf of your subcommittee. On Saturday, March 6, I received a subpoena which called for my attendance at a hearing to be held that afternoon. On Monday, March 8, I received another subpoena calling for my attendance at a hearing to be held the same day.

"As you know, my official duties are to advise and assist the President of the United States. After the receipt of each of these subpoenas, I promptly informed the President, and in each instance the President directed me, in view of my duties as his assistant, not to appear before your subcommittee." (Letter printed in appendix, H. Rept. No. 1595, 80th Cong., 2d sess., 1948).

May 15, 16, 1951: In the course of the hearings on the dismissal of General MacArthur and the military situation in the Far East (hearings before the Committee on Armed Services and the Committee on Foreign Relations, Senate, 82d Cong., 1st sess., (1951), hereinafter cited as "hearings"), General Bradley, then Chairman of the Joint Chiefs of Staff, refused to testify as to certain conversations in the executive branch. He had testified that a meeting was held on April 6, 1951, attended by the President, Marshall, Acheson, Harriman, and himself, at which General MacArthur was discussed. He was asked, by a member of the committee, what was said at the meeting. General Bradley replied: "Senator, at that time I was in a position of a confidential adviser to the Presi-

dent. I do not feel at liberty to publicize what any of us said at that time" (hearings, 763). He added, "If I have to publicize my recommendations and my discussions \* \* \* my value as an adviser is ruined" (id.).

The chairman (Senator Russell), ruled "that any matter that transpired in the private conversation between the President and the Chief of Staff as to detail can be protected by the witness if he so desires, and if General Bradley relies upon that relationship \* \* \* I would rule that he be protected" (hearings, 765). This ruling was upheld by vote of the committee (hearings, 872).

Further clarifying his refusal, the general stated that he would testify as to the conclusions reached at White House conferences, and the reasons given by the Joint Chiefs of Staff to General Marshall for thinking that General MacArthur should be relieved but not as to the conversations (hearings, 810). He felt free to testify about reasons advanced because General Marshall had given his permission for such testimony (id.).

Although General Bradley first suggested that he talk to the President about the possibility of disclosure, he later took the position that he should not consult with the President and would refuse to testify on his own initiative (hearings, 816).

May 17, 1954: John G. Adams, counselor to the Army, in his testimony before the committee investigating the Army-McCarthy controversy (hearings before the Special Subcommittee on Investigations of the Committee on Government Operations, Senate, 83d Cong., 2d sess. (1954), pursuant to S. Res. 189, hereinafter referred to as "hearings") stated that on January 21, 1954, he had attended a meeting with Attorney General Brownell, Deputy Attorney General Rogers, Presidential Assistant Sherman Adams, White House Administrative Assistant Gerald Morgan and U. N. Ambassador Henry Cabot Lodge. Adams testified that he had outlined the Cohn-Schine situation to the meeting and Sherman Adams had suggested that a memorandum of all incidents in reference to Private Schine should be prepared. The meeting concluded that the Republican members of the Investigations Subcommittee should be briefed (hearings, 1059). When the committee attempted to question Adams as to what had happened at the meeting, beyond what he had testified to, Mr. Welch, counsel for the Army, interrupted with the following statement: "This was a high-level discussion of the executive department, and this witness has been instructed not to testify as to the interchange of views on people at that high level at that meeting" (hearings, 1169). Adams stated that the instruction had come to him orally, and that "the indications were that they were instructions from the Deputy Secretary of Defense," Robert B. Anderson, who was transmitting them from some other, higher, authority (hearings, 1170). It was argued that the witness had waived immunity by bringing up the subject of the meeting himself (hearings, 1171). Thereafter, Adams refused to answer several questions pertaining to the meeting (hearings, 1170 to 1173). Agreement was reached that the witness would bring to the committee written authorization for his position from the executive branch (hearings, 1197-1199).

On May 17 Adams submitted a letter of the same date from President Eisenhower to the Secretary of Defense (hearings, 1249) which reads in part:

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

A memorandum from the Attorney General to the President accompanied the President's letter (hearings, 1269-1275). After reviewing historical examples the memorandum concluded:

"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 three great branches of our Government clearly defined, no one branch has been able to encroach upon the powers of the other."

The hearings recessed for a week to allow members of the committee to consider problems raised by the President's letter. The committee, on reconvening, announced that it did not want to burden the hearings with the difficulties involved in making a final determination of the problem at that time. It put no restrictions on questions which could be asked, but it was "up to each witness and his counsel to make the plea of the protections set up by the Executive order when it is considered essential to do so" (hearings, 1288).

July 1955: During the course of hearings before a subcommittee of the Subcommittee on Antitrust and Monopoly Legislation of the Committee on the Judiciary, there were the following instances of Executive refusal to supply information and documents and to disclose the content of executive conferences and conversations.

#### *F. Sinclair Armstrong, Chairman of the SEC*

The SEC, on June 13, had postponed hearings on Dixon-Yates, at which Adolph H. Wenzell and Duncan R. Linsley (both of whom had been or were connected with the First Boston Corp.) were to testify. On that date, the House of Representatives was approaching a vote on a bill involving Dixon-Yates. The allegation was made that the postponement of the hearing was intimately connected with the pending vote in the House.

July 12, 1955: Armstrong testified that on June 13 he had met with the Commissioners and ordered the postponement. However, he refused to testify as to whether the hearing had been postponed on White House orders or at the request of someone close to the President. He also refused to answer the following questions: (1) Whether any Government officials had suggested the SEC postpone its hearings; (2) whether the "privilege" stand itself had been an inter-agency decision; (3) whether anyone from the SEC had initiated Dixon-Yates matters with the White House; (4) whether the White House had made any "representation" to the SEC during an earlier hearing on issuing Dixon-Yates stock; (5) question concerning minutes of the Commissioner's meeting on the day the hearings were postponed.

Armstrong claimed his privilege under authority of President Eisenhower's order of May 17, 1954, which was issued in connection with the Army-McCarthy hearings (discussed *supra*). He stated that the SEC had "administrative" and "judicial" functions and that "to the extent that the Chairman [of the SEC] may have conversations with the executive branch of the Government, those pertain to the 'administrative' branch of the agency." He added: "The Commission has complete administrative power \* \* \* over when hearings should be terminated. That has nothing to do with the judicial matters." Armstrong was ordered to return the following day. (Above material from New York Times, July 13, 1955, p. 1; Washington Post and Times Herald, same date, p. 1).

July 13, 1955: The following day, on the basis of a written opinion by Herbert Brownell, Attorney General, Chairman Armstrong changed his position. Brownell's opinion stated, in part:

"Any communication within the SEC among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the Agency. Likewise, any communication from others of the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954 (forbidding access to confidential FBI files during the Army-McCarthy hearing).

"You inquired specifically whether when a proceeding is pending before the Commission a request to the Commission for an adjournment by someone in the executive branch outside the Commission is likewise covered. Because such a proceeding is quasi-judicial in nature, it is my opinion that such a request would not be covered by the President's letter \* \* \*. Once the proceeding is no longer pending before the Commission such information should, upon request, be made available by the Commission to an appropriate congressional committee."

Armstrong testified that Sherman Adams, Presidential assistant, had telephoned on June 11 and had asked Armstrong to postpone the hearings and that

on June 15, the day the House voted, he had called him again and had told him that Government attorneys had decided not to intervene. The possibility of such intervention was the reason Adams had given for his request for postponement according to Armstrong. However, Armstrong refused to testify as to whether the House vote had been discussed in these conversations, stating that such testimony went beyond the Brownell opinion. The committee ordered him to again consult with the Attorney General. (Above material from New York Times, July 14, 1955, p. 1).

July 20, 1955: Chairman Armstrong again retreated from a previous position. He testified that Sherman Adams had mentioned the pending House vote in his June 11, 1955, telephone conversation. Armstrong refused to testify as to whether he had collaborated with Sherman Adams with reference to testimony to be given before the investigating committee, stating "it has nothing to do with proceeding before the SEC" (New York Times, July 21, 1955, p. 1; Washington Post and Times Herald, same date, p. 1).

July 30, 1955: Armstrong again refused to testify as to what advice Adams had given him regarding testimony before the committee. Armstrong stated that this position was sustained by Herbert Brownell, Jr., and Gerald Morgan, special counsel to the President, on the grounds that it was privileged information (New York Times, July 30, p. 6).

*Sherman Adams, Assistant to the President*

July 21, 1955: Replying to a request by Senator Kefauver to testify before the committee, Mr. Adams stated in a letter to the committee: "Since every fact to which I might give testimony either has been or could be testified to fully by other responsible Government officials and because of my official and confidential relationship to the President, I respectfully decline the subcommittee's invitation" (New York Times, July 22, p. 1).

July 26, 1955: Replying to a letter from Senator Kefauver asking him to reconsider, Mr. Adams stated in a short letter that his position had not changed (New York Times, July 30, 1955, p. 6).

*Kenneth E. Fields, General Manager, Atomic Energy Commission*

July 21, 1955: Senator Kefauver, by letter of July 18, 1955 (reprinted, Daily Congressional Record, July 21, 1955, at p. 9576), requested Mr. Fields to deliver certain reports and memorandum. Fields stated in reply:

"The documents to which you refer constitute internal working papers within the Commission and reflect staff discussions prior to final action. They do not constitute official actions by a Government agency or a Government official. I hope you will appreciate, therefore, that they constitute privileged communications within the executive branch under the well-recognized doctrine of separation of powers, a principle which was recently reiterated by the President. Under the circumstances, therefore, the Commission has instructed me to advise you that we must respectfully decline to comply with your request."

Fields took the same position at the hearings that day (New York Times, July 22, 1955, p. 1).

*Rowland Hughes, Director of the Bureau of the Budget*

Hughes refused to make available to the committee a copy of a report prepared by Wenzell. Subsequently, Hughes released a copy of the report to Wenzell to use as he saw fit, and Wenzell turned it over to the committee. The committee, in its interim report states that the "refusal of the document to the committee directly still stands" (interim report to the Subcommittee on Antitrust and Monopoly Legislation of the Committee on the Judiciary (1955), p. 14). This refusal was made after checking with the President (id.). The report further states that Hughes refuses "on claim of Executive privilege, apparently still with the support of the President \* \* \* other documents \* \* \* including a memorandum prepared for his attention" and shown to a private party (id. 15). The report does not give dates for these refusals.

83D CONGRESS }  
2d Session }

SENATE

{ DOCUMENT  
No. 99

## CONGRESSIONAL POWER OF INVESTIGATION

A STUDY PREPARED AT THE REQUEST OF  
SENATOR WILLIAM LANGER, CHAIRMAN OF  
THE COMMITTEE ON THE JUDICIARY

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CONGRESSIONAL POWER OF INVESTIGATION



PRESENTED BY MR. LANGER

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(II)

# CONTENTS

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	Page
<b>I. Congressional power of investigation generally:</b>	
1. The Constitution grants the legislative authority to Congress.....	2
2. The constitutional grants do not spell out express powers of Congress to compel disclosures by means of contempt proceedings.....	2
3. Power to compel pertinent disclosures is implied in the grant of all legislative power to Congress.....	2
4. A legislative purpose will be presumed in authorizing a congressional investigation.....	3
5. A congressional inquiry may be as broad as the legislative purpose requires.....	3
6. Appeals by persons investigated to courts for aid should be timely and necessary.....	3
7. Congress should enforce its own process.....	4
8. Pertinency of evidence is not determined by its probative value.....	4
9. The "Do-you-know-a-certain-person" question, without more, is of doubtful pertinency.....	4
10. Witnesses may be punished for mistakes of law in refusing to answer.....	5
11. Cotumacy may be punished either by Congress or as a misdemeanor under Revised Statutes 102 (U. S. C. 2: 192).....	5
12. Whether or not a witness has purged himself of contempt is for the House of Congress having jurisdiction to decide.....	6
13. Members of a committee may plead immunity to prosecution for false arrest of a witness.....	6
14. The plea of privilege may be denied to witnesses.....	6
15. Forcing officers of the executive departments to divulge information may be a question of expediency rather than one of authority.....	6
16. The authority of the President to pardon persons punished by either House for contempt has not been determined.....	7
17. The life of a House committee expires with a Congress, but that of a Senate committee depends upon its authorization.....	7
18. Investigatory powers are granted to the standing committees of the Senate by Public Law 601, 79th Congress.....	8
19. Perjury, under the criminal statute, can be committed only before a duly constituted committee or subcommittee.....	8
20. A witness is not required to enter into a guessing game.....	8
<b>II. Investigations involving matters already before the courts</b> .....	<b>9</b>
<b>III. Privilege against incrimination</b> .....	<b>10</b>
<b>IV. Privilege of an attorney</b> .....	<b>13</b>
<b>V. Recent citations</b> .....	<b>14</b>
<b>VI. Rights of a witness</b>	<b>15</b>
1. Searches and seizures.....	15
2. Disgracing and inconveniencing questions.....	16
3. Right to counsel.....	16
4. Cross-examination.....	17
5. Presenting written statements or calling witnesses.....	17
6. Pertinency of the testimony.....	17
7. Defamation by a congressional witness.....	18
8. The oath.....	18
9. Undignified activity of a member.....	19
10. Immunity from service of civil process.....	19
11. Privilege with respect to international organizations.....	19
12. Quorum.....	19
13. Telecasting.....	20

	Page
<b>VII. Investigation of the executive branch</b>	20
1. Authority and purpose	22
2. Supervision by investigation	24
3. Congress versus the President	25
4. The subpoena	27
5. Concluding statement	27
<b>VIII. Investigation of the judicial branch</b>	27
<b>IX. General observations and suggestions</b>	29
1. General types of contempt cases	29
2. Limitations on investigatory powers	29
3. Relevancy and pertinency	30
4. Recommending action to the executive branch	30
5. Disclosure of crimes and future prosecutions	31
6. Potential resistance by executive officers	31
7. Guide for handling recalcitrant witness	32
(a) Immunity waived	32
(b) Questions framed with care	32
(c) Counsel permitted to interpose	33
(d) Member protests	33
(e) Chairman rebukes counsel	33
(f) Declaration of contempt unnecessary	33
(g) Committee deliberates action and reports	34
(h) Senate takes action	34
8. Reversible procedural error	34
<b>X. Rules</b>	35
<b>XI. House precedents—Punishment at the bar</b>	36
1. Answers at the bar	36
2. Confinement	36
3. Continuance	37
4. Costs	37
5. Counsel	37
6. Examination	37
7. Habeas corpus	37
8. Privilege	37
9. Procedure—arrest, arraignment, and trial	37
10. Prosecutions in the courts	38
11. Purgation	38
12. Record	38
13. Service	38
14. Subpoena	39
15. Warrant—return	39
<b>XII. Senate precedents</b>	39
1. Confinement	39
2. Habeas corpus	39
3. Procedure—arrest, arraignment, and trial	39
4. Purgation	39
5. Subpoena	40
<b>XIII. Appendixes</b>	40
1. The case of Reuben M. Whitney	40
2. The case of Thaddeus Hyatt	44
3. <i>Kilbourn v. Thompson</i>	47
4. <i>Marshall v. Gordon</i>	47
5. <i>Jurney v. MacCracken</i>	48
6. Gerhart Eisler	49
7. President Andrew Jackson	50
8. President Buchanan	55
9. President Tyler	56
10. President Polk	57
11. Senate Resolution of 1886	57
<b>XIV. Bibliography</b>	58

## PREFACE

Congressional Power of Investigation is a revision of a study prepared at the direction of Senator Wiley in the 80th Congress by the Legislative Reference Service for the use of the Committee on the Judiciary. The earlier study, published as a committee print, was entitled "Proceedings Involving Contempt of Congress and Its Committees." The copies of this print were soon exhausted because of current public interest. Numerous requests that the study be revised and republished by the Service thereafter were received. However, the requested work could not be done because of limitations placed on appropriations with respect to publishing Service studies.

Following the adjournment of the 1st session of the 83d Congress, I requested that the subject be reexamined and the study revised for publication as a Senate document. Thereafter similar requests were received from Senators Hendrickson, Ferguson, Wiley, and Jenner.

The revision, as completed, contains the original preface of Senator Wiley.

WILLIAM LANGER,  
*Chairman, Committee on the Judiciary, United States Senate.*

FEBRUARY 9, 1954.



## ORIGINAL PREFACE BY SENATOR WILEY

Whenever men have banded together for mutual protection, assistance, and survival, they have been confronted with a problem whose complexities are legion—the problem of regulating their relationships one with the other. It involves compromise, respect, understanding, protection of individual rights, and the rights of minorities and the underprivileged while safeguarding the rights and the well-being of an all-encompassing group. The machinery for regulating man's relationship with man we call government. Our Government evolved in part from our common heritage with Anglo-Saxon history.

From the time of the Magna Carta there was a constant widening of the schism between the Sovereign and his direct control of the people. As the concerns of the nation became more complex, as the barons and their successors became more resistant, the need for the monarch to consult the nation became more imperative and imposed vague restraints upon the Crown.

The nature and procedure of this consultation was uncertain, but the passing years built up many precedents. Obviously, the Sovereign could not consult each person, or for that matter each spokesman of the people; the only medium he had was the Parliament, and it was destined that this body of humble origin should become the prototype of the most important instruments for governing yet devised by mankind.

The origin of the English Parliament seems traceable to the witenagemot of the Saxon Kings which apparently began as the King's Council of wise men to perform various legislative-judicial functions for the Sovereign. After the Norman conquest it took on the name of curia regis and ultimately became known as the Parliament. The powers of the Parliament grew through the generations. The powers of the King correspondingly diminished. This struggle took centuries with an autonomous Parliament finally emerging as the legislative branch of the English nation.

In the early colonial days of our own country the various Colonies needed a legislative branch of their own. Although, they were under English domination, many autonomous acts were permitted them, and they set up their own assemblies patterned after the Parliament of their home country.

It has been said that the one fundamental dogma of English constitutional law is absolute sovereignty of the Parliament. The Colonies inherited this concept. When the Founding Fathers met to establish a government of their own, their compelling considerations were the rights of the 13 member Colonies, the establishment of a system patterned on their English heritage, and the drawing of a Constitution which would protect them from the abuses of the old system.

The Constitution set up as we all know so well the tripartite system with checks and balances. To the legislative branch, which received

the most consideration, went the law-making power (among others) held by the duly constituted and elected members.

History has shown us that the best law is the one which is based upon the most widespread human knowledge and proper ascertainment of the facts. A rule made by one man is not nearly so good as the one a man would make after consultation with those who are intimately acquainted with the situation the rule is designed to cover.

However, large bodies of men experience difficulty in taking direct action or agreeing to take action, and a corollary of this is that large bodies of men would waste time considering in toto each item. Congress, of course, reconciles the need for consultation with the time limitation by following the committee system.

The power of Congress to investigate facts is well settled by our history and precedents. The Constitution makes the legislative grant to Congress and implied in the grant is the power to do those things necessary to bring the grant into being. One means which Congress has taken to carry out the power is the committee process.

The general lack of understanding of the status, duties, and powers of the congressional committees is a matter for concern in an age when the efficient functioning of legislative bodies is the principal bulwark of free men against totalitarian ideologies. As chairman of the Senate Committee on the Judiciary I felt it was desirable to make a study of proceedings involving contempt of Congress and its committees. The committee accordingly has authorized the publication of this study.

It was my thought that a work such as this would serve as a source of information on the investigative function of Congress. The emphasis naturally is upon the substantive part of the study for it is essentially a memorandum involving the rights of individuals when called upon to serve the public by testifying to facts peculiar to their knowledge. An attempt has been made to clarify the procedural aspects of committee proceedings.

The aspect of committee proceedings which is most widely discussed is the typical case where the witness desires to refrain from giving answers which would tend to render him infamous and abhorrent in the eyes of his fellow men. It is the clashing of two public policies: (1) the protection of the dignity of the individual; and (2) the public policy of protecting the right of the whole people to have the legislative information which the one possesses though the disclosure may unfortunately be defamatory to the witness.

I believe this situation will be understood better after studying the text. It is an earnest hope that this memorandum will be of some service to committee members and to the public.

ALEXANDER WILEY,

*Chairman, United States Senate Committee on the Judiciary.*

JANUARY 6, 1948.

## CONGRESSIONAL POWER OF INVESTIGATION

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This is a revision of a study prepared in the 80th Congress by the Legislative Reference Service, at the direction of Senator Wiley, for the use of the Committee on the Judiciary. The earlier study, published as a committee print, was entitled "Proceedings Involving Contempt of Congress and Its Committees." Like the earlier work, this revision examines and discusses the investigatory powers of the Congress giving particular attention to the problems faced by the legislative branch. To other persons are left the expositions of the subject as viewed by the executive and judicial branches, except insofar as reference to such views will serve as a guide to Congress.

In referring to certain instances, and in selecting certain illustrations there has been no intention to criticize or reflect discredit on actions or individuals. The instances and materials have been selected because they may serve as guides or suggest variations in methods of handling problems. In some cases they are used merely to indicate possible attitudes on the part of the judiciary.

This revision follows the earlier outline except that the sections dealing with punishment at the bar of the Senate or the House are placed at the end. Proceedings at the bar have not been used in recent years although they remain a potent weapon to use in obtaining definitive adjudications if the need arises and either House wills the test. There has been no enlargement of these sections.

Much of the newer material incorporated has been taken from memoranda prepared by this Service. Many problems selected for presentation or examination were suggested by questions raised earlier by Members of Congress or members of the professional staffs. It is hoped that this selected material will be useful to the Members and to committees confronted in the future with situations which may be new to them.

The power of Congress and its committees to obtain information deemed necessary to the legislative process and the assertion and exercise of this power has been of extreme interest throughout the history of the national lawmaking body. That Congress considered this power to be implied in the general grant of legislative power is shown by the act of May 3, 1798 (1 Stat. 554, Chap. XXXVI), which reads:

*SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the Senate, the Speaker of the House of Representatives, a chairman of a committee of the whole, or a chairman of a select committee of either house, shall be empowered to administer oaths or affirmations to witnesses, in any case under their examination.*

*SECTION 2. And be it further enacted, That if any person shall wilfully, absolutely and falsely swear or affirm, touching any matter or thing material to the point in question, whereto he or she shall be thus examined, every person so offending, and being thereof duly convicted, shall be subjected, to the pains, penalties and disabilities, which by law are prescribed for the punishment of the crime of wilful and corrupt perjury.*

Since that date there has evolved a considerable body of law and precedent which serves as a guide to the Congress and its committees in requiring the production of information and the attendance of witnesses and in dealing with recusancy and contumacy. In recent years the practice has been to leave the punishment of recalcitrant witnesses up to the courts under Revised Statutes 102.

### I. CONGRESSIONAL POWER OF INVESTIGATION GENERALLY

At the outset it is deemed advisable to list the following 20 guiding principles. Only basic authorities are cited. Particular attention is invited to Revised Statutes 102 (U. S. C. 2:192, *infra*), which applies to "every person" who fails to appear as a witness or produce the papers requested.

#### *1. The Constitution grants the legislative authority to Congress*

Any authority of a congressional committee essential to the legislative process must be found in the powers granted to Congress in article I, section 1, and in section 5, clause 2, of the Constitution.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

SECTION 5. \* \* \* Each House may determine the Rules of its Proceedings, punish its members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

#### *2. The constitutional grants do not spell out express powers of Congress to compel disclosures by means of contempt proceedings*

It is certainly true that there is no power given by the constitution to either house, to punish for contempts except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one coordinate branch of the government. Shall we, therefore, decide that no such power exists?

It is true that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate \* \* \* (*Anderson v. Dunn* (1821) 6 Wheat. 204, 224).

\* \* \* Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain. The loose language of *Kibbourn v. Thompson*, 103 U. S. 168, the weighty criticism to which it has been subjected, see e. g., Fairman, Mr. Justice Miller and the Supreme Court, 332-334; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, the inroads that have been made upon that case by later cases, *McGrain v. Daugherty*, 273 U. S. 185, 170-171, and *Sinclair v. United States*, 279 U. S. 263, strongly counsel abstention from adjudication unless no choice is left (*U. S. v. Rumely* (1953) 345 U. S. 41, 46).

#### *3. Power to compel pertinent disclosures is implied in the grant of all legislative power to Congress*

\* \* \* there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so

regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures (*McGrain v. Daugherty* (1927) 273 U. S. 135, 161).

#### 4. A legislative purpose will be presumed in authorizing a congressional investigation

We cannot assume on this record that the action of the Senate was without a legitimate object, and so encroach upon the province of that body. Indeed, we think it affirmatively appears that the Senate was acting within its right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded (*In re Chapman* (1897) 166 U. S. 661, 670).

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable \* \* \* (*McGrain v. Daugherty* (1927) 273 U. S. 135, 178).

\* \* \* "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended." (Quoting *People v. Keeler*, 99 N. Y. 473.)

Accordingly, the courts will not attempt to determine in advance whether invalid or unconstitutional legislation may emanate from the investigation (*U. S. v. Dennis* (1947) 72 F. Supp. 417, *Barsky v. U. S.* (1948) 167 F. 2d 241).

#### 5. A congressional inquiry may be as broad as the legislative purpose requires

A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress \* \* \*. A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder, and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. Many a witness in a judicial inquiry has, no doubt, been embarrassed and irritated by questions which to him seemed incompetent, irrelevant, immaterial, and impertinent. But that is not a matter for a witness finally to decide. Because a witness could not understand the purpose of cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations. \* \* \* (*Townsend v. U. S.* (1938) 95 F. 2d 352, 361. See also *Marshall v. U. S.* (1949) 176 F. 2d 473, 474, cert. den. 339 U. S. 933).

#### 6. Appeals by persons investigated to courts for aid should be timely and necessary

Once information is in the possession of a committee, courts are reluctant to interfere with its use.

And so we think the law is settled that if appellant were before the Senate Committee as a witness and were questioned as to matters unrelated to the legislative business in hand, as his bill alleges is true of the messages in question, he would be entitled to refuse to answer; and if, for his supposed contumacy, he were imprisoned, he could secure his release on habeas corpus. And so, also, if a Senate Committee were to attempt to force a telegraph company to produce telegrams not pertinent to the matters the committee was created to investigate, the company could be restrained at the instance of the sender of the telegrams, for as the Supreme Court said in *McGrain v. Daugherty* \* \* \* the decisions in *Kilburn v. Thompson* \* \* \* and *Marshall v. Gordon* \* \* \*, point, in such circumstances, to admissible measures of relief. We are, therefore, of opinion that the court below was right in assuming jurisdiction as to the commission, and

if the bill had been filed while the trespass was in process it would have been the duty of the lower court by order on the commission or the telegraph companies or the agents of the committee to enjoin the acts complained of. But the main question we have to decide is in a different aspect. Here, as appears both from the bill and by admission of parties, the committee has obtained copies of the telegrams and they are now physically in its possession; and this means neither more nor less than that they are in the hands of the Senate, for the committee is a part of the Senate \* \* \* created, as we have seen, by the Senate for the purpose of investigating the subject of lobbying, in aid of proposed legislation. The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference (*Hearst v. Black* (1936) 87 F. 2d 68, 71).

#### 7. Congress should enforce its own process

\* \* \* It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees. By means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to the matters committed to it by the Constitution. *McGrain v. Daugherty* \* \* \*. And Congress has passed laws calculated to facilitate such investigations. (*Reed v. County Commissioners* (1928) 277 U. S. 376, 388. See also the statement of Mr. McCormack, Cong. Rec. 94:5710.)

Congress has the power to prescribe the duties of the citizens of the United States, including the duty to return from abroad to give testimony (*Blackmer v. U. S.* (1932) 284 U. S. 421).

#### 8. Pertinency of the evidence is not determined by its probative value

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation \* \* \*

The question of pertinency under sec 102 U. S. C. 2: 192<sup>1</sup> was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary, it is uniformly held that relevancy is a question of law. (*Sindair v. U. S.* (1929) 279 U. S. 263, 296–297, 298.) [See also *Morford v. U. S.* (1949) 176 F. 2d 54.]

#### 9. The "Do-you-know-a-certain-person" question, without more, is of doubtful pertinency

\* \* \* Committees may and do obtain vague information and receive hearsay evidence from which they form well-grounded suspicions that evils exist at which legislation should be aimed. That is to say, committee's conclusions that corrective legislation should be enacted need not be reached on the basis of relevant and pertinent evidence only. The precision of court procedure is not required. It may often be proper, justifiable, and ultimately helpful in the accomplishment of its investigative purposes for a Congressional committee to address to witnesses questions which it cannot demonstrate to be pertinent. But in branding a refusal to answer as a misdemeanor, Congress was careful to provide that the question must be "pertinent to the question under inquiry." It follows that, when a witness refuses to answer a question and the government undertakes to convict him of a criminal offense for not answering, then pertinency must be established. Presumption or possibility of pertinency will not suffice (*Bowers v. U. S.* (1953) 202 F. 2d 447, 448).

*10. Witnesses may be punished for mistakes of law in refusing to answer*

\* \* \* A witness may exercise his privilege of refusing to answer questions [before a committee] and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute \* \* \*. Beyond this, he must conform to the procedure of the committee and respond to its questions \* \* \*. He cannot be heard to plead justification and, hence, lack of willfulness in defiantly leaving a hearing because he does not like the questions propounded to him—remedy by objection and refusal to answer both being open to him (*Townsend v. U. S.* (1938) 95 F. 2d 352, 361).

There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer [the committee] he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and section 102 made it appellant's duty to answer. He was bound rightly to construe the statute (*Sinclair v. U. S.* (1929) 279 U. S. 263, 299).

*11. Contumacy may be punished either by Congress or as a misdemeanor under United States Code 2: 192 (Rev. Stat. 102)*

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 joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

This statute cannot be qualified by permitting a witness to set conditions before he will testify (*Eisler v. U. S.* (1948) 170 F. 2d 273). "Wilful" does not involve, necessarily, a criminal intent (*Barsky v. U. S.* (1948) 167 F. 2d 241). It means no more than that a person charged with the duty of testifying knows what he is doing and not that he must suppose he was breaking the law (*Fields v. U. S.* (1947) 164 F. 2d 97).

The authority to punish under this section rests with Congress and its committees and not with its employees. See *Ex parte Frankfeld* (1940) 32 F. Supp. 915.

Counsel contend \* \* \* that the law delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases. \* \* \*

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 offence against the United States.

\* \* \* We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account (*In re Chapman* (1897) 166 U. S. 661, 671, 672).

Where proceedings of the Senate require secrecy, judgment for contempt may be pronounced in secret session.

It was also contended in argument that although the Senate might hold secret sessions, they could not in secret session punish a man for a contempt. The court, however, cannot perceive any reason why the Senate should not have the same power of punishing contempts in secret as in open session \* \* \* (*Ex parte Nugent* (1848) 18 Fed. Cas. 483).

*12. Whether or not the witness has purged himself of contempt is for the House of Congress having jurisdiction to decide*

\* \* \* MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission, and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. (Compare *Barry v. U. S. ex rel. Cunningham* (1929) 279 U. S. 597; *Henry v. Henkel* (1914) 235 U. S. 219; *Matter of Gregory* (1911) 219 U. S. 210 (*Jurney v. MacCracken* (1935) 294 U. S. 125, 152).)

*13. Members of a committee may plead immunity to prosecution for false arrest of a witness*

The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the senators and representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place" (*Kilbourn v. Thompson* (1881) 103 U. S. 168, 201).

\* \* \* the plea set up by those of the defendants who were members of the House is a good defence, and the judgment of the court overruling the demurser to it and giving judgment for those defendants will be affirmed. As to Thompson [the sergeant at arms], the judgment will be reversed and the case remanded for further proceedings (*Ibid.*, p. 168).

*14. The plea of privilege may be denied to witnesses*

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous (R. S. 103, U. S. C. 2:193).

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part (*McGrain v. Daugherty* (1927) 273 U. S. 135, 179-180). [See sec. III of this memorandum.]

*15. Forcing officers of the executive department to divulge information may be a question of expediency rather than one of authority*

A certain amount of discretion in making disclosures will ordinarily be exercised by an executive officer [Hinds' Precedents of the House of Representatives \* \* \* 1907, vol. III, sec. 1738]. "The mischief of the House calling for documents might easily be a very great one \* \* \*" (sec. 1700).

Congress has gone far at times in asserting its authority to investigate activities in the executive department; for examples, the resolution to investigate, in 1792, the failure of the expedition under Major General St. Clair (Hinds', sec. 1725) and the creation of a joint committee on the conduct of the war in 1861 (Hinds', sec. 1728).

On the other hand, President Jackson resisted with vigor an attempt of a committee of the House to secure his assistance in an investigation of his administration. (Hinds', sec. 1737. See generally Hinds', vol. 6, secs. 404-437.) President Truman probably resisted even more vigorously though he had extensive legislative experience in conducting investigations.

*16. The authority of the President to pardon persons punished by either House for contempt has not been determined*

This is an interesting question for which there is no settled law. Certainly the right of Congress to obtain information for a legislative purpose should not be permitted to be defeated by the Presidential pardoning power. The pardoning power is limited to relief from undue harshness or evident mistake. Many people have urged that criminal contempts should not be held within the pardoning power because it would tend to destroy the independence of the judiciary. Undoubtedly the courts would differentiate between the pardoning of the contempt of a committee when prosecuted under the statutes and the pardoning of a contempt when prosecuted before the bar of the House or Senate as an enforcement in their own right. An example of a pardon of the statutory offense was that granted to Mr. Townsend by the President following the affirmation of his conviction. (See *Townsend v. U. S.*, *supra*.) However, to be considered is the exercise by the President of his power to pardon a criminal contempt of court. On this point it has been said by the Supreme Court:

\* \* \* [C]riminal contempts of a federal court have been pardoned for eighty-five years. In that time the power has been exercised twenty-seven times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments or *contempts*, using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress. In 1841, Attorney General Gilpin approved the pardon of a contempt on the ground that the principles of the common law embraced such a case and this Court had held that we should follow them as to pardons (3 Op. A. G. 622). Attorney General Nelson in 1844 (4 Op. A. G. 317), Attorney General Mason in 1845 (4 Op. A. G. 458), and Attorney General Miller in 1890 (19 Op. A. G. 476) rendered similar opinions. Similar views were expressed, though the opinions were not reported, by Attorney General Knox in 1901 and by Attorney General Daugherty in 1923. Such long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on (p. 118).

\* \* \* it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary \* \* \* (p. 119).

\* \* \* Complete independence and separation between the three branches, however, are not attained, or intended \* \* \* (p. 119).

Executive clemency exists to afford relief from undue harshness or evident mistake \* \* \* (p. 120).

(*Ex parte Grossman* (1925) 267 U. S. 87, 118, 119, 120).

*17. The life of a House committee expires with a Congress, but that of a Senate committee depends upon its authorization*

\* \* \* It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose

members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised, the select committee having this investigation in charge has neither made a final report nor been discharged, nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers \* \* \* (*McGrain v. Daugherty* (1927) 273 U. S. 135, 181).

The continuity of the Senate was questioned at the beginning of the 83d Congress. The issue was resolved in favor of the precedent. On this point see Senate Rules and the Senate as a Continuing Body (1953), S. Doc. 4, 83d Congress.

*18. Investigatory powers are granted to the standing committees of the Senate by the Legislative Reorganization Act of 1946*

SEC. 134. (a) Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of \$10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

On the House side, the Legislative Reorganization Act of 1946 (60 Stat. 812) granted general investigatory powers only to the Committee on Un-American Activities. Therefore, authority of other committees must be sought in specific resolutions passed by the House for that purpose.

*19. Perjury, under the criminal statute, can be committed only before a duly constituted committee or subcommittee*

We are measuring a conviction of a crime [of perjury] by the statute which defined it [D. C. C. 22-2501] \* \* \*. An element of the crime charged in the instant indictment is the presence of a competent tribunal. \* \* \* The House insists that to be such a tribunal a committee must consist of a quorum, and \* \* \* to convict, the jury had to be satisfied beyond a reasonable doubt that there were "actually and physically present" a majority of the committee (*Christoffel v. U. S.* (1949) 338 U. S. 84, 89).

*20. A witness is not required to enter into a guessing game*

Committees of Congress must conduct examinations in such a manner that it is clear to the witness that the committee recognizes him as being in default, and anything short of a clear-cut default on the part of the witness will not sustain a conviction for contempt of Congress. The transcript of defendant Kamp's testimony fails to disclose such a clear-cut default. The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then to rule on the witness' response (*U. S. v. Kamp* (1952) 102 F. Supp. 757, 759).

## II. INVESTIGATIONS INVOLVING MATTERS ALREADY BEFORE THE COURTS

Two Supreme Court cases, *Kilbourn v. Thompson* (1880) (103 U. S. 168) and *Marshall v. Gordon* (1917) (243 U. S. 521), furnish some indication of the attitude of the judicial branch where an investigation by a committee of Congress cuts across or involves matters pending before the courts. (See also *Delaney v. U. S.* (1952) 199 F. 2d 107.)

The power of congressional committees to invade the judicial field is an undecided question. The courts will not permit a committee to sit in judgment over people or issues when the identical case or controversy is pending before a court of competent jurisdiction. The rule has been laid down that the implied power of legislative assemblies to deal with contempt is the least possible power adequate to the end proposed. The courts seem disposed to apply this rule when a congressional inquiry becomes enmeshed with the judicial machinery.

The question is open as to what the congressional power is after the legal processes have been exhausted. There seems to be no reason or precedent against investigations involving matters which have been finally decided by the courts. It is the interference with the court systems while operating that is abhorrent to our theory of jurisprudence.

To be considered in addition to investigatory powers are constitutional principles and indications of the attitude of the judicial branch. Based largely on these latter considerations, the probable rules are that (1) a congressional committee cannot subpoena and thereby force a grand jury foreman to make disclosures respecting the proceedings of a grand jury, and (2) if in response to such a subpoena he does make disclosures, he could be subject to disciplinary action by the court. That does not mean that he will be disciplined.

The Constitution of the United States unavoidably deals in general language (*Martin v. Hunter* (1816) 1 Wheat. 304, 326). The fifth amendment spells out none of the details concerning the powers of a grand jury which was an established institution with established prerogatives when reference to it was first specifically incorporated in the Constitution upon the adoption of the first 10 amendments in 1791. Its origin is difficult to trace to an exact source. (See Edwards, *The grand jury \* \* \** (1906), part 1.) But, this and other historical legal institutions have assisted in preserving the spirit of personal liberty and individual right through progressive growth and wise adaptation to new circumstances. See *Hurtado v. California* (1884) (110 U. S. 516). As will be noted later, grand jury proceedings are protected by a veil of secrecy which may be lifted only in the sound discretion of the court. See *U. S. v. American Medical Ass'n et al.* (1939) (26 F. Supp. 429, 430), *Application of Texas Co.* (1939) (27 F. Supp. 847, 850-851). The secrecy of grand jury proceedings is specifically protected by rule 6 (e) of the Federal Rules of Criminal Procedure which reads:

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by

the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

This rule has a statutory foundation. It was promulgated by the United States Supreme Court under the authority of an act of Congress (act of June 29, 1940, 54 Stat. 688). It may be said to have continued the traditional practice of secrecy on the part of members of the grand jury except when the Court permits a disclosure. See the notes to this rule, and *U. S. v. Socony-Vacuum Oil Co.* (1940) (310 U. S. 150, 233-234), *Schmidt v. U. S.* (1940) (115 F. 2d 394), and other cases. However, see also *Atwell v. U. S.* (1908) (162 F. 97).

Secrecy extends to the vote in any given case, to the evidence delivered by witnesses and to the communications of the grand jurors to each other. The disclosure of these facts, unless under the sanction of the court, would render the imprudent person making them liable to punishment. See for examples *Goodman v. U. S.* (1939) (108 F. 2d 516, 519), and *State v. Pennington* (1859) (40 Tenn. 299). As stated in *U. S. v. Alper* (1946) (156 F. 2d 222, 226):

\* \* \* Rule 6 (e) of the New Federal Rules of Criminal Procedure also recognizes, at least by implication, that the court has power "in connection with a criminal proceeding" to compel disclosure of matters occurring before the grand jury. Whether the power should be exercised lies, like other matters pertaining to the conduct of a trial, within the court's discretion. \* \* \*

See also *U. S. v. Byoir* (1945) (58 F. Supp. 273, 274-275) and *American Jurist Grand Jury* (sec. 47 et seq.).

We are unable to resolve the constitutional issue of secrecy, which is also protected by court rule based on statutory law, in favor of the power of the committee to compel disclosure by a grand jury foreman in response to a subpoena. As indicated above, the foreman should appear and then claim his privilege, but if he voluntarily makes disclosures without permission of the court he may be subject to summary action by the court in which instance Congress probably could afford no redress whatever.

Appendix 3 contains a brief digest of the issues and decisions in the two controlling Supreme Court cases of *Kilbourn v. Thompson* and *Marshall v. Gordon*.

### III. PRIVILEGE AGAINST INCRIMINATION

The fifth amendment to the Constitution states that "no witness shall be compelled in any criminal case to be a witness against himself." The Supreme Court has given this provision a broad construction holding that it is not limited to criminal prosecutions. It applies in instances where the Government of the United States is attempting to obtain incriminatory information from a witness against his will. See *Counselman v. Hitchcock* (1892) (142 U. S. 547, 562).

Note should be taken of the fact that the fifth amendment does not say that a person shall not be asked an incriminatory question. It says he shall not be compelled to answer. In fact, the privilege is personal (*Hale v. Henkel* (1906) 201 U. S. 43) and may be waived,

that is, a person may answer if he so wishes (*U. S. v. Monia* (1943) 317 U. S. 424). But, if he does not wish to answer, he must claim his constitutional right to refuse. To do so requires no technical statement on his part but merely understandable language indicating that he knows his right and wishes to claim it. However, he cannot make a partial waiver of his constitutional right. If he waives this privilege, he must make a full disclosure (*Brown v. Walker* (1896) 161 U. S. 591, 597 and *Rogers v. U. S.* (1951) 340 U. S. 367). With respect to immunity afforded by statute, *U. S. v. Monia, supra*, indicates that unless the statute requires an affirmative claim of the privilege, it automatically attaches.

The immunity statute applicable to congressional investigations is United States Code 18:3486. The infirmity of this law has been pointed out by Mr. Chief Justice Vinson in *U. S. v. Bryan* (1950) 339 U. S. 323, as follows:

Third. Respondent also contended at the trial that the court erred in permitting the Government to read to the jury the testimony she had given before the House Committee when called upon to produce the records. She relies upon R. S. § 859, now codified in § 3486 of Title 18 U. S. C., which provides that "No testimony given by a witness before \* \* \* any committee of either House, \* \* \* shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. \* \* \*". Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage. We agree.

We need not set out the history of the statute in detail. It should be noted, however, that its function was to provide an immunity in subsequent criminal proceedings to witnesses before congressional committees, in return for which it was thought that witnesses could be compelled to give self-incriminating testimony. That purpose was effectively nullified in 1892 by this Court's decision in *Counselman v. Hitchcock*, 142 U. S. 547, holding that R. S. § 860, a statute identical in all material respects with R. S. § 859, was not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions. Under that decision, a witness who is offered only the partial protection of a statute such as §§ 859 and 860—that his testimony may not be used against him in subsequent criminal proceedings—rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity (pp. 335-336).

If the witness does rely on section 3486 and testifies, he is entitled to the limited protection it affords. (See *U. S. v. DeLorenzo* (1945) 151 F. 2d 122.) However, voluntary disclosure of a fact waives the privilege as to details (*Rogers v. U. S.* (1951) 340 U. S. 367, 373).

The immediate predecessor of section 3486 was Revised Statutes 859 which stemmed from the act of January 24, 1862 (12 Stat. 333). This latter act was preceded by the act of June 24, 1857 (11 Stat. 155), which granted immunity on such broad terms that persons who had committed grave crimes against the Government were said to have welcomed and even sought a chance to appear before an investigating committee and make general disclosures thereby immunizing themselves against criminal prosecution. See the debate on H. R. 219, 37th Congress, 2d session, *Globe* (pp. 428-431). See also the debate, 34th Congress, 3d session, *Globe* (pp. 404-405). Congress apparently intended by the act of January 24, 1862, *supra*, to foreclose this loophole and require that the witness claim his privilege. Judge Hoehling of the old Supreme Court of the District of Columbia appears to have ruled in accordance with this intent in the trials of Secretary Albert B. Fall and Mr. Edward L. Doheny for conspiracy to defraud the

Government in the leasing of the naval oil reserve at Elk Hill, Calif. The attempt of the defense, under Revised Statutes 859, to prevent the introduction of testimony given before the Senate investigating committee, was rejected on the ground that Fall and Doheny waived protection by testifying voluntarily; in other words, they had not claimed their privilege. See *United States Daily* for December 1, 1926 (p. 15), and December 2, 1926 (p. 7). This ruling, of course, preceded *U. S. v. Monia* (1943) (317 U. S. 424), which held that the immunity provision of the Sherman Act, which does not contain a clause requiring a witness to claim his privilege against self-incrimination, precludes subsequent prosecution of the witness whether he claimed the privilege at the time or not (p. 426). The act of June 22, 1938 (52 Stat. 943), merely inserted the reference to any joint committee established by a joint or concurrent resolution in Revised Statutes 859.

Returning to the Bryan case, *supra*, you will note that it refers to *Counselman v. Hitchcock* (1892) (142 U. S. 547). The immunity statute found in that case to be constitutionally inadequate was Revised Statutes, section 860, which read:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, *shall be given in evidence*, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. [Italics supplied.]

The immunity statute in question, relating to testimony before Congress, as enacted by Public Law 772, 80th Congress, reads:

#### § 3486. TESTIMONY BEFORE CONGRESS; IMMUNITY

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, *shall be used as evidence* in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. [Italics supplied.]

Note that both of these provisions merely state that the information shall not be used as evidence against the person who was compelled to make the disclosure. This does not mean that the testimony cannot be introduced to prove willful default under United States Code 2: 192 (*U. S. v. Fleischman* (1950) 339 U. S. 349, 352). See also *U. S. v. Emspak* (1951) (95 F. Supp. 1012).

The wording of the immunity statute (U. S. C. 15:32), which was found in *Heike v. U. S.* (1913) (227 U. S. 131), *U. S. v. Monia*, *supra*; etc., to satisfy the constitutional requirement, reads:

#### § 32. IMMUNITY OF WITNESS.

*No person shall be prosecuted* or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or supplemental thereto, and sections 8-11 of this title: *Provided*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying (February 25, 1903, ch. 755, § 1, 32 Stat. 904). [Italics supplied.]

Before leaving the subject of the immunity statute, we wish to point out that a plea, that the testimony will incriminate the witness under State law, may not, necessarily, avail under the rule of *U. S. v. Murdock* (1931) (284 U. S. 141), notwithstanding the fact that

in an earlier decision (*Ballmann v. Fagin* (1906), 200 U. S. 186) a contrary view had been indicated. See also *U. S. v. Salina Bank* (1828) (1 Pet. 100, 103). Later decisions appear to have followed the Murdock decision, for example see *U. S. v. Greenberg* (1951) (20 L. W. 2197-2198). However, *U. S. v. DiCarlo* (1952) (102 F. Supp. 597, 605) has held that the Murdock rule cannot be extended to cases where, in the exercise of overlapping jurisdiction of the Federal Government, a congressional committee enters upon investigations of State crimes.

#### IV. PRIVILEGE OF AN ATTORNEY

The right of an attorney to raise personally the plea of privilege before a congressional committee is controlled largely by *Jurney v. MacCracken* (1935) (294 U. S. 125) and by Revised Statutes 102, 103, and 104 (U. S. C. 2:192, 193, and 194).

The provisions of the Revised Statutes are as follows:

##### SEC. 192. REFUSAL OF WITNESS TO TESTIFY.

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 joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months (Revised Statutes, sec. 102; June 22, 1938, ch. 594, 52 Stat. 942).

##### SEC. 193. PRIVILEGE OF WITNESSES.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous (Revised Statutes, sec. 103; June 22, 1938, ch. 594, 52 Stat. 942).

##### SEC. 194. WITNESSES FAILING TO TESTIFY OR PRODUCE RECORDS.

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action (Revised Statutes, sec. 104; July 13, 1936, ch. 884, 49 Stat. 2041; June 22, 1938, ch. 594, 52 Stat. 942).

The facts of *Jurney v. MacCracken* indicate that the court will not concern itself with a plea of privilege raised during an authorized congressional investigation until that question has been decided by the House of Congress concerned. See appendix 4 for factual brief and decision.

In connection with the statutes and the case cited, consideration should be given to the following propositions:

(a) Generally speaking, an attorney at law is not allowed to divulge confidential communications, information, and secrets imparted to

him by the client or acquired during their professional relation unless he is authorized to do so by the client himself (5 Am. Jur. 286).

(b) *Arnold v. Chesebrough* (1886) 41 F. 74 infers that this is not an absolute privilege. In this case an attorney's refusal to produce evidence was upheld on the ground that there was nothing to show that it was impossible to serve the subpoena duces tecum on the person from whom the attorney received the correspondence.

(c) *U. S. v. Philadelphia and R. Ry. Co.* (1915) 225 F. 301: Records cannot be cloaked with immunity or privilege merely by depositing them in the legal department of a company. In fact, an individual is responsible for producing records, even if the office through which he acts is one of joint responsibility (*U. S. v. Fleishman* (1950), 339 U. S. 349; *U. S. v. Bryan* (1950), 339 U. S. 323).

(d) *Bowles v. Insel* (1945) 148 F. 2d 91, 93: Records required by law to be kept are not privileged. See also a discussion of this in *Wilson v. U. S.*, *infra*.

(e) *Wilson v. U. S.* (1911) 221 U. S. 361: A person has no privilege, constitutional or otherwise, against the compulsory production of records belonging to another. (See pp. 379-386.)

(f) *McMann v. Engel* (1936) 16 F. Supp. 446, 448: There are exceptions to the above rule where a relationship raising a privilege exists—such as attorney and client.

## V. RECENT CITATIONS

In addition to the resolutions or reports already cited in connection with prosecutions or particular problems, we invite attention to the following:

House Reports Nos. 2849, 2855, 2856, 2857, and 2858, 81st Congress, from the House Committee on Un-American Activities, citing Philip Bart, James J. Matles, Thomas J. Fitzpatrick, Thomas Quinn, and Frank Panzino, respectively.

House Report No. 1293, 82d Congress, from the House Committee on Un-American Activities, citing Sidney Buchman.

Senate Reports Nos. 30 and 88, 82d Congress, from the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, citing Walter M. Pechart and David N. Kessel, respectively. In addition, the following reports from this special committee are of interest because they contain memoranda from committee counsel or associate counsel certifying that the contempts complained of were, in their opinions, punishable as a matter of law: Senate Reports Nos. 200, 201, 202, 205, 206, and 207, 82d Congress, citing Frank Erickson, Joseph Doto, alias Joe Adonis, Stanley Cohen, William G. O'Brien, Ralph J. O'Hara, and John Croft, respectively.

House Report No. 1748, 82d Congress, from the House Committee on Ways and Means, citing Henry W. Grunewald exemplifies more the difficulty a committee may experience with the counsel of a witness, than the recusancy of the witness. Judge Alexander Holtzoff of the District Court, District of Columbia, fined Grunewald \$1,000 and suspended a 90-day jail sentence which he later revoked. The Washington Star of June 4, 1953, carried the following account:

The judge cited as "mitigating circumstances" the "fantastically bad" advice given Grunewald by his former attorney, William Power Maloney of New York.

In a blistering denunciation of Mr. Maloney's tactics before the House Ways and Means Subcommittee delving into Grunewald's connection with high Internal

Revenue Bureau officials, which called Grunewald as a witness in 1951, Judge Holtzoff declared: "Were it not for the fact that it isn't customary to prosecute" defense counsel in such matters "he could have been indicted for aiding and abetting contempt."

#### NO JUSTIFICATION FOR ADVICE

The jurist was alluding to Mr. Maloney's action in repeatedly directing Grunewald not to answer questions posed by the subcommittee even to the extent of refusal to divulge his name.

"There is no doubt that this was sheer defiance of the committee," the judge stated. "On the other hand," he said, "the witness was accompanied by a supposedly competent counsel. He was confronted by a situation which placed him between Scylla and Charybdis."

The jurist continued: "He received very bad advice—so bad as to be fantastic. There was no justification to advise that he refuse to answer.

"The fact that a defendant is advised by counsel to commit a criminal act is no defense. But in determining sentence it may be mitigating. The average client feels he has a lawyer who knows what he is doing."

"The court will consider this mitigating circumstance."

A salutary result probably could have been obtained by requiring Mr. Maloney to appear before the bar of the House to answer for his actions.

### VI. RIGHTS OF A WITNESS

There are few safeguards for the protection of a witness before a congressional committee. However, the Supreme Court claims it has not hesitated to protect the rights of a private individual when it found Congress was acting outside its legislative role (*Tenney v. Brandhove* (1951), 341 U. S. 367, 377). In committee, his treatment usually depends upon the skill and attitude of the chairman and the members. Since an investigation by a committee is not a trial, the committee is under no compulsion to make the hearings public. (See Eberling, *Congressional Investigation* (1928), pp. 288, 390; 3 Hinds' *Precedents of the House of Representatives* (1907), sec. 1732; and *Ex parte Nugent* (1848) 18 Fed. Cas. 483.) For the same reason the committee is not required to make the inquiry speedy. (See Dimock, *Congressional Investigating Committees* (1929), p. 158, and the sixth amendment to the Constitution of the United States.) Self-incrimination has been treated separately in part III.

#### 1. Searches and seizures

The question of unreasonable searches and seizures, with regard to a committee investigation, resolves into a determination of the committee's jurisdiction in making the investigation, and whether the required testimony and the documents of the witness are pertinent thereto. (See Dimock, op. cit. supra, p. 153.) Where the committee has jurisdiction, the congressional attitude at times in the past has been that a broad and sweeping inquiry into papers and documents could be made without specificity and that this would not be hindered or prevented by the fourth amendment. (See Eberling, op. cit. supra, pp. 226, 232-241, 245, and 285; Dimock, op. cit. supra, pp. 153-154, and 155-156.) There has been a later tendency, however, toward definiteness or careful designation in subpoenaing the papers and records desired (Dimock, op. cit. supra, p. 155). A more recent writer states that the fourth amendment serves as "a definite check on the methods which the committees may employ" and that "neither House of Congress has any 'general power' to search into, or compel disclosures concerning private affairs." (See McGahey, *The Develop-*

ment of Congressional Investigative Power, 1940, p. 106.) This assertion is supported by the decision in *Strawn v. Western Union Telegraph Co.* (Sup. Ct. D. Col. 1936, 3 L. W. 646), holding that response to a committee subpoena could be restrained on the basis that it constituted an unreasonable search and seizure under the fourth amendment and "went way beyond any legitimate exercise of the right of the subpoena duces tecum." A witness confronted with a broad subpoena, therefore, can appeal to the courts for aid but his appeal must be timely, for once his papers are in the possession of the committee, the courts will be reluctant to interfere with their use (*Hearst v. Black* (1936), 87 F. 2d 68, 71).

Where officers of an association are directed to produce books and papers, they cannot severally thwart with immunity the demands of the investigating committee by denying possession of the requested items or the authority to produce them. See *United States v. Fleischman* (1950) (339 U. S. 349). Further, records required by law to be kept are not privileged (*Bowles v. Insel* (1945), 148 F. 2d 91, 93, and *United States v. Wilson* (1911), 221 U. S. 361).

### *2. Disgracing and inconveniencing questions*

A witness may not refuse to answer a question upon the ground that his testimony may tend to disgrace or otherwise render him infamous. Revised Statutes, section 103 (U. S. C. 2: 193), states:

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Nor may a witness be excused from supplying information properly within the scope of the inquiry by the fact that the testimony sought by the committee will militate against the interest of the witness in a pending suit. (See 6 Hinds' Precedents \* \* \* sec. 338.) He cannot justify his refusal to answer inquiries on the refusal of the committee to keep his testimony secret (*U. S. v. Orman* (1953), 207 F. 2d 148, 159). However, the Supreme Court has pointedly warned against the conversion of investigations into mere harassment of persons and beliefs (*U. S. v. Rumely* (1953), 345 U. S. 41, 43-44).

### *3. Right to counsel*

The privilege of a witness to have advice of counsel depends upon the committee, and the rule has varied a good deal (Dimock, op. cit. supra, 159-160). In some cases, presence of or consultation with counsel has been permitted (Dimock, op. cit. supra; 3 Hinds' op. cit. supra, secs. 1735, 1772, 1788). In others, it has been refused (Dimock, op. cit. supra; 3 Hinds' Precedents \* \* \* sec. 1837). It has been urged, as a matter of fairness, that counsel should be allowed to appear, and it has been said that the tendency is in this direction (Dimock, op. cit. supra, pp. 161-163; see also McGahey, op. cit. supra, p. 80, n. 88). But in the final analysis, the matter is one which the committee has the power to determine for itself; it is "a matter of privilege, not of right" (Eberling, op. cit. supra, p. 390). (See also 3 Hinds' Precedents \* \* \* sec. 2501.)

#### 4. *Cross-examination*

Whether a witness or his counsel may cross-examine other witnesses depends upon the attitude of the committee. It has been said that the custom is to permit little or no cross-examination (McGeary, op. cit. supra, p. 80). For an instance recounted where cross-examination was permitted, see Dimock (op. cit. supra, p. 160). And in one case, the committee permitted counsel to communicate questions through some member of the committee but not to ask them directly (Dimock, op. cit. supra; 3 Hinds' Precedents \* \* \* sec. 1788).

It has been contended that the privilege of cross-examination should be accorded those who are being investigated or those representing issues under investigation (McGeary, op. cit. supra, pp. 80-81; also quoting then Professor (now Justice) Frankfurter, Dimock, op. cit. supra, pp. 161-163). For cases where this has been done, see Hinds' Precedents \* \* \* (secs. 1620, 1644).

#### 5. *Presenting written statements or calling witnesses*

Whether or not a witness may present a preliminary written statement by himself or counsel depends generally upon the desires of the committee (Dimock, op. cit. supra, pp. 158-159; McGeary, op. cit. supra, pp. 79-80). This is also demonstrated by the recent successful prosecution of Gerhart Eisler for contempt in refusing to be sworn as a witness until he had made a brief statement. Because these statements are sometimes needlessly long or have little relevance some committees, in order to expedite matters, have refused witnesses the privilege (McGeary, op. cit. supra). Where the privilege is granted, the reading of the statement may be interrupted by interrogations which are aimed at clarification (*ibid.*). The Legislative Reorganization Act of 1946 (sec. 133), provides that—

Each standing committee shall, so far as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, and to limit their oral presentation to brief summaries of their argument.

A witness may call other witnesses in his behalf, as a rule, upon permission accorded him by the committee, but he has no inherent right to do so (Dimock, op. cit. supra, p. 159). For instances where production of testimony was allowed, see 3 Hinds' Precedents \* \* \* (secs. 1741, 1787). In investigating charges of an impeachable offense, a committee permitted the accused to have process to compel testimony (3 Hinds' Precedents \* \* \* sec. 1736). In one case, an investigating committee permitted a person implicated by prior testimony to appear and testify (3 Hinds' Precedents \* \* \* sec. 1789).

#### 6. *Pertinency of the testimony*

Pertinency of evidence presented before a congressional committee is not determined by its probative value. This matter received attention in *Sinclair v. United States* (1929) (279 U. S. 263, 296), wherein the Court said:

Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation. \* \* \*

The question of pertinency under section 102 (U. S. C. 2:192) was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary, it is uniformly held that relevancy is a question of law (p. 298).

Where an indictment charges unlawful refusal to answer questions "all of which were pertinent to the question then under inquiry before the subcommittee," pertinency is an element of the criminal offense which must be shown by the prosecution \* \* \* (*Bowers v. U. S.* (1953), 202 F. 2d 447, 452).

#### 7. Defamation by a congressional witness

Defamatory testimony before a regularly constituted legislative body, or a committee thereof, making a legally authorized investigation, is generally held to be subject to the same rules of privilege as similar testimony in courts of justice. If the testimony is material to the inquiry, or is responsive to a question asked by the members of a committee, it is generally privileged absolutely (12 A. L. R. 1255 citing *Terry v. Fellows* (1869) 21 La. Ann. 375; *Wright v. Lothrop* (1889) 149 Mass. 385; *Sheppard v. Bryant* (1906) 191 Mass. 591). See also *McLaughlin v. Charles* (1891) (60 Hun. 239). Compare *Blakeslee v. Carroll* (1894) (64 Conn. 223).

#### 8. The oath

While the administration of an oath to a witness adds dignity to a congressional hearing, it is not essential. If administered, it comes within the purview of Revised Statutes, section 101 (U. S. C. 2:191), which reads:

The President of the Senate, the Speaker of the House of Representatives, or a chairman of any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or of a Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination.

Any Member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof.

In case of false testimony after taking an oath, a witness may be prosecuted under United States Code 18:1621, which reads:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the Untied States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both.

A correction in testimony, subsequently made, will not prevent a verdict of guilty of perjury. See *United States v. Norris* (1937) (300 U. S. 564). However, it is essential that the committee or subcommittee be duly constituted at the time that the perjured testimony is given and that quorum requirements be met (*Christoffel v. United States* (1949), 338 U. S. 84). The failure to state the name and the authority of the person who administered the oath to a congressional witness does not invalidate an indictment for perjury (*U. S. v. Debrow* (1953), Docket 51, 1953-54 term, 22 L. W. 4019).

### 9. Undignified activity of a member

In *U. S. v. Pechart et al.* (1952) (103 F. Supp. 417), attention was directed to language used by a member in addressing a witness who was attempting to assert his constitutional privilege against self-incrimination. The statement of the member, said the judge (p. 419): certainly could not have put the defendants in a frame of mind where they felt that they were being questioned in an atmosphere of impartiality appropriate to accomplish the laudable purposes of a very important committee of the United States Senate.

There is no indication that impartiality and dignity are requisite to a successful prosecution. However, their lack may influence decisions of courts.

A different view is taken in *Barsky v. U. S.* (1943) (167 F. 2d 241, 250), which states that unseemly conduct, if any, by committees of Congress is a problem for Congress or the people to consider. It is a political, not a judicial question.

Judge Louis E. Goodman, United States district court, San Francisco, Calif., who thus criticized the Senate committee in the Pechart case showed some truculence before the Special Subcommittee To Investigate the Department of Justice, House Committee on the Judiciary, 83d Congress, under House Resolution 50. See serial No. 2, part 2, pages 1752-1766. The Congress, of course, legislates with respect to many things pertaining to the courts such as jurisdiction, rules, procedures, and the administration of justice generally. This matter is discussed briefly in part VIII.

### 10. Immunity from service of civil process

The service of summons and complaint on a nonresident while he was in attendance as a witness before a committee of Congress has been quashed on the ground that such a witness is immune from service of civil process while in attendance as a witness and while traveling to and from the place where he was called upon to testify. Notwithstanding *Wilder v. Welsh* (1874) (8 D. C. 566, 1 MacArthur 566), it has been held that the immunity of a nonresident witness to service of process applies not only to witnesses before judicial tribunals, but also to witnesses before bodies of the executive branch of the Government. "This being the case," said the court, "no reason appears for not applying the immunity to witnesses appearing before the legislative branch of the Government" (*Youpe v. Strasser* (1953) 113 F. Supp. 289).

### 11. Privilege with respect to international organizations

The subject of privileged communications is within the field of municipal law and is governed by the law of the United States and not by any principle of international law. \* \* \* The United Nations is not clothed with the power to legislate on matters in the realm of municipal law of the United States. This proposition is axiomatic and may be stated without disparaging or detracting from the tremendous importance and vital significance of this international organization (*U. S. v. Keeney* (1953), 111 F. Supp. 233, 234, 235).

### 12. Quorum

We have already indicated the importance of quorum in perjury cases (*Christoffel v. U. S., supra*). To avoid future difficulties on this point, the Senate passed Senate Resolution 180, 81st Congress, adding a new paragraph (b) to section 3 of rule XXV, authorizing standing committees and subcommittees to fix a lesser number than one-third

of its entire membership who shall constitute a quorum for the purpose of taking sworn testimony. Thus these Senate committees and subcommittees can authorize interrogation by a single member. See *U. S. v. DiCarlo* (1952) (102 F. Supp. 597) and *U. S. v. Auippa* (1952) (102 F. Supp. 609).

The House does not have this provision in its rules. However, we know of no objection to the designation of small subcommittees for the purpose of taking testimony. A witness may rightfully demand the presence of quorum and if this is done, the committee should show specifically in the transcript at that point that a quorum was present. See *U. S. v. Bryan* (1950) (339 U. S. 323, 332-335).

### 18. Telecasting

Neither the House nor the Senate has provided by rule for televising hearings. Accordingly, it may be possible to effectively object to testifying before cameras. See *U. S. v. Kleinman* (1952) (107 F. Supp. 407), wherein the court stated (p. 408):

The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all of these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

The court held that the refusal of the defendants to testify was justified. See also Congressional Record (February 25, 1952) (98:1334-1335) wherein the Speaker ruled on the question.

## VII. INVESTIGATION OF THE EXECUTIVE BRANCH.

Many events have transpired since the publication of the original study in the 80th Congress. A former President has been subpoenaed and has declined to appear before the congressional committee from whence the subpoena issued. Both Congress and the President have strongly asserted their rights but to date the basic issue has not been settled by the Supreme Court. Law review articles, such as Wolkinson, Demands of Congressional Committees for Executive Papers (1949, 1950) (Fed. B. J. 10:103-150, 223-259, and 319-350) have supported the President while others, such as Collins, The Power of Congressional Committees of Investigation To Obtain Information From the Executive Branch: The Argument for the Legislative Branch (1951) (Geo. L. J. 39:563), have supported the Congress. Views, pro and con, also have been presented in House Report No. 1595, 80th Congress, on House Joint Resolution 342, and House Report No. 1753, 80th Congress, on House Resolution 522, directing the Secretary of Commerce to transmit to the House of Representatives a certain letter with respect to Dr. Edward U. Condon, Director of the National Bureau of Standards. While the resolution passed the House April 22, 1948, no further action was taken and the letter was not produced.

The House of Representatives probably could have forced the issue in the Condon case to a definitive court adjudication had it desired to do so. This would have required the passage of a resolution directing the Speaker to issue his warrant directing the Sergeant at Arms to take the Secretary of Commerce into custody and to bring him before the bar of the House to answer for his failure or refusal. Upon further refusal, the House could have ordered that he be kept by the Sergeant at Arms in the guardroom of the Capitol Police. (See 3 Hinds' \* \* \* secs. 1669, 1672, 1684, 1686, and 1690.) The matter probably would be placed immediately before the courts by means of a petition for a writ of habeas corpus and a definitive pronouncement could thus be obtained.

It is obvious that a definitive court pronouncement could not be obtained by the usual procedure of reporting the refusal under Revised Statutes 104 (U. S. C. 2:194), whereby a statutory prosecution under Revised Statutes 102 (U. S. C. 2:192) would be sought by a United States district attorney. It is unlikely that the Department of Justice would prosecute an executive officer whose refusal was based on a Presidential directive. Further, inasmuch as a statutory penalty would be involved, there could be little doubt concerning the power of the President to pardon in advance. See Taft, *Our Chief Magistrate and His Powers* (1925 edition, 121-124). It is doubtful, however, if the President could take definitive action in this manner with respect to a person held under an order of the House. See *Ex parte Grossman* (1925) (267 U. S. 87, 118).

In pointing to this possible action, there is no intention to recommend that either the Senate or the House seek definitive action in a given instance.

While there is a respectable body of general case law and precedent on the investigatory power of Congress and its committees, that phase dealing with the extent of congressional power with respect to investigations of the executive branch is singularly lacking in definitive precedents. (See sec. 1 of his report.)

This study supports generally the following propositions:

(a) That the scope of a congressional investigation is as broad as the legislative purpose requires (*Townsend v. U. S.* (1938) 95 F. (2d) 352, 361, and sec. 1 of this report).

(b) That the subpoena of a duly authorized investigatory committee of Congress is no more restricted than that of a grand jury. (See sec. 4 of this section.)

(c) That the right of a legislative body to demand and receive, from the executive branch, information and papers which it deems pertinent to the legislative process is established. (See sec. 1 of this section.)

(d) That this established right has been vigorously asserted at times by the Congress of the United States against the President and executive officers. (See sec. 3 of this section.)

(e) That the President and the executive officers have vigorously defended against such asserted right on the basis of the fundamental doctrine of separation of powers of the executive, legislative, and judicial branches of the Federal Government. (See sec. 3 of this section.)

(f) That the Congress has merely asserted its right to obtain information without attempting to enforce it. (See sec. 3 of this section.)

(g) That the Congress has never attempted to invoke against executive officers the law which provides that every person who, having

been summoned by either House to give testimony or to produce papers upon a matter under inquiry, willfully makes default, is criminally liable. (See sec. 1 of this report.)

### 1. Authority and purpose

The primary purpose of a committee of Congress in conducting an investigation is to assist the function of lawmaking. A secondary purpose of almost equal importance is fulfilled by investigations whereby Congress supervises and checks activities in the executive departments. See section 136 of the Legislative Reorganization Act of 1946, *infra*. In the latter type of investigation two questions of basic importance arise: How far can Congress go in requiring information from the executive branch of the Government? To what extent does the separation of powers of the Federal Government protect the executive officers? (See McGeary, *Development of Congressional Investigative Power*, p. 102.) To date these questions have not been completely answered. Such answers as are obtained must be found in historical precedents and in analogies, for the possibility of clear-cut court decisions are unlikely on questions arising from congressional investigations culminating in tests of strength between the legislative and executive branches.

It is perhaps unfortunate that the Supreme Court of the United States has never flatly recognized the fitness and propriety of the investigative process in relation to the supervisory power of Congress over administration. When opportunity was apparently provided for such an avowal in the case of *McGrain v. Daugherty* (1927) (273 U. S. 135), the Court satisfied itself by declaring the investigation of the Attorney General necessary and proper on the ground that such information was needed for the "efficient exercise of the legislative function." By this indefinite phrase "the legislative function," the Court apparently meant the lawmaking function (Dimock, *Congressional Investigating Committees*, p. 27).

Investigations of the executive departments are necessary and proper, not only because Congress must learn the needs of the departments in legislating but also because it possesses and has consistently exercised the power to see that the departments are conducted in accordance with law and policy. When Congress suspects, for good and sufficient reason, that irregularities are taking place in a department, it is its duty and privilege under the Constitution to investigate as a means to other action (p. 28). Implementing legislation contained in section 136 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 832), spells out this power of "legislative oversight" as follows:

Sec. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

"Legislative power" as used in article I, section 1, of the Constitution unhappily fails to be either a word of art or a self-defining concept. Like "judicial power," it summarizes the history of an institution of government for any particular period of time. It did so in 1789. When the political thinkers of that period erected a

Government and set forth its outlines in a Constitution, they were not dealing with new concepts into which judges of a later date were to pour a meaning dissociated from past history and experience. Bred to the bone, as they were, with English conceptions and traditions, a phrase such as "legislative power" precipitated centuries of parliamentary history and decades of colonial practice (Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 156).

A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin. Its roots lie deep in the British Parliament, and only in the light of a knowledge of these origins and subsequent developments does it become possible to comprehend its limits. The value of British precedents, however, has been doubted on the ground that Parliament as distinguished from Congress was originally a judicial body; that powers judicial in character commonly exercised by it are attributable to its judicial nature and therefore cannot be incident to a legislature stripped in its creation of all judicial functions. To this argument several answers are to be made. The assertion that Parliament was a judicial body is in itself one that scholars have vigorously denied. But assuming the premise to be true, neither the nature of the power to punish recalcitrant witnesses nor the history of its exercise lends color to the contention that it is to be deduced from the possession of judicial as distinguished from legislative powers by Parliament. Its character as a power ancillary and subordinate to the legislative process cannot be overemphasized. Its origins and its exercise are either necessary for the self-defense of the legislature or necessary for its efficient functioning (Landis, pp. 159-160).

Committees of Parliament deputed on inquiries of a different character were, during the period 1604-1868, armed with powers to compel the production of persons and papers, administer oaths, and report recalcitrant and untruthful witnesses to Parliament. Such committees might be concerned with discovering data for proposed legislative enactments. Such was the case of Sheriff Acton, of London, who was found guilty by the Commons of prevarication before a "Committee for the Examination of the Merchants' Business," and in consequence sentenced to the Tower. Similarly, on April 21, 1664, a committee, to whom the bill for settling the navigation of the River Wye had been referred, was empowered by the House to send to the warden of the fleet to cause James Pitson to be brought before them from time to time and be examined as occasion required (8 Comm. Journal, 547 (1664)). The power of Parliament over the purse also gave rise to the institution of committees to discover whether funds appropriated had been expended for authorized purposes. Among the earliest of these instances is that of a committee deputed "to inspect the several Accompts of the Officers of the Navy, Ordnance, and Stores," and empowered to send for persons and papers (*ibid.*, 628 (1666); Landis, p. 161).

The privileges and powers of the Commons were naturally assumed to be an incident of the representative assemblies of the Thirteen Colonies. The colonial records are too vast and uncharted a continent to permit the uninitiated to glean more than a handful of illustrations of the methods of work and the problems of 13 different

legislatures dealing with a multitude of different problems. But enough has been uncovered to illustrate the incidence of privileges and powers and the solution of the problem of self-defense by colonial legislatures on the principles of Parliamentary precedents and practices.

Just as military disasters in Ireland gave rise to a Parliamentary inquiry, the failure to carry out certain offensive operations in the field led the Massachusetts House of Representatives in 1722 to assert its right to summon before them Colonel Walton and Major Moody. The Governor's attempt to thwart the inquiry led to the solemn pronouncement by the house that it was—

not only their Privilege but Duty to demand of any Officer in the pay and service of this Government an account of his Management while in the Public Employ.

Parliamentary control over the purse by committees charged with examining the accounts of disbursing officials finds its parallel in the creation of a standing committee of the Pennsylvania House of Delegates charged with the duty of auditing and settling the accounts of the treasurer and given—

full Power and Authority to send for Persons, Papers, and Records by the Sergeant at Arms of this House.

Similarly the Colonial Assembly of North Carolina ordered the arrest and detention of the receiver of powder money at Roanoke for his refusal, under the Governor's orders, to submit his accounts to the house. Public scrutiny of the conduct of different departments of governments is illustrated by the action of the Pennsylvania House of Delegates in examining witnesses upon charges of misconduct against W. Moore, judge of the court of common pleas, whom the Governor alone had the power of removing. As a result of the examination of the charges, the house felt justified in petitioning the Governor for his removal (Landis, pp. 165-166).

## *2. Supervision by investigation*

As pointed out earlier, the secondary function of a congressional investigation of the executive branch is for supervisory purposes. See section 136 of the Legislative Reorganization Act of 1946, *supra*. There are three important reasons why Congress must obtain information concerning the executive departments in carrying out this function: First, to learn departmental needs and hence legislate efficiently; second, to make possible alterations in the distribution of work in the respective departments; and third, to determine whether or not the law regulating the work of the departments is being carried out legally, economically, and to the best advantage. (See Dimock, *Congressional Investigating Committees* (1929), p. 85.) Perhaps another reason is to inform public opinion (*Galloway, Investigative Function of Congress*, 21 Am. Pol. Sc. Rev., p. 60).

Especially with regard to the last two reasons, the possible importance of the threat of investigation should not be overlooked. While there are no scales to measure the unethical and undesirable practices which it may prevent, the fear of publicity through investigation may carry the same restraint as fear of the law. (See McGahey, *The Developments of Congressional Investigative Power* (1940), p. 21.)

At this point it should be emphasized that the power to investigate the executive branch is perhaps the least of the great powers vested or

inherent in Congress. Of greater scope and consequence are the power to impeach, the power to control through appropriations, the power to abolish functions or transfer functions, and the power to refuse to withhold advice and consent.

### 3. Congress versus the President

The Constitution was hardly adopted and the new Government organized before Congress and the President were at odds over a request for the transmission of Executive papers. In 1796 the House of Representatives requested President Washington to lay before it certain papers relating to the negotiation of the treaty with the King of Great Britain. The President refused the request, pointing out that the assent of the House is not necessary to the validity of a treaty and that the treaty exhibited in itself all the objects requiring legislative provision. He wrote:

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 \*\*\* forbids a compliance with your request. (See I Richardson, J. D., *Messages of the Presidents* (Washington, 1896-99), p. 196.)

One of the most famous congressional investigations was that authorized in 1861 by concurrent action of the two Houses, which assumed, without much question, the right to investigate the conduct of the war. On December 9, 1861, the Senate agreed to the following:

*Resolved by the Senate, the House of Representatives concurring.* That a joint committee of three members of the Senate and four members of the House of Representatives be appointed to inquire into the conduct of the present war; that they have power to send for persons and papers, and to sit during the session of either House of Congress (37th Cong., 2d sess., *Globe*, p. 29).

The military disasters at Bull Run and Balls Bluff led to the demand in the Senate for this investigation. These victories had not only moderated the easy optimism of the North but had left Congress and the northerners badly bewildered. Perhaps, it was thought, the President was to blame. Certainly there was something wrong with the War Department. At any rate, Congress was determined to discover where the source of weakness lay, and the investigating committee appeared as the most efficient device. In the crisis Congress apparently did not trouble itself with the reflection that, inasmuch as the President is the Commander in Chief of the Army, such interference constituted a serious infringement of the Executive prerogative. In the Senate the resolution passed by a vote of 33 to 3, and in the House there was not even debate or division. This investigation marks the use for the first time of the joint investigating committee (Dimock, p. 111).

The Wade committee, so constituted, went about its duties vigilantly during the entire course of the war. Their reports comprise four large volumes. In truth, it may be said that this committee took over a partial control of Union operations. Practically no phase of the conflict escaped the inquisitorial eye. Battles, disloyal employees, naval stations, surrenders at sea, military and naval supplies were summarily investigated. War contracts were inspected with special zeal. If legislative meddling could be shown to be damaging from a strategic standpoint, at least Congress was able to legislate with adequate knowledge and to hold the officials in Washington and upon the line of battle to strict accountability (p. 112).

Attention is invited to the activities of the Joint Committee on the Investigation of the Pearl Harbor Attack, which furnishes a direct contrast to the Committee on the Conduct of the Civil War. Though actual hostilities had ceased when this last investigation of the disaster was undertaken, the activities of the committee were seriously restricted by an order issued by President Truman on August 28, 1945, which directed the pertinent departments, agencies, and units to—take such steps as are necessary to prevent release to the public except with the approval of the President in each case—

of certain information. While the order was later modified, this new order contained the phrase "material to the investigation," which in effect left the decision on this point in the Executive rather than in the committee. (See S. Doc. No. 244, 79th Cong., p. 498.)

Nor were these the only restrictions. The committee restricted the activities of its own members, preferring, it seems, to depend upon counsel to produce facts and develop the case. There was certainly no assertion of authority comparable to that asserted by its predecessor, the earlier Committee on the Conduct of the Civil War.

The congressional investigation into the conduct of Gen. Andrew Jackson during the Seminole War (Annals of Congress, 15th Cong., 2d sess., pp. 37, 256), may have influenced the attitude of the general, when the matter of the congressional investigation came up during his term of office as President. For an account of this episode see appendix 6.

Recent difficulties are characterized by the directive of March 13, 1948 (13 Federal Register 1359), wherein the President ordered that reports of the FBI and other investigative agencies of the executive branch were to be regarded as confidential.

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 branch \* \* \* who are entitled thereto by reason of their special 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 this directive except with my express authority.

In this connection, see House Report No. 141, 45th Congress. The effectiveness of this type of regulation can be seen in *Touhy v. Ragen* (1951) (340 U. S. 462), which involved a similar regulation of the Attorney General (11 Federal Register 4920). The Supreme Court held that the order effectively precluded a response to a subpoena duces tecum by a subordinate officer, in this case an FBI agent.

Senate Resolution 15, 83d Congress, ostensibly is an attempt to provide summary proceedings in the Senate for the purpose of coping with the refusal of an officer to produce books and papers. It would, in effect, command the Sergeant at Arms either to produce the required books, papers and records or to take the defaulting officer into bodily custody and bring him before the bar of the Senate. (See Congressional Record (daily), January 9, 1953, vol. 99: 278-279).

The executive branch can be, and often is, very cooperative especially in situations of national excitement and public demand for information. For examples, note the information concerning the insurgency in prisoner-of-war camps in Korea which was promptly declassified and made available under pressures of congressional demand and public opinion. (See H. Repts. Nos. 2128, 2129, 2130, and 2131, 82d Cong.)

#### 4. *The subpoena*

As indicated in this report, investigations of Executive action are well grounded by long-continued practice. In conducting these investigations, the authority of Congress should be recognized in unequivocal terms. (See Dimock, Congressional Investigating Committees (1929), pp. 146-147.) While the use of a blanket subpoena might, in some instances, raise the cry of protest "fishing expedition," there appears to be no reason why the subpoena of a congressional committee, especially where an executive department or agency is involved, should not be as broad as, or broader than, that which a Federal grand jury may issue. A corporate officer does not hold the books and papers of his company in a private capacity (see *Essgee Co. v. U. S.* (1923), 262 U. S. 151, 158) and is required to submit them to a duly constituted authority, such as a grand jury, when demand is suitably made (p. 156). The time-honored cry "fishing expedition," standing alone, can no longer serve to halt pretrial discovery (*Hickman v. Taylor* (1947) 329 U. S. 495, 507.) Similarly, an officer in the executive branch does not hold the public papers and documents of his office in a private capacity and accordingly should be required to submit them to Congress, or one of its committees, upon proper demand.

In exercising its authority, Congress of necessity will be guided by good judgment and expediency, giving due consideration to the nature of the inquiry, the state of public and international affairs, and the general welfare of the country.

#### 5. *Concluding statement*

The beginning of this section stated that no categorical answer can be given to the question: How far can Congress go in requiring information from the executive branch? The activities of an investigatory committee and its members are limited by the extent of the backing which the particular House, or Congress itself, is willing to afford by way of official action, either at the bar of the Senate or House or otherwise.

In answer to the second question: To what extent does the separation of powers of the Federal Government protect the executive officers? The answer, to the extent that there is an answer, is found in the historical right of the legislative branch to assert the right of inspection, even over the objections of the Executive. Past practices in the Federal Government, in this regard, furnish an inconclusive and unsatisfactory guide. Precedent has never definitively passed the point where the assertion was made.

### VIII. INVESTIGATION OF THE JUDICIAL BRANCH

Congress legislates with respect to the courts. It enacts judicial codes (Public Law 772, 80th Cong., U. S. C. 28:1 et seq.). It provides for rules and it amends rules (48 Stat. 1064, 64 Stat. 158, 45 Stat. 54). It has removed jurisdiction (61 Stat. 81). It has provided an administrative office (U. S. C. 28:601 et seq.). To argue that Congress must enact legislation pertaining to the courts without the aid of pertinent knowledge would, indeed, be an anomaly. We do not believe that separation of powers requires this result either as a doctrine or as a practical matter. See *Ex parte Grossman* (1925) (267 U. S. 87, 119-120).

In the exercise of its constitutional power to obtain information for a legislative purpose, Congress has investigated the conduct of judges. See Senate Resolution 170, 74th Congress, which supplemented earlier resolutions by providing for an investigation of the administration of justice in the courts. As agreed to, this resolution reads:

*Resolved*, That in addition to the authority conferred upon the Special Committee of the Senate To Investigate the Administration of Receivership and Bankruptcy Proceedings in the Court of the United States, created under Senate Resolution 78, Seventy-third Congress, first session, agreed to June 13, 1933, and supplemented by Senate Resolution 72, Seventy-fourth Congress, first session, agreed to February 15, 1935, said committee shall have authority to make a full and complete investigation of the administration of justice in the courts of the United States. The Department of Justice is requested to furnish the committee such investigators and legal assistants as the committee may require in its investigation.

Pursuant to this resolution the special Senate committee interrogated a United States district court judge under oath and refused to permit him to be represented by counsel. (See hearings before a Special Committee To Investigate Bankruptcy and Receivership Proceedings and Administration of Justice in United States Courts, U. S. Senate, 74th Cong., 2d sess., pursuant to S. Res. 78, 73d Cong., and S. Res. 72 and S. Res. 170, 74th Cong., pt. 8, pp. 2299 ff.) Charges against judges and legislative propositions relating to the service of the Department of Justice historically have been within the jurisdiction of the Committee on the Judiciary. (See 4 Hinds' Precedents, secs. 4062 and 4067; see also Rules of the House, H. Doc. No. 564, 82d Cong., rule XI, 12, pp. 347-348.)

This service has supported consistently the general right of Congress to require the production of information deemed pertinent to its exercise of the constitutional grant of all legislative power. (See H. Rept. No. 1595, 80th Cong., pts. 1 and 2, on H. J. Res. 342; and H. Rept. No. 1753, 80th Cong., on H. Res. 522.) However, we also have stated consistently, and we wish to emphasize the fact, that the right is not self-executing and that the activities of investigatory committees are limited in many instances by the extent of the backing which the particular House, or Congress itself, is willing to afford by way of official action either at the bar of the Senate or the House or otherwise.

Mr. Justice Tom Clark declined an invitation of Chairman Keating, Subcommittee To Investigate the Department of Justice, 83d Congress (hearings \* \* \* serial No. 2, pt. 2, p. 2134), and he later declined to honor a subpoena from Chairman Velde, House Committee on Un-American Activities.

According to a news report (Washington Evening Star, June 23, 1953) the House Committee on the Judiciary voted 22 to 5 against the recommendation of the Keating subcommittee that Mr. Justice Clark be subpoenaed following his refusal of the invitation to testify.

Committee Chairman Chauncey W. Reed \* \* \* said his group decided not to disclose how individual members voted. He revealed, however, that the committee agreed unanimously that the committee had authority to issue a subpoena to a Supreme Court Justice.

The Keating subcommittee also directed United States District Judge Louis Goodman to appear. This is the same Judge Goodman who criticized a Senate committee for lacking an atmosphere of impartiality. In a letter to the subcommittee, seven district judges, including Judge Goodman, professed unwillingness that a judge should

testify with respect to any judicial proceeding (pp. 1753-1754). He did appear and did testify although with obvious reluctance (pp. 1752-1766).

## IX. GENERAL OBSERVATIONS AND SUGGESTIONS

If the general investigatory powers of Congress are derived by implication from the vesting by the Constitution of "All legislative Powers" in the Congress, then as a necessary corollary these powers must rest with the Congress, together with the right to effectively invoke them, rather than with the committees and subcommittees which merely exercise authority actually assigned. Stated otherwise, the ultimate power to punish a recusant witness rests with the Senate or the House of Representatives rather than with the committees, the subcommittees, or their chairmen. Even in instances where Revised Statute 102 is invoked, this is done upon the determination of the parent body. See in this connection the statement of Senator Walsh before the Senate, March 22, 1924 (*Congressional Record* 65: 4725-4726).

### *1. General types of contempt cases*

Two types of cases should be noted in any discussion of the exercise by Congress of its investigatory power. The first type involves the person whose attitude and actions are unruly and obstreperous and indicate contempt of Congress and its powers. The only recourse available in this instance is punishment at the bar of the House or the Senate. For excerpts of testimony illustrative of this type of case, see McGeary, *The Development of Congressional Investigative Power*, pages 74-79. The chairman in the recounted instance warned the witness of possible proceedings before the bar of the Senate. (See also Cannon's *Precedents*, vol. VI, secs. 332-334.)

The second type of case arises where the witness, though otherwise courteous and cooperative, refuses to give requested information. In this instance he may be taken before the bar of the Senate or House or he may be prosecuted under Revised Statute 102 (U. S. C. 2:192). The observations and suggestions in this section are directed to this second type of case.

### *2. Limitations on investigatory powers*

Inasmuch as the investigatory powers of Congress are derived by implication from the grant of "All legislative Power" in article I, section 1, of the Constitution there can be no express constitutional limitations on the exercise of these powers. The only general constitutional provision affording an absolute safeguard appears to be the privilege against self-incrimination found in the fifth amendment. However, the constitutional right (fourth amendment) to be free from unreasonable searches and seizures may be protected by a timely application to the proper court.

No assumption should be made that, because there are few absolute limitations or protective safeguards, the witness is completely at the mercy of a subcommittee, for its authority and activities are subject not only to review by the courts, but also to review and control of the whole committee as well as the Senate or the House, as the case may be. An omission in this chain of review occurs when Congress is not in session. Then the violation of Revised Statute 102, instead of being reported to the Senate or House, is reported to the President

of the Senate or the Speaker of the House who in turn certifies the statement of fact under seal to the appropriate United States attorney for submission to the grand jury for action (U. S. C. 2:194). An example of this type of certification is the following letter from Representative Rayburn, Speaker of the House, 79th Congress, to Representative Martin, Speaker of the House, 80th Congress (Congressional Record 93:39-40), relating to Benjamin F. Fields:

**SELECT COMMITTEE TO INVESTIGATE DISPOSITION OF SURPLUS PROPERTY**

The Speaker laid before the House the following communication which was read by the Clerk:

JANUARY 3, 1947.

The SPEAKER,  
*House of Representatives, United States,*  
*Washington, D. C.*

DEAR MR. SPEAKER: I desire to inform the House of Representatives that subsequent to the sine die adjournment of the 79th Congress the Select Committee To Investigate the Disposition of Surplus Property, authorized by House Resolution 385, 79th Congress, reported to and filed with me as Speaker a statement of facts concerning the willful and deliberate refusal of Benjamin F. Fields to produce certain books, records, documents, memoranda, and papers which had been duly subpoenaed before the said select committee of the House, and I, as Speaker of the 79th Congress, pursuant to the mandatory provisions of Public Resolution 123, 75th Congress, certified to the United States attorney, District of Columbia, the statement of facts concerning the said Benjamin F. Fields on September 6, 1946.

Respectfully,

SAM RAYBURN.

However, in certifying these facts—

it necessarily follows that either the President of the Senate or the Senate itself must determine to be true what the committee has found *prima facia*, namely, that it has propounded a pertinent question and the witness has refused to answer that pertinent inquiry (Senator George, discussing the Sinclair case, Congressional Record 65:4726).

**3. Relevancy and pertinency**

With regard to this matter of relevancy or pertinency, no set rule can be stated at this time. Congressional investigations are part of the legislative process and are used to obtain facts and information for legislative purposes. They are not criminal prosecutions, grand-jury inquisitions, nor any other type of judicial proceeding and therefore committees conducting such investigations are not bound by rules of evidence or other court procedural safeguards. A witness may take issue with a committee on the question of relevancy or pertinency and leave the correctness of his judgment to the final determination by the court as a question of law if he is prosecuted under Revised Statute 102 (*Townsend v. U. S.*, *supra*; *Sinclair v. U. S.*, *supra*; *McGrain v. Daugherty*, *supra*; *Morford v. U. S.* (1949) 176 F. 2d 54). But as pointed out before, if he is mistaken that will not save him from punishment though he acted in good faith or on advice of counsel. Relevancy is by precedent left largely to the determination of the committee (*Townsend v. U. S.*, *supra*; *McGrain v. Daugherty*, *supra*; and *U. S. v. Dennis* (1947) 72 F. S. 417, 420).

**4. Recommending action to the executive branch**

Mindful, then, of the fact that a legislative inquiry is not a judicial proceeding and is therefore not bound by court rules and procedural safeguards, a committee or a subcommittee should carefully avoid actions which indicate usurpation of judicial or grand-jury functions.

Granted that investigations seeking facts and information may disclose crimes, or that they may have certain salutary supervisory aspects with regard to administration of the laws, these are merely incidental though perhaps important results. Inviting the attention of proper administrative agencies informally to pertinent disclosures may be defensible but the formal transfer by a chairman of information obtained to the executive branch with a demand for action as a matter of practice is open to serious question. At least one safeguard suggests itself—if such formal reference is to be made it should be done upon the recommendation of the full committee as approved by the Senate or the House.

#### *5. Disclosure of crimes and future prosecutions*

At this point it is pertinent to note that perhaps a witness may be immunized by an incautious or overzealous chairman against possible conviction for crimes which he has committed. In this connection see part III of this memorandum. Therefore, where congressional investigation cuts across a situation involving a crime, a delicate question is presented. The fifth amendment protects a witness against forced disclosures in any proceedings which can later be used to convict him. This constitutional protection he must affirmatively claim. (See *In re Knickerbocker Steamboat Co.* (1905), 136 F. 956.) But the law (R. S. 102) makes the refusal of a witness to testify a crime. In order to invoke this law there must be afforded an absolute immunity which appears to be provided by United States Code 18:3486. Admitting that there is infirmity in this statute (*U. S. v. Bryan* (1950), 339 U. S. 323) a committee could not in good conscience require a witness to make disclosures which could be used to convict him later and then tell a witness he had no right to rely on the statutory immunity; that he should have claimed the constitutional immunity. Thus where a congressional investigation seeking information for legislative purposes indicates that transactions under scrutiny involve crimes, the committee will be required to decide whether it is more important to the legislative process to have all the facts regardless of possible immunization of the wrongdoers or whether a future criminal prosecution is more important. In the face of a dilemma of this nature, the committee should proceed with caution, seeking either a waiver of immunity by the witness or the counsel of law-enforcement units before proceeding with further interrogation.

#### *6. Potential resistance by executive officers*

As no dividing line can be drawn or worthwhile generalization made with regard to potential resistance to committee subpoenas by officers in the legislative, judicial, or executive branches (particularly the "principal officers" of the latter—see Constitution, art. 2, sec. 2, cl. 2) and, inasmuch as resistance, when experienced, often stems from instructions from the highest authority (see pt. VIII-3), perhaps mindful of the doctrine of separation of powers, the Senate and the House should adopt some uniform plan or procedure for determining in advance of an actual clash how far the committee or subcommittee is to be backed in seeking information. Where a special resolution has authorized and directed a specific inquiry, resort to this special procedure would be unnecessary because of the determination in advance of the scope thereof, but where the chairman of a standing

committee, and especially where the chairman of a subcommittee, seeks to invoke against a "principal officer" general investigatory authority, such as was granted to standing committees of the Senate by section 134 (a) of the Legislative Reorganization Act of 1946 (Public Law 601, 79th Cong., 60 Stat. 812), and resistance is anticipated as a result of the preliminary work of the subcommittee, then the matter should have the specific authorization of the full committee and the Senate or the House as the case may be. Such authority could be stated in the form of a resolution which should be voted up or down by the interested body. This procedure would avoid embarrassing tests of strength with subsequent appeals by chairmen of subcommittees to the parent body for vindication. At the same time it would serve as a guide to the "principal officer" of the will of the Senate or the House with regard to the pertinency of demanded information.

#### *7. Guide for handling recalcitrant witnesses*

The suggestion has been made that this memorandum also contain material which would serve as a procedural guide to a chairman who is confronted with a recalcitrant witness. The following proceedings before the Senate Committee on Public Lands and Surveys on March 22, 1924, will serve as a partial guide. Mr. Sinclair had just made a statement which, among other things, contained the following:

##### *(a) Immunity waived.—*

I do not decline to answer any question upon the ground that my answers tend to incriminate me (Congressional Record 65:4723 and 4786). \* \* \*

He thus waived immunity.

*(b) Questions framed with care.*—Thereupon the following proceedings were had:

Senator WALSH of Montana. Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that.

Mr. SINCLAIR. I decline to answer on advice of counsel, on the same ground.

Senator WALSH of Montana. Since you were last upon the stand we had, Mr. Sinclair, before us a copy of a contract entered into between the Mammoth Oil Co., under which or as a consequence of which the Pioneer Oil Co. ceased to be a competitor of yours in this lease of the Teapot Dome. Will you tell us about that matter?

Mr. SINCLAIR. I decline to answer on advice of counsel, on the same ground.

Senator WALSH of Montana. When your private confidential secretary, Mr. Wahlberg, was before the committee he told us about the loan of some stock of the Sinclair Consolidated Co. to one Hays. Will you tell us about that transaction?

Mr. SINCLAIR. I decline to answer by advice of counsel, on the same ground.

Senator WALSH of Montana. Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Co. Will you tell us about that matter?

Mr. SINCLAIR. I decline to answer on the advice of counsel, on the same ground.

Senator WALSH of Montana. Mr. Sinclair, will you tell the committee where and when you met Secretary Fall during the months of November and December last?

Mr. SINCLAIR. I decline to answer on the advice of counsel, on the same ground.

Senator WALSH of Montana. On the 3d day of February 1923, Mr. Sinclair, as my information is, you caused to be transmitted to the National Metropolitan

Bank, of this city, from the National Park Bank, of New York, the sum of \$100,000 payable to your order which, on the 7th day of February 1923, you transmitted to the Chase National Bank upon your direction. Will you tell us about that transaction?

Mr. SINCLAIR. On advice of counsel I decline to answer, on the same ground.

Senator WALSH of Montana. Information has come to the committee to the effect that you contributed 75,000 shares of the stock of the Sinclair Consolidated Co. to Mr. Hays, or to someone representing the National Republican Committee, for the purpose of making up the deficit in the account of that committee. Will you tell us about that matter?

Mr. SINCLAIR. On advice of counsel I decline to answer, on the same ground.

Senator WALSH of Montana. The committee is still desirous, Mr. Sinclair, of examining the books of the Hyvas Corp. Are you prepared to produce those books?

Mr. SINCLAIR. On advice of counsel I decline to bring the books before this committee, upon the same ground.

Senator WALSH of Montana. Then, Mr. Chairman, I offer to prove by the witness, if he would answer, that, among other things—

Senator SPENCER (interposing). Do I understand, Senator Walsh, that what you propose to put into the record is what you think the witness would testify if he did not claim exemption?

Senator WALSH of Montana. Yes, sir. I propose to prove certain facts by this witness.

(c) *Counsel permitted to interpose.*—

Mr. LITTLETON. If I have any rights at all here—I am counsel for the witness—I certainly object to your putting into this record what you imagine the witness would have answered when he has claimed his rights here under the law.

Senator WALSH of Montana. All right, Mr. Littleton.

(d) *Member protests*—

Mr. LITTLETON. I protest most earnestly against it as an outrage.

Senator WALSH of Montana. I protest, Mr. Chairman, against any such remarks from counsel as an abuse of his privilege. Counsel yesterday, here by the courtesy of this committee, said that certain things that this committee propose to do were monstrous, and now we are told this morning that what I offered to do with the privilege of the committee, is an outrage. That is an abuse of the privilege of counsel, and I desire the chairman to admonish counsel to that effect.

(e) *Chairman rebukes counsel.*—

The CHAIRMAN. It is the opinion of the chairman that counsel went beyond his rights, both yesterday, and today, in his statements.

Senator WALSH of Montana. Now, Mr. Chairman, inasmuch as the witness, through his counsel, has objected and protested against the proposal which I make to set out what I expect to prove by the witness, I do not press my purpose to state the facts to the committee. That is all, Mr. Chairman.

The CHAIRMAN. Any further questions?

Senator DILL. I wanted to ask Mr. Sinclair whether he was willing to answer any questions about the services that Mr. Archie Roosevelt performed for his organization in reference to testimony given here since he was last before us.

Mr. SINCLAIR. I decline to answer, by advice of counsel, on the same ground.

Senator ADAMS. Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you have in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?

Mr. SINCLAIR. I decline to answer, on advice of counsel, on the same ground.

The CHAIRMAN. Are there any further questions on the part of any member of the committee? Senator Adams, have you any further questions?

(No response.)

The CHAIRMAN. Mr. Sinclair, you are excused.

(f) *Declaration of contempt unnecessary.*—Note should be taken of the obvious care with which these questions were framed and the fact that several Senators participated. There was no declaration of contempt although the chairman might have specifically warned the witness had he deemed such warning useful under the circumstances

or necessary. At the close, the witness was simply notified, "Mr. Sinclair, you are excused."

(g) *Committee deliberates action and reports.*—A preliminary report of this proceeding was given to the Senate (p. 4722) on March 22, 1924. Two days later Senator Ladd, the chairman of the committee, submitted for the committee a further report which contained not only the earlier material but also an enumeration of the committee's authority—thus the report contained a statement of the authority of the committee and a bill of particulars (p. 4785). The decision to report the incident quite naturally was arrived at after full deliberation under the rules of the committee which decided questions of quorum and procedure as well as who should make the report. Thereupon Senator Walsh made the following motion before the Senate:

I now move that the President of the Senate be by the Senate directed to certify to the district attorney for the District of Columbia the facts as reported, in the report by the Committee on Public Lands and Surveys.

The PRESIDING OFFICER. The question is upon agreeing to the motion of the Senator from Montana (p. 4788).

(h) *Senate takes action.*—During the debate a suggestion was made and accepted by Senator Walsh that he modify the motion to read that "the Senate adopt the report of the committee and direct the Presiding Officer," etc., to certify the report to the district attorney. (See p. 4790.) The modified motion was agreed to by rollcall vote (p. 4791). The report of the committee was certified accordingly; an indictment was returned by the grand jury against Sinclair, and he was convicted. An appeal was carried to the United States Supreme Court (279 U. S. 263). There the Court reviewed the entire record. Questions cannot be lifted out of context or related questions in order to obtain a conviction (*U. S. v. Raley* (1951), 9 F. Supp. 495). Interesting to note is the fact that the first count in the indictment was based on the refusal of Sinclair to answer the first question asked by Senator Walsh (279 U. S. 288). Thus the Sinclair case furnishes excellent guidance in precedent to a chairman who is mindful of the fact that his primary function is directed at factfinding for legislative purposes rather than at potential criminal prosecutions. If the latter were the primary function, then of necessity complete procedural rules and safeguards would be necessary.

On the House side the present committee having the most extensive experience in citing recusant witnesses appears to have evolved a somewhat uniform procedure and form in presenting each case to the House of Representatives. A study of House Reports Nos. 1128 to 1137 of the 80th Congress indicates that the Committee on Un-American Activities has stated with care its authority and the incident which it reports. However, it is doubtful if a certification by committee counsel of the adequacy of the record carries any weight in the courts. (See S. Repts. Nos. 200, 201, 202, 205, 206, and 207, 82d Cong.)

#### 8. *Reversible procedural error*

Once criminal prosecution in the courts is under way, there arises a question of how far the court will go behind the resolution directing the certification of the case to the district attorney. The authorization of the committee will naturally be carefully examined; however, it is doubtful if the court will go behind the resolution to examine

the minutes and the rules of the committee. Supporting the assumption that it will not do so is the refusal of the Supreme Court to do this with regard to acts of Congress properly certified, approved, and deposited in the State Department in order to search for possible procedural deficiencies in the journals of the Senate or the House. (See *U. S. v. Ballin* (1892), 144 U. S. 1, 4, and *Field v. Clark* (1892), 143 U. S. 649, 669-670, and 673.) However, if the defendant has raised the question of quorum, then procedural proof is essential. (See *Christoffel v. U. S.* (1949) 338 U. S. 84, and *U. S. v. Bryan* (1950) 339 U. S. 323.)

## X. RULES

It is not the purpose of this memorandum to examine the various legislative proposals relating to uniform rules for conducting congressional investigations. (See Galloway, Proposed Reforms (1951), University of Chicago Law Review 18: 478.) For a current listing of proposals, see Digest of Public General Bills, items listed under subject heading "Investigations, hearings," etc. Rules of this nature are, of course, within the constitutional power of each House (art. I, sec. 5, cl. 2). They need not be enacted as statutory law.

House Report No. 1748, 82d Congress, reporting the recusancy of Henry W. Grunewald contains the rules of procedure of the Ways and Means Subcommittee on Administration of the Internal Revenue laws. (See pp. 43-44.) The House Committee on Un-American Activities has published its rules including applicable Rules of the House, in a small nine-page booklet containing advisory footnotes.

As an illustration of rules used in congressional investigations, we have selected for presentation here, the rules of procedure of the House Committee on the Judiciary, Subcommittee to Investigate the Department of Justice. (See Hearings \* \* \*, 83d Cong., serial No. 2, pt. 1, p. III.)

1. No major investigation shall be initiated without approval of a majority of the subcommittee. Preliminary inquiries may be initiated by the subcommittee staff with the approval of the chairman of the subcommittee.

2. The subject of any investigation in connection with which witnesses are summoned shall be clearly stated before the commencement of any hearings, and the evidence sought to be elicited shall be relevant and germane to the subject as so stated.

3. All witnesses at public or executive hearings who testify as to matters of fact shall be sworn.

4. Executive hearings shall be held only with the approval of a majority of the members of the subcommittee, present and voting. All other hearings shall be public.

5. Attendance at executive sessions shall be limited to members of the subcommittee and its staff and other persons whose presence is requested or consented to by the subcommittee.

6. All testimony taken in executive session shall be kept secret and shall not be released or used in public session without the approval of a majority of the subcommittee.

7. Any witness summoned at a public session and, unless the subcommittee by a majority vote determines otherwise, any witness before an executive session shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights while on the witness stand.

8. Every witness shall have an opportunity, at the conclusion of the examination by the subcommittee, to supplement the testimony which he has given, by making a brief written or oral statement, which shall be made part of the record; but such testimony shall be confined to matters with regard to which he has previously been examined. In the event of dispute, a majority of the subcommittee shall determine the relevancy of the material contained in such written or oral statement.

9. An accurate stenographic record shall be kept of the testimony of each witness, whether in public or in executive session. In either case, the record of his testimony shall be made available for inspection by the witness or his counsel; and, if given in public session, he shall be furnished with a copy thereof at his expense if he so requests; and, if given in executive session, he shall be furnished upon request with a copy thereof, at his expense, in case his testimony is subsequently used or referred to in a public session.

10. Any person who is identified by name in a public session before the subcommittee and who has reasonable ground to believe that testimony or other evidence given in such session, or comment made by any member of the subcommittee or its counsel, tends to affect his reputation adversely, shall be afforded the following privileges:

(a) To file with the subcommittee a sworn statement, of reasonable length, concerning such testimony, evidence, or comment, which shall be made a part of the record of such hearing.

(b) To appear personally before the subcommittee and testify in his own behalf, unless the subcommittee by a majority vote shall determine otherwise.

(c) Unless the subcommittee by a majority vote shall determine otherwise, to have the subcommittee secure the appearance of witnesses whose testimony adversely affected him, and to submit to the subcommittee written questions to be propounded by the subcommittee or its counsel to such witnesses. Such questions must be proper in form and material and relevant to the matters alleged to have adversely affected the person claiming this privilege. The subcommittee reserves the right to determine the length of such questioning.

(d) To have the subcommittee call a reasonable number of witnesses in his behalf, if the subcommittee by a majority vote determines that the ends of justice require such action.

11. Any witness desiring to make a prepared or written statement in executive or public sessions shall be required to file a copy of such statement with the counsel or chairman of the subcommittee 24 hours in advance of the hearing at which the statement is to be presented.

12. No report shall be made or released to the public without the approval of a majority of the full Committee on the Judiciary.

13. No summary of a subcommittee report or statement of the contents of such report shall be released by any member of the subcommittee or its staff prior to the issuance of the report of the subcommittee.

## XI. HOUSE PRECEDENTS—PUNISHMENT AT THE BAR

An examination of volume 3, Hinds' Precedents of the House \* \* \*, relating to contempt proceedings before the bar of the House, indicates an established procedure having not only general uniformity, but also considerable flexibility. For convenience these precedents are outlined under the following 14 headings:

### 1. Answers at the bar

Witnesses arraigned at the bar of the House have at times been permitted to answer orally (sec. 1669) and not under oath (sec. 1688); have at other times been required to answer in writing and under oath (secs. 1670, 1684), or in writing but not sworn to (sec. 1687), or having answered in writing have been permitted to make oral statements (sec. 1686); have been permitted to file an amended answer (secs. 1673, 1693), and present an answer which in fact was an argument (sec. 1689).

It is for the House, not the Speaker, to determine whether or not a person arraigned for contempt shall be heard before being ordered into custody (sec. 1684).

### 2. Confinement

A person adjudged in contempt may, under order of the House (1) be continued in close custody by the Sergeant at Arms (secs. 1669, 1684), (2) be committed to the common jail of the District of Columbia

(secs. 1672, 1690), or (3) be kept by the Sergeant at Arms in close confinement in the guardroom of the Capitol Police (sec. 1686).

### *3. Continuance*

A continuance may be granted to permit the witness to consult counsel and prepare his answer (secs. 1668 and 1695).

### *4. Costs*

The payment of costs has been required as a condition to discharge (secs. 1677, 1680, 1688).

The House has assumed the expenses of Members defending suits brought by persons punished for contempt (secs. 1716 and 1717).

### *5. Counsel*

The general practice has been to permit a recusant witness to have the assistance of counsel (secs. 1667 and 1696).

### *6. Examination*

A person on trial at the bar of the House for contempt has been given permission to examine witnesses, while examination for the House was done by a committee (sec. 1668).

During the trial before the bar of the House, Members were examined in their places (sec. 1668).

### *7. Habeas corpus*

The Sergeant at Arms asks for and receives instructions from the House upon being served with a writ of habeas corpus (sec. 1691).

### *8. Privilege*

A witness has been held in contempt of the House and imprisoned for refusing to divulge information which, he claimed, involved transactions privileged by reason of an attorney-client relationship (sec. 1689). (In this case the witness, Stewart, later brought an action of trespass for assault and false arrest against Speaker Blaine and Sergeant at Arms Ordway but the court held that an order of the House was complete protection to both (*Stewart v. Blaine* (1874), 1 MacArthur 453).)

### *9. Procedure—Arrest, arraignment, and trial in the House*

It is important to realize that the House of Representatives has the power, for which there is ample precedent, to conduct its own trial of the contempt of witnesses before committees. This jurisdiction has been used in the past against recalcitrant parties, and although not frequently assumed of late, it is nevertheless a selective course of action. In recent years it has been more common practice to deliver those charged with contempt to the proper tribunals for appropriate criminal action. The press of legislative affairs has prompted the Members to use the latter procedure. This trend has resulted perhaps in a more ordinary and uniform dispensation of justice, and moreover it has relieved a busy legislative body of an additional task, but both have been at a sacrifice. Undoubtedly the prestige of the legislative branch of the Government would be enhanced if it occasionally handled the punishment of contempt in its own right. Forceful and determinate action to substantiate the power of Congress to compel disclosure of information pertinent to the legislative processes would be a salutary caveat to prospective malefactors. It is believed

that the present is a propitious time for the House and the Senate to energetically enforce its prerogatives.

Appendix 1, attached hereto, is a sample case of the procedure of arrest, arraignment, and trial in the House. Close scrutiny of the procedural steps illustrates that the power of the House to conduct a trial is plenary and that the only inhibiting factor, from both the procedural and substantive legal aspects, is the will of the Members expressed by their votes.

#### *10. Prosecutions in the courts*

The case of a recalcitrant witness in custody, pursuant to a resolution requiring the Sergeant at Arms of the House to commit him to the common jail, has been certified by the Speaker to the district attorney of the District of Columbia. Upon indictment, the witness was delivered to the officers of the court (sec. 1672).

#### *11. Purgation*

A witness has been deemed to have purged himself of contempt—

(1) By respectful and sufficient answers at the bar of the House (secs. 1670, 1676, 1678, 1681, 1682, and 1692).

(2) By showing that he was under heavy local bonds which, he was advised, would be forfeited if he left the jurisdiction and that he was willing to appear and answer (sec. 1673).

(3) By showing that he left town, contrary to the order of the House, under a misapprehension or misunderstanding (sec. 1674).

(4) By showing that he had appeared before the committee, testified, and paid the costs growing out of the attachment (sec. 1673).

(5) By a letter of apology where a disrespectful answer was submitted upon arraignment (sec. 1693).

(6) By promising to respond (sec. 1694) although he may be retained in custody until the committee reports the purgation (sec. 1701).

#### *12. Record*

A committee in reporting contumacy included a transcript of the testimony (sec. 1671).

In reporting the contempt to the House, the committee should show that the testimony or papers required are material, and it should present copies of the subpoenas (sec. 1701).

#### *13. Service*

In the absence of the Sergeant at Arms, his deputy has been empowered by special resolution to execute the orders of the House and to arrest a recalcitrant witness (sec. 1669). The Sergeant at Arms has, however, without specific authorization merely endorsed on a subpoena a deputation to another (sec. 1673). In Massachusetts, a warrant for arrest directed only to the Senate Sergeant at Arms was held by Chief Justice Shaw to be limited to the person named and therefore could not be served by a deputy (sec. 1718, 15 Gray 399). The form of the resolution may command the Sergeant at Arms or his special messenger to execute the order or make the arrest (sec. 1688).

#### *14. Subpēna*

The validity of a subpēna signed only by the chairman of a House committee has been sustained (sec. 1668) and verbal defects will not avail to defeat contempt proceedings (sec. 1696).

#### *15. Warrant—return*

The warrant of the Speaker is as follows:

To A. J. Glossbrenner, Sergeant at Arms of the House of Representatives:

You are hereby commanded to arrest John W. Wolcott, wheresoever he may be found, and have his body at the bar of the House forthwith to answer as for a contempt in refusing to answer a proper and competent question propounded to him by a select committee of the House of Representatives, in pursuance of the authority conferred by the House upon said committee.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington this 11th day of February 1858.

[L. s.]

JAMES L. ORR, *Speaker.*

Attest:

J. C. ALLEN, *Clerk.*

Verbal return by the House Sergeant at Arms, having the witness in custody, has been accepted (secs. 1678 and 1697).

### XII. SENATE PRECEDENTS

On the Senate side there have not been as many instances of attempts to punish witness at the bar of the Senate for recusancy. In the early history of the Government, "the House conducted most of more important investigations, \* \* \* now the Senate is the grand inquisitor" (Eberling, Congressional Investigations (1928), p. 272). The following review of precedents is taken from volume 3 of Hinds' Precedents of the House and indicates that the Senate has looked to the House for guidance in dealing with contumacious witnesses (sec. 1724).

#### *1. Confinement*

The Senate has ordered the confinement of a contumacious witness in the common jail of the District of Columbia (sec. 1722 and f., n. 2, of sec. 1724).

#### *2. Habeas corpus*

A prisoner arrested by a deputy of the Sergeant at Arms was forcibly taken from his custody in Massachusetts by a deputy sheriff armed with a writ of habeas corpus. The supreme court of that State held that the authority granted in the warrant, which was directed to the Sergeant at Arms, could be exercised only by that officer (sec. 1718).

#### *3. Procedure—arrest, arraignment, and trial in the Senate*

For an illustration of this procedure, see appendix 2. The remarks under II-9, "Procedure—arrest, arraignment, and trial in the House," are applicable to this corresponding section for the Senate.

#### *4. Purgation*

Upon satisfactory statement of the reason for his failure to comply with the commands of a committee of the Senate, a witness has been discharged (secs. 1702, 1703). In at least one instance, a witness has been discharged on the ground that no beneficial result could be obtained from forcing him to testify inasmuch as his testimony could

not be relied on (sec. 1720). See also *Jurney v. MacCracken* (1935) 294 U. S. 125, 152.

### 5. Subpnea

Return by the Sergeant at Arms on a subpnea served by his deputy has not availed to test the legality of the arrest of a witness (sec. 1702).

## XIII. APPENDIXES

### APPENDIX 1

#### *The Case of Reuben M. Whitney (3 Hinds' Precedents \* \* \*)*

On January 17, 1837, the House agreed to this resolution (sec. 1667):

*Resolved*, That so much of the President's message as relates to the "conduct of the various Executive Departments, the ability and integrity with which they have been conducted, the vigilant and faithful discharge of the public business in all of them, and the causes of complaint, from any quarter, at the manner in which they have fulfilled the objects of their creation," be referred to a select committee, to consist of nine members, with power to send for persons and papers, and with instructions to inquire into the condition of the various Executive Departments, the ability and integrity with which they have been conducted, into the manner in which the public business has been discharged in all of them, and into all causes of complaint from any quarter at the manner in which said departments, or their bureaus or offices, or any of their officers or agents of every description whatever, directly or indirectly connected with them, in any manner, officially or unofficially, in duties pertaining to the public interest, have fulfilled or failed to accomplish the objects of their creation, or have violated their duties or have injured and impaired the public service and interest; and that said committee, in its inquiries, may refer to such periods of time as to them may seem expedient and proper.

\* \* \* \* \*

On February 9, Mr. Wise [the chairman] made a report, in pursuance of the following proceeding of the select committee, which he handed in at the Clerk's table:

Reuben M. Whitney, who has been summoned as a witness before this committee, having, by letter, informed the committee of his peremptory refusal to attend, it becomes the duty of the committee to make the House acquainted with the fact: Therefore,

*Resolved*, That the chairman be directed to report the letter of Reuben M. Whitney to the House, that such order may be taken as the dignity and character of the House requires.

\* \* \* \* \*

Finally, the House [on February 10], by a vote of 99 yeas to 86 nays, agreed to the following:

*Resolved*, That whereas the select committee of this House, acting by authority of the House under a resolution of the 17th of January last, has reported that Reuben M. Whitney has peremptorily refused to give evidence in obedience to a summons duly issued by said committee, and has addressed to the committee the letter reported by said committee to the House: Therefore,

*Resolved*, That the Speaker of this House issue his warrant directed to the Sergeant at Arms, to take into custody the person of Reuben M. Whitney, that he may be brought to the bar of the House to answer for an alleged contempt of this House; and that he be allowed counsel on that occasion should he desire it.

On February 11 the Speaker announced to the House that the Sergeant at Arms had made return of the service of the warrant against Reuben M. Whitney, and that the said Whitney was in custody.

This announcement was made during proceedings on another matter, at the conclusion of which Mr. John Calhoun, of Kentucky, offered this resolution, which was agreed to:

*Resolved*, That Reuben M. Whitney, now in custody of the Sergeant at Arms, be brought to the bar of this House to answer for an alleged contempt of the House in peremptorily refusing to appear and give evidence as a witness, on a summons duly issued by a select committee acting by the authority of this House, under a resolution of the 17th of January last, and in the matter of a letter, expressing said refusal, addressed by the said Reuben M. Whitney to the committee, and by the committee referred to the House; and that he be forthwith furnished with a copy of the report of said committee, and of the letter aforesaid.

On the succeeding day the Speaker announced to the House that Reuben M. Whitney was in the custody of the Sergeant at Arms, without the bar, awaiting the further order of the House in the premises; and that he had been furnished by the Clerk with the copies of papers, as directed by the order of the 11th instant.

Whereupon, on motion of Mr. John M. Patton of Virginia, it was—

*Ordered*, That Reuben M. Whitney be brought to the bar of the House.

Reuben M. Whitney was then brought to the bar of the House by the Sergeant at Arms, when the Speaker addressed him, as follows:

Reuben M. Whitney: You have been brought before this House, by its order, to answer the charge of an alleged contempt of this House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House; which committee had, by an order of the House, power to send for persons and papers.

Before you are called upon to answer, in any manner, to the subject matter of this charge, it is my duty, as the presiding officer of this House, to inform you that, by an order of the House, you will be allowed counsel should you desire it. If you have any request to make in relation to this subject your request will now be received and considered by the House. If, however, you are now ready to proceed in the investigation of the charge, you will state it; and the House will take order accordingly.

To which the said Reuben M. Whitney answered as follows:

The undersigned answers that his refusal to attend the committee, upon the summons of its chairman, was not intended, or believed by him, to be disrespectful to the honorable the House of Representatives; nor does he now believe that he thereby committed a contempt of the House.

His reasons for refusing to attend the committee are truly stated in his letter to that committee.

He did not consider himself bound to obey a summons issued by the Chairman of the committee.

He had attended, in obedience to such a summons, before another committee, voluntarily and without objection to the validity of the process; and would have attended in the same way before the present committee but for the belief that he might thereby be exposed to insult and violence.

He denies, therefore, that he has committed a contempt of the House; because First. The process upon him was illegal, and he was not bound to obey it; and Secondly. Because he could not attend without exposing himself thereby to outrage and violence.

If the House shall decide in favor of the authority of the process, and that the respondent is bound to obey it, then he respectfully asks, in such case, that, in consideration of the peculiar circumstances in which he is placed, as known to the House, the committee may be instructed to receive testimony upon interrogatories to be answered, on oath, before a magistrate, as has been done in other instances in relation to other witnesses; or that the committee be instructed to prohibit the use or introduction of secret and deadly weapons in the committee room during the examination of the witnesses.

And, in case he shall think it necessary, he prays to be heard by counsel, and to be allowed to offer testimony on the matter herein submitted.

R. M. WHITNEY.

The House was proceeding to consider the method of procedure when Mr. John M. Patton, of Virginia, made the point of order that the respondent ought to retire during the deliberations.

The Speaker said that such had been the uniform course in former cases, and, believing it to be the sense of the House, he would direct the Sergeant at Arms to take Reuben M. Whitney from the bar; which was done.

Propositions were then made for the appointment of a committee of privileges to report a mode of procedure and also that the respondent be discharged. Finally, under the operation of the previous question, the House agreed to the following resolution proposed by Mr. Samuel J. Gholson, of Mississippi:

*Resolved*, That Reuben M. Whitney be now permitted to examine witnesses before this House in relation to his alleged contempt, and that a committee of five be appointed to examine such witnesses on the part of this House; that the questions put shall be reduced to writing before the same are proposed to the witness, and the answers shall also be reduced to writing. Every question put by a Member, not of the committee, shall be reduced to writing by such Member, and be propounded to the witness by the Speaker, if not objected to; but if any question shall be objected to, or any testimony offered shall be objected to by any Member, the Member so objecting, and the accused or his counsel, shall be heard thereon; after which the question shall be decided without further debate. If parol evidence is offered, the witness shall be sworn by the Speaker and be examined at the bar, unless they are Members of the House, in which case they may be examined in their places.

The following committee was then appointed: Messrs. Gholson, of Mississippi; Levi Lincoln, of Massachusetts; Francis Thomas, of Maryland; Benjamin Hardin, of Kentucky; and George W. Ownes, of Georgia.

Reuben M. Whitney was then again placed at the bar, and the resolution adopted by the House was read to him; and, being asked by the Speaker if he was ready to proceed in the trial of the case, he answered:

I am not ready to proceed at this time, and ask to be indulged until Wednesday next to make preparation. I herewith hand in a list of names of sundry persons, and respectfully request that they be summoned to attend as witnesses in the trial of the case.

This list, which appears in the Journal, contains the names of 4 Members of the House and 2 citizens.

It was then—

*Ordered*, That further proceedings in this trial be postponed until Wednesday next; and that Reuben M. Whitney be furnished with a copy of the resolution adopted by the House this day.

It was also—

*Ordered*, That subpens issue for the witnesses named by Reuben M. Whitney with directions to attend on Wednesday, the 15th day of February instant.

On February 15, 1837, the Sergeant at Arms was directed to place Reuben M. Whitney at the bar of the House; whereupon Reuben M. Whitney was placed at the bar of the House, accompanied by Walter Jones and Francis S. Key, as his counsel.

The Speaker addressed him as follows:

Reuben M. Whitney: You stand charged before this House with an alleged contempt of the House, in having peremptorily refused to give evidence in obedience to a summons duly issued by a committee of this House, which committee had, by an order of the House, power to send for persons and papers.

You will say whether you are now ready to proceed to trial, in the mode prescribed by the order of the House, before you are put upon your trial; if you have, it will now be received and considered by the House.

To which the said Reuben M. Whitney answered as follows:

I am ready to proceed to trial.

A motion was then made by Mr. George N. Briggs, of Massachusetts, in the words following:

Whereas, by the Eleventh rule of this House, all acts, addresses, and joint resolutions shall be signed by the Speaker; and all writs, warrants, and subpoenas, issued by order of the House, shall be under his hand and seal, attested by the Clerk;

And whereas the subpoena by virtue of which Reuben M. Whitney, now in the custody of the Sergeant at Arms of the House, by order of the House, for an alleged contempt, for refusing to appear and give testimony before one of the select committees of the House, was not under the hand and seal of the Speaker, attested by the Clerk, but signed by the chairman of the said select committee: Therefore

*Resolved*, That the refusal of Reuben M. Whitney to appear before said committee was not a contempt of this House;

*Resolved*, That said Whitney be forthwith discharged from the custody of this House.

In the course of debate on this resolution Mr. Abijah Mann, Jr., of New York, said that this question had been raised in several other cases, notably in the committee sent to Philadelphia to investigate the affairs of the Bank of the United States. In the latter case the committee were called upon to issue the highest process in its power; and the question was then raised and mooted, with a former Speaker or with the present, he was not certain which, whether the process issued by that committee, under the powers given them to send for persons and papers, should be signed by the Speaker of the House and attested by the Clerk. The committee decided, and in that decision, if he was not mistaken, the incumbent of the chair coincided, that the summons the committee were authorized to issue, by the power to send for persons and papers, need only be signed by the chairman of that committee. When the House issued an order or warrant in a particular case, under this rule, the Speaker must issue the summons under his hand and seal, and it must be attested by the Clerk; but when the power was granted to a committee to send for persons and papers in a particular case, a summons signed by the chairman of the committee was sufficient.

The motion of Mr. Briggs was ordered to lie on the table by a vote of 157 yeas to 33 nays.

*Ordered*, That further proceedings in the case of R. M. Whitney be postponed until 12 o'clock tomorrow; and that the Clerk of the House furnish to the three other witnesses, Members of this House, who are sworn, copies of all the questions that have been propounded to the witness just examined, that they may be prepared to answer them in writing tomorrow.

The examination of witnesses was continued until February 20, the record of questions and answers appearing in the Journal. From the examination it appeared that there had been personal difficulty between the respondent and Messrs. Peyton and Wise, of the investigating committee, and that there had occurred in the committee room a difference which had seemed likely at one time to result in the use of weapons. The idea that the witness had been deterred by fear from responding to the subpoena of the committee was broached. Finally Mr. Amos Lane, of Indiana, offered this resolution:

*Resolved*, That it is inexpedient to prosecute further the inquiry into the alleged contempt of R. M. Whitney against the authority of this House; and that the said Whitney be now discharged from custody.

This resolution was agreed to—yeas 99, nays 72.

And the said Reuben M. Whitney was discharged accordingly (sec. 1668).

A contumacious witness need not be given a second opportunity by a committee before the House orders his arrest (sec. 1671).

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## APPENDIX 2

### *The Case of Thaddeus Hyatt (3 Hinds' Precedents \* \* \*)*

On December 14, 1859, the Senate, after debate, agreed unanimously to a resolution providing that a committee be appointed to inquire into the facts attending the late invasion and seizure of the armory and arsenal at Harpers Ferry by a band of armed men and report whether the same was attended by armed resistance to the authorities and public force of the United States, and the murder of any citizens of Virginia, or any troops sent there to protect public property; whether such invasion was made under color of any organization intended to subvert the government of any of the States of the Union; the character and extent of such organization; whether any citizens of the United States not present were implicated therein or accessory thereto by contributions of money, arms, ammunition, or otherwise; the character and extent of the military equipments in the hands or under the control of said armed band; where, how, and when the same were obtained and transported to the place invaded; also, to report what legislation, if any, is necessary by the Government for the future preservation of the peace of the country and the safety of public property—the committee to have power to send for persons and papers.

The committee was appointed, consisting of Senators James M. Mason, of Virginia; Jefferson Davis, of Mississippi; Jacob Collamer, of Vermont; Graham N. Fitch, of Indiana; and James R. Doolittle, of Wisconsin.

On February 21, 1860, Mr. Mason, from the committee, reported the following preamble and resolution:

Whereas Thaddeus Hyatt, of the city of New York, was, on the 24th day of January, A. D. 1860, duly summoned to appear before the select committee of the Senate, appointed "to inquire into the facts attending the late invasion and seizure of the armory and arsenal of the United States at Harpers Ferry, in Virginia, by a band of armed men," and has failed and refused to appear before said committee, pursuant to said summons: Therefore,

*Resolved*, That the President of the Senate issue his warrant, directed to the Sergeant at Arms, commanding him to take into his custody the body of the said Thaddeus Hyatt, wherever to be found, and to have the same forthwith before the bar of the Senate to answer as for a contempt of the authority of the Senate.

After debate, the resolution was agreed to—yeas 43, nays 12.

On March 6 the Sergeant at Arms appeared at the bar of the Senate having Mr. Hyatt in custody, and Mr. Mason submitted the following preamble and resolution, which were agreed to—yeas 49, nays 6.

*Resolved*, That Thaddeus Hyatt, of the city of New York, now in custody of the Sergeant at Arms, on an attachment for contempt in refusing obedience to the summons requiring him to appear and testify before a committee of the Senate, be now arraigned at the bar of the Senate, and that the President of the Senate propound to him the following interrogatories:

First. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January 1860?

Second. Are you now ready to appear before the said committee and answer such proper questions as shall be put to you by said committee?

And that the said Thaddeus Hyatt be required to answer said questions in writing and under oath.

On March 9 the witness presented a sworn statement questioning the authority of the committee and declining to answer the questions. As part of this statement he presented the argument of his counsel, Messrs. S. E. Sewall and John A. Andrew, who thus summarized the objections to the Senate's jurisdiction:

The inquisition delegated to the committee, being an inquiry as to who committed crimes, was a judicial one, and a usurpation of the functions of the judiciary.

The object of the inquisition being unconstitutional, the Senate could have no power to compel the attendance of witnesses before the committee.

The investigations being made with a view to legislation cannot give the Senate authority to make a judicial inquisition as to the authors of specific crimes, if it would not otherwise have possessed such authority.

Even had the inquisition been constitutional, still, being for legislative purposes, the Senate could not coerce the attendance of witnesses.

All the powers of the Senate are derived from the Constitution, and not gained by long prescription, like those of the Houses of Parliament in Great Britain.

The power of committing witnesses for contempt in cases of this kind is not given directly by the Constitution, or by necessary implication, because legislation can be effected by it without any such power.

This is not a case in which the Senate has judicial or quasi-judicial power; in which case authority to compel the attendance of witnesses as a necessary incident of the power need not be disputed.

Since the statute of 1857 has made the refusal of a witness to appear before a committee an indictable offense, the Senate cannot try any such witness for a contempt, because that would be to try him for a crime without a jury, in violation of the Constitution. We deny, then, the power of the Senate committee to act as inquisitors in regard to crimes. We deny their right to drag our client from his home in New York to testify before them.

If the Senate can thus usurp some of the functions of the judiciary, what other functions of the judiciary or the executive may they not assume? The liberties of the people are gone, if the Senate by its own power can create a secret inquisitorial tribunal and compel any witnesses they please to appear before it.

The power of punishment for contempt is always arbitrary and dangerous, whether exercised by courts or legislative bodies. The constitutions and the legislation of the United States and of the several States have been constantly aiming to limit and define it. It is dangerous, because the party injured becomes the judge in his own case both of law and fact. It involves, therefore, a violation of one of the first principles of justice and is only to be sustained by the extremest necessity. We believe that the House and Senate have seldom been called to act in a case of alleged contempt in which the power has not been seriously questioned, and in which, from a just sense of its arbitrary character, they have not aimed to make the punishment light rather than severe. In the cases, for instance, of John Anderson and General Houston, the reprimands of the Speaker of the House appear small punishments compared with the gravity of the charges against them.

On March 12 Hyatt was brought to the bar, and Mr. Mason proposed the following preamble and resolution, which, after long debate, were agreed to—yeas 44, nays 10:

Whereas Thaddeus Hyatt, appearing at the bar of the Senate, in custody of the Sergeant at Arms, pursuant to the resolution of the Senate of the 6th of March instant, was required by order of the Senate then made, to answer the following questions, under oath and in writing: "1. What excuse have you for not appearing before the select committee of the Senate, in pursuance of the summons served on you on the 24th day of January 1860? 2. Are you ready to appear before said committee and answer such proper questions as shall be put to you by said committee?" time to answer the same being given until the 9th of March follow-

ing; and whereas on the said last-named day the said Thaddeus Hyatt, again appearing in like custody at the bar of the Senate, presented a paper, accompanied by an affidavit, which he stated was his answer to the said questions; and it appearing, upon examination thereof, that the said Thaddeus Hyatt has assigned no sufficient excuse in answer to the question first aforesaid, and in answer to the said second question, has not declared himself ready to appear and answer before said committee of the Senate, as set forth in said question, and has not purged himself of the contempt with which he stands charged: Therefore,

*Be it resolved*, That the said Thaddeus Hyatt be committed by the Sergeant at Arms to the common jail of the District of Columbia, to be kept in close custody until he shall signify his willingness to answer the questions propounded to him by the Senate; and for the commitment and detention of said Thaddeus Hyatt, this resolution shall be a sufficient warrant.

*Resolved*, That whenever the officer having the said Thaddeus Hyatt in custody shall be informed by said Hyatt that he is ready and willing to answer the questions aforesaid, it shall be the duty of such officer to deliver the said Thaddeus Hyatt over to the Sergeant at Arms of the Senate, whose duty it shall be again to bring him before the bar of the Senate, when so directed by the Senate.

In the course of the debate preceding the adoption of this preamble and resolution, Mr. Charles Sumner, of Massachusetts, argued that the Senate had no right to compel testimony required for legislative purposes only. On June 15, when the Senate ordered the discharge of Hyatt from confinement, Mr. Sumner spoke again on this subject, thus summarizing his argument:

We must not forget a fundamental difference between the powers of the House of Representatives and the powers of the Senate. It is from the former that the Senator from Virginia has drawn his precedents, and here is his mistake.

To the House of Representatives are given inquisitorial powers expressly by the Constitution, while no such powers are given to the Senate. This is expressed in the words, "the House of Representatives shall have the sole power of impeachment." Here, then, obviously, is something delegated to the House and not delegated to the Senate, namely, those inquiries which are in their nature preliminary to an impeachment—which may or may not end in impeachment; and since, by the Constitution, every "civil officer" of the General Government may be impeached, the inquisitorial powers of the House may be directed against every "civil officer," from the President down to the lowest on the list.

This is an extensive power, but it is confined solely to the House. Strictly speaking, the Senate has no general inquisitorial powers. It has judicial powers in three cases under the Constitution:

1. To try impeachments.
2. To judge the elections, returns, and qualifications of its Members.
3. To punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.

In the execution of these powers, the Senate has the attributes of a court; and, according to established precedents, it may summon witnesses and compel their testimony, although it may well be doubted if a law be not necessary, even to the execution of this power.

Besides these three cases, expressly named in the Constitution, there are two others, where it has already undertaken to exercise judicial powers, not by virtue of express words, but in self-defense:

1. With regard to the conduct of its servants, as of its printer.
2. When its privileges have been violated, as in the case of William Duane, by a libel, or in the case of Nugent, by stealing and divulging a treaty while still under the seal of secrecy.

It will be observed that these two classes of cases are not sustained by the text of the Constitution; but if sustained at all, it must be by that principle of universal jurisprudence, and also of natural law, which gives to everybody, whether natural or artificial, the right to protect its own existence; in other words, the great right of self-defense. And I submit that no principle less solid could sustain this exercise of power. It is not enough to say that such a power would be convenient, highly convenient, or important. It must be absolutely essential to the self-preservation of the body; and even then, in the absence of any law, it may be open to the gravest doubts. (See Hinds', sec. 1722.)

## APPENDIX 3

*Kilbourn v. Thompson* (103 U. S. 168)

Briefly, the facts of the Kilbourn case are:

On January 24, 1876, the House authorized a special committee to inquire into the affairs of the defunct Jay Cooke & Co., and especially into its activities in a "real-estate pool." The preamble stated that, because of improvident deposits in the company by the Secretary of the Navy and because of certain settlements, the United States and other creditors were placed at a serious disadvantage which the courts were powerless "to afford adequate redress."

On March 14, 1876, the Select Committee on the Real Estate Pool and Jay Cooke Indebtedness served a subpoena on Hallet Kilbourn, requiring his appearance, certain specified papers and documents, "and all other documents, letters \* \* \* books \* \* \* or maps, that can afford any information or evidence \* \* \*"

Kilbourn appeared but refused to produce books and papers or to answer certain questions, on the ground that they involved private matters rather than the public interest. He was thereafter cited for contempt and upon arraignment before the bar of the House argued that his offense, if any, was punishable only under Revised Statutes 102. In the meantime he was indicted on five counts under the statute. Custody of the prisoner was refused the United States marshal for the District of Columbia. On April 15 the Sergeant at Arms was authorized to make a return of a writ of habeas corpus issued by the Supreme Court of the District of Columbia in person with Kilbourn. On April 19 the court ordered the marshal to take custody of the prisoner. On May 2 the House declined an offer of Kilbourn to appear before the committee and testify and furnish such information as his books might contain.

Kilbourn later brought an action for false imprisonment against John G. Thompson, the Sergeant at Arms, and several Members of the House (2 Hinds', sec. 1608).

The action was sustained as to the unfortunate Sergeant at Arms Thompson but not as to the Members.

Concerning the wording of the preamble, the Supreme Court pointedly asked:

How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again, what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one House of Congress, or by an act or resolution of Congress on the subject? The case being one of judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative \* \* \* (p. 194).

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## APPENDIX 4

*Marshall v. Gordon* (243 U. S. 521)

Briefly the facts of *Marshall v. Gordon* are:

Marshall, while a United States attorney, conducted a grand-jury investigation which led to the indictment of a Congressman. As

a result of the Member's charges of misfeasance and nonfeasance on the part of the attorney, the House, by resolution, directed its Judiciary Committee to inquire into and report on Marshall's liability to impeachment. During the inquiry, Marshall sent to the chairman and gave to the press a letter charging in intemperate language that the investigation was merely an attempt to frustrate the action of the grand jury and therefore had no legislative purpose. The House ordered his arrest, and the lower court refused to issue a writ of habeas corpus. In reversing the lower court, the Supreme Court based its opinion on the limitation enunciated in *Anderson v. Dunn* that—

\* \* \* in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "the least possible power adequate to the end proposed" (p. 541).

Accordingly, the power to punish Marshall for contempt was inadequate and the attempt was deemed to result from indignation on the part of the committee members rather than by reason of any obstruction to the legislative process (pp. 545-546).

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#### APPENDIX 5

##### *Jurney v. MacCracken* (294 U. S. 125)

William P. MacCracken, Jr., a lawyer, was arrested by Sergeant at Arms Chester W. Jurney on February 12, 1934, after declining to appear before the bar of the Senate in response to a citation of the Senate requiring him to show cause why he should not be punished for the removal and destruction of certain papers from his files after they had been subpenaed by the Special Senate Committee Investigating Ocean and Air Mail Contracts. After being served with a subpena duces tecum, MacCracken had personally given Gilbert Givven, a representative of Western Air Express, permission to examine the files relating to that company and to remove papers not related to airmail contracts. Another client, L. H. Brittin, of Northwest Airways, Inc., also removed papers, with the permission of MacCracken's partner, Mr. Lee, but without MacCracken's permission or knowledge.

The original subpena, which had been served on MacCracken January 31, 1934, had ordered his appearance and the production of all books of accounts and papers relating to airmail and ocean mail contracts. He appeared on that day, testified that he was a lawyer; that he was ready to produce all books and papers which were not privileged; that unless he secured waivers from clients as to certain papers, he must exercise his own judgment as to which were privileged. He gave the committee the names of his clients and he obtained waivers from some of them, whereupon he immediately produced the papers released.

On February 2, before the committee had decided the question of privilege, MacCracken appeared and related his story of the removal and destruction of papers by Givven and Brittin. Upon conclusion of this testimony, the committee decided that none of the papers were privileged, and all papers then remaining in the files were produced. Upon MacCracken's request, Givven restored what were purported to be all of the papers taken by him. Many of the papers taken by

Brittin were recovered later from the trash and pieced together by post-office inspectors.

MacCracken was arrested pursuant to a resolution of the Senate and immediately petitioned the old Supreme Court of the District of Columbia for a writ of habeas corpus. After a hearing the petition was dismissed, but that judgment was reversed by the court of appeals. The United States Supreme Court issued a writ of certiorari because of the importance of the question presented.

In reversing the court of appeals, the Supreme Court held—

1. Where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without significance. Congress can punish for past acts, subject to judicial review.

2. The enactment of Revised Statute 102 did not impair the right of Congress to punish for contempt.

3. Whether a recalcitrant witness has purged himself of contempt is for Congress to decide and cannot be inquired into by a court by a writ of habeas corpus.

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## APPENDIX 6

### *Gerhart Eisler*

House Resolution 104, 80th Congress, involved Gerhart Eisler, an alleged leader of Moscow-directed Communist activity in the United States, who refused to be sworn in as a witness before the House Committee on Un-American Activities until he had made a brief statement. The chairman informed the witness that he could make any statement he desired at the conclusion of his testimony. Eisler insisted on making his statement before taking the oath, whereupon the chairman ordered him to step aside.

During the afternoon session the chairman announced that the committee unanimously voted, in executive session, to request the certification of the proceedings to the Department of Justice for the purpose of charging Eisler with contempt of Congress. In accordance with this decision, the following resolution (H. Res. 104) was submitted in the House on February 18, 1947:

*Resolved*, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the willful and deliberate refusal of Gerhart Eisler to be sworn and to testify before the said Committee on Un-American Activities, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States Attorney for the District of Columbia, to the end that the said Gerhart Eisler may be proceeded against in the manner and form provided by law.

The report (H. Rept. No. 43, 80th Cong.) accompanying the resolution recited the following essential information:

### REPORT CITING GERHART EISLER

The Committee on Un-American Activities, as created and authorized by the House of Representatives, through the enactment of Public Law No. 601, section 121, subsection Q (2), caused to be issued a subpoena to Gerhart Eisler, of 48-46 Forty-seventh Street, Borough of Queens, New York City, N. Y. The said subpoena directed Gerhart Eisler to be and appear before the said Committee on

Un-American Activities on February 6, 1947, and then and there to testify touching matters of inquiry committed to the said committee; the subpena being set forth in words and figures as follows:

"By authority of the House of Representatives of the Congress of the United States of America, to the Sergeant At Arms, or his special messenger: You are hereby commanded to summon Gerhart Eisler, 48-46 Forty-seventh Street, Borough of Queens, New York, N. Y., to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Honorable J. Parnell Thomas is chairman, in their chamber in the city of Washington, on February 6, 1947, in room 226, Old House Office Building, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee. Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 23d day of January 1947.

"J. PARNELL THOMAS, *Chairman.*

"Attest:

"JOHN ANDREWS, *Clerk.*"

The said subpena was duly served, as appears by the return made thereon by Louis J. Russell, investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpena, the return of the service by the said Louis J. Russell being endorsed thereon, which is set forth in words and figures as follows:

"Subpoena for Gerhart Eisler, 48-46 Forty-seventh Street, Borough of Queens, New York City, N. Y., to appear before the committee on the 6th day of February 1947, at 10 a. m. Served the within named on January 24, 1947, at 8:30 a. m., at his residence by Louis J. Russell."

The said Gerhart Eisler, pursuant to said subpena and in compliance therewith, appeared before the said committee to give such testimony as required under and by virtue of Public Law No. 601, section 121, subsection Q (2). The said Gerhart Eisler, after making his appearance in the chambers of the said committee, refused to be sworn by the chairman of the said committee; and as the result of the said Gerhart Eisler's refusal to be sworn as a witness before the committee, your committee was prevented from receiving testimony and information concerning a matter of inquiry committed to said committee in accordance with the terms of the subpena served upon the said Gerhart Eisler. The record of the proceedings before the committee on Thursday, February 6, 1947, during which the said Gerhart Eisler refused to be sworn as a witness and to give testimony is set forth as follows: \* \* \*

Thereafter follows the transcript of the pertinent part of the proceedings of the committee and a concluding statement that this refusal to be sworn and to testify had deprived the committee of necessary information. The resolution was debated (Congressional Record (daily), February 18, 1947, pp. 1177-1187) and agreed to (p. 1187).

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## APPENDIX 7

### *President Andrew Jackson*

The following account of this episode is related by Eberling in his study, Congressional Investigations, 1928 edition.

The House committee appointed on January 17, 1837, "to examine into the condition of the executive departments, etc., " had a checkered career. On January 23 it adopted a series of resolutions calling on President Jackson and heads of departments for information of various kinds. One of these resolutions was as follows:

*Resolved*, That the President of the United States be requested and the Heads of the several departments be directed to furnish this committee with a list, or lists, of all officers or agents, or deputies, who have been appointed or employed and paid since 4th of March 1829, to the first of December last (if any without

authority of law) or whose names are not contained in the last printed register of public officers commonly called the Blue Book by the President or either of the said Heads of Departments respectively; and without nomination to, or the advice and consent of the Senate of the United States showing the names of such officers or agents or deputies; the sums paid each, the services rendered and by what authority appointed and paid, and what reasons for such appointments.

*Resolved*, That the various executive officers, in replying to the foregoing resolution, be requested at the same time, to furnish a statement of the period at which any innovations, not authorized by law (if such exist) had their origin, their causes, and the necessity which has required their continuance (24th Cong., 2d sess., Debates, vol. xiii, Appendix, pp. 199, 200).

By order of the committee, the chairman transmitted to the President of the United States a copy of the above resolutions. The copy transmitted in the letter of the chairman was attested by the clerk of the committee. On January 27, Mr. Andrew Jackson, Jr., Secretary of the President, entered the committee room and delivered to the chairman, Mr. Henry A. Wise, of Virginia, a letter addressed to Mr. Wise and giving the President's reasons for not complying with the request of the committee. The President pointed out in his letter that the resolution adopted by the House authorizing the investigation cast doubt upon the statement in his annual message that the executive departments were in excellent condition. He stated further:

The first proceeding of the investigating committee is to pass a series of resolutions, which, though amended in their passage, were, as understood, introduced by you, calling on the President and the Heads of Departments, not to answer to any specific charge, not to explain any alleged abuse, not to give information as to any particular transaction, but assuming that they have been guilty of the charges alleged, calls upon them to furnish evidence against themselves. After the reiterated charges you have made, it was to have been expected that you would have been prepared to reduce them to specifications, and that the committee would then proceed to investigate the matters alleged. But, instead of this, you resort to generalities even more vague than your original accusations; and in open violation of the Constitution, and of that well established and wise maxim, that all men are presumed to be innocent until proven guilty; according to the established rules of law, you request myself and the Heads of Departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body, in which alone by the Constitution, the power of impeachment is vested. The Heads of Departments may answer such a request as they please, provided they do not withdraw their own time and that of the officers under their direction, from the public business to the injury thereof \* \* \*. For myself, 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 (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 202).

The President further lectured the chairman of the committee and concluded his letter by expressing astonishment that the House should make such a call on the Executive when there were six standing committees of the House specifically charged with examining the details of expenditures in the departments (*Ibid.*, p. 202).

The attitude of the President greatly enraged the chairman of the committee and, on January 30, he offered these resolutions to the committee:

*Resolved*, That the letter of the President of the United States dated the 26th inst. addressed to the Chairman of this committee and handed to him by the private secretary of the President in the presence of the committee, is an official attack of the President upon the proceedings of the House of Representatives and of this committee, and upon the privileges of members of both Houses of Congress, and opposes unlawful and unconstitutional resistance to the just powers of the House of Representatives and of the committee;

*Resolved*, That the Chairman of the committee be directed to report to the House his letter and the resolution of this committee enclosed, addressed to the President, and the letter of the President in reply thereto, dated the 26th inst. and to submit to the consideration of the House the propriety and necessity of adopting measures to defend its proceedings, to protect the privileges of its members; and to enforce its just powers and those of its committees; to enable this committee to discharge the duties devolved upon it by the resolution of the 17th inst. adopted by the House of Representatives.

These resolutions were voted down by a vote of 6 yeas to 3 nays. An effort was made to consider and amend them, but it failed.

It seems that the majority of the committee opposed their chairman and in their report stated:

Neither did the committee discover in the letter of the President any attack upon the proceedings of the House or the privileges of its members, for the plain reason that neither the House nor its members have any privilege to call upon parties accused to criminate themselves. Consequently, they could not sanction the resolution offered by the chairman to censure the President for his emphatic repulsion of what he construed to mean charges of personal accusation; and calls for self-crimination; nor could they consent to put a stop to the public business by getting up a debate in the House to enforce any pretended privilege of the House or its committees to compel public officers to furnish evidence against themselves. The committee were satisfied of the impropriety and inconsistency of all the calls upon the President and Heads of Departments embraced in the resolution offered by the Chairman; but to reject them entirely in the beginning, although, in effect, they called upon the accused to furnish evidence against themselves, might have subjected the committee to the charge of suppressing evidence, or inquiry. They preferred, therefore, to assume the responsibility of giving too great latitude to inquiry, rather than to seem to check it in the beginning (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 194).

The majority of the committee believed, as stated in their report, that this investigation could be instituted only for 1 of 2 purposes—impeachment or legislation; they maintained it could not be one for legislation, because no defect in the laws has been anywhere alleged, except in their execution. Hence, they could only regard this investigation in the light of a preliminary inquiry into facts and evidence, to show whether a process of impeachment ought not to be instituted by the House of Representatives against the Executive and heads of departments. Strong proof that this investigation could be regarded only in the light of an inquiry preliminary to impeachment, they held, lay in the fact that one of the powers conferred on the committee by the resolution of the House was the power to send for persons and papers. As they said:

At best, this is a vague and not well-defined power, incidental and not derived from any express provision in the Constitution. In its exercise, therefore, there should be some limitation; and it should be carefully used; only in cases where the direct legislation of Congress, the protection and enforcement of the privileges and rules of either House, or manifest public interest demand it. It is a judicial power, which Congress can exercise merely as a power incidental to the power, "to make all laws which shall be necessary and proper." To construe it into an unlimited power for a committee of this House to bring before them the persons of citizens from any part of the Union, at their own arbitrary will without just cause, or to compel the surrender of all papers which a committee might see fit to send for, would be to set up an incidental power of the House nowhere expressly recognized in the Constitution, which would totally annul one of the express provisions of the Constitution, to secure the citizen against these very outrages, viz: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The committee decided they did not have the right to demand all the personal and private papers of public officers, in order that the

committee could decide whether there were any which ought to go into the public files, and concluded their report by stating that—

so far as had come to their knowledge, from the results of this investigation, the condition of the various executive departments is prosperous, and that they have been conducted with ability and integrity.

Mr. Wise, the chairman of the committee, held that this letter of President Jackson is an official assumption of authority by the executive over the proceedings of the House of Representatives, and over the proceedings of one of its committees, that it is an official attack upon the privileges of members of both Houses of Congress; and that it opposes an unauthorized resistance to the just powers of the House and its committee, in direct hostility to inviolable principles necessary to the administration of a free government (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 203).

He believed that this Government was instituted for the common benefit, protection, and security of the people; that its form was adopted as one most effectually secured against the danger of mal-administration; that all power is vested in and consequently derived from the people; that magistrates are their trustees and servants at all times and amenable to them.

That if neither House of Congress could, nor would, inquire into the official conduct and administration of executive officers, the people who could not inquire in their aggregated or conventional capacity, and the States which cannot, from their own organization and that of the Federal Government, institute inquiries at all efficiently, could never be informed of the official conduct of their federal officers; and these officers would, in effect, become irresponsible for their acts, except such as they might disclose, being unknown:

Mr. Wise differentiated between "inquiries" and "inquisitions." Inquiry into the condition and conduct of public affairs is a right of legislators. Inquisition into the conduct and condition of private affairs is no right, even of the sovereign power. Inquisition would violate the fourth article of the amendments to the Constitution. The resolution of inquiry did not invade the security of these rights, as was urged by those in favor of the amendments proposed to it. That article reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

This right is the right of the people. Are the executive departments and their officers the people? They belong to the people; though the history of Government proves too sadly that, without constant vigilance and strict superintendence over them by the people or their representatives, the people soon come to belong to them. Had these officers the right to be secure from all inquiry? It was thought that they were mere trustees and servants, who might be called upon at any time to give an account of their stewardship. The inquiry proposed by the resolution was not deemed unreasonable (24th Cong., 2d sess., Debates, vol. xiii, appendix, p. 204).

The chairman mentioned some of the standing rules of the House such as rule 57, which made it the duty of the Committee on Ways and Means to examine into the state of the several executive departments. He said:

If the resolution of the House was inquisitorial, these rules were, and have been, from the earliest period of the existence of the House itself, standing inquisitions. There was the duty enjoined to examine into the state of the several executive departments. There was a search for any and whatever abuses might be found to exist and a report of them required. Was it ever dreamed that these standing rules were inquisitorial? No. They were the institutions of wise and jealous patriots, to insure that eternal vigilance which is the price of liberty.

He mentioned several previous inquiries to show that general and indefinite investigations had been made before (*ibid.*, p. 205; e. g., Post Office Investigation, June 26, 1834).

In concluding his report he claimed to have proved that the majority of the committee showed very little disposition to pursue inquiry and showed every disposition to sustain the President and the departments in their positions and in their course of obstructing fair and full investigation. This, he said, was proved by the following procedure of the committee: (1) The member of the committee at whose instance a witness was called was required to state in writing the charges the witness was expected to sustain; (2) the committee positively determined that it would not, in the absence of definite, specified charges of corruption and abuses, inquire into the reasons of the Executive, or heads of departments, for appointments to, or removals from office, in direct contradiction to the House, which rejected the amendment requiring specific charges; (3) it decided that when definite and specific charges were made of corruption and abuses in appointments and removals from office, and in subsidizing the public press, it would not inquire into them. The questions which were propounded to witnesses also showed that the committee desired to shield the Executive, according to Mr. Wise. He claimed there was neither consistency, nor propriety, nor liberality, nor fairness in propounding or rejecting interrogatories. Some questions were proposed to witnesses which in substance were rejected as to others. Subjects of inquiry of the deepest interest to the public were preemptorily excluded from investigation. (For a list of the questions, see *ibid.*, pp. 214, 215.)

But the chairman said:

Such a procedure was to be expected from the committee from the moment of its appointment. Six friends of the Executive to three of the opposition were placed upon it by the Speaker, who is supposed to owe his election to the influence of the President over a House where there is an overwhelming majority in favor of the administration; and of these six, several were known, by their speeches on the floor, to be utterly opposed to the resolution under which the committee was appointed and to the investigation which that resolution instituted.

This case represents one of the most successful attempts of a President of the United States to resist a congressional inquiry. Jackson's position in these proceedings was probably strengthened by the fact that he had an overwhelming majority in the House and he knew he could successfully resist an investigation for that reason, as his own party would not take serious issue with him. The fact that the committee reported that all was well with the executive departments after this feint at an investigation shows the importance of considering the political character of the committee personnel in these investigations. Investigating committees, packed with members in sympathy with the administration, might well become vehicles of vindication for the Executive.

## APPENDIX 8

*President Buchanan*

In direct contrast is the account of the Covode investigation during the administration of President Buchanan, also related by Eberling.

While President Buchanan "fully and cheerfully" admitted that inquiries which are incident to legislative duties were highly proper and belong equally to the Senate and the House, and that they were necessary in order to enable them to discover and to provide the appropriate legislative remedies for any abuse which might be ascertained, yet he protested the power given to the Covode committee to inquire—

not into any specific charge or charges, but whether the President has by money, patronage, or other improper means sought to influence not the individual action of members of Congress but the action of the entire body itself, or any committee thereof.

Such an accusation, Buchanan said—

extended to the whole circle of legislation, to interference for or against the passage of any law appertaining to the rights of any state or territory. Since the time of Star Chambers and general warrants, there has been no such proceeding in England.

He also protested because such an investigation was in violation of the rights of the coordinate executive branch of the Government and subversive of its constitutional independence. Moreover he claimed such an investigation was a flagrant abuse of a private person's rights under the Constitution, for John Covode, who accused the President, was also chairman of the committee.

I am to appear before Mr. Covode either personally or by a substitute, to cross-examine the witnesses which he may produce to sustain his own accusations against me; and perhaps this poor boon may be denied the President (36th Cong., 1st sess., *Globe*, p. 1434) (Eberling, p. 167).

Shall the Executive alone be deprived of rights which all his fellow citizens enjoy? The whole proceeding against him justifies the fears of those wise and great men, who, before the Constitution was adopted by the States, apprehended that the tendency of the Government was to the aggrandizement of the legislative at the expense of the executive and judicial departments (*Ibid.*, p. 1435. Cf. Madison's statement in *Federalist*, p. 219).

After a short debate on the President's protest his statement was referred to the Judiciary Committee, with leave to report at any time. On April 9 following, Mr. John Hickman, from said committee, made a report (see *Globe*, 36 Cong., 1st sess., vol. iii, H. Rept. No. 394), accompanied by the following resolution, viz:

*Resolved*, That the House dissents from the doctrine of the special message of the President of the United States on March 28, 1860; that the extent of power contemplated in the adoption of the resolutions of inquiry of March 5, 1860, is necessary to the proper discharge of the constitutional duties devolved upon Congress; that judicial determinations, the opinions of former Presidents, and uniform usage sanctions its use; and that to abandon it would leave the executive department of the Government without supervision or responsibility and would be likely to lead to a concentration of power in the hands of the President which would be dangerous to the rights of a free people.

The resolution was eventually adopted. On June 25 the President sent another protest to the House claiming that the committee had acted as though they possessed unlimited power, and without any warrant whatever had pursued a course not merely at war with the constitutional rights of the Executive but tending to degrade the

Presidential office itself to such a degree as to render it unworthy of the acceptance of any man of honor or principle (36th Cong., 1st sess., *Globe*, p. 3299). The President claimed that the committee had proceeded to investigate subjects not warranted in the resolutions; that it had taken testimony *ex parte*; had dragged private correspondence to light, which a truly honorable man would never have an even distant thought of divulging. Even members of the Cabinet were called upon to testify.

Should the proceedings of the committee be sanctioned by the House and become a precedent for future times, the balance of the Constitution will be entirely upset, and there will no longer remain the three coordinate and independent branches of the government, Legislative, Executive, and Judicial. Should secret committees be appointed, with unlimited authority to range over all the words and actions, and if possible the very thought of the President, with a view to discover something in his past life prejudicial to his character from parasites and informers, this would be an ordeal which scarcely any mere man since the fall could endure (*Ibid.*, p. 3300).

This last protest of the President was referred to a select committee which made a report. There is no question that Congress was firmly convinced, and in this case the House, that the power of investigating the President, even where specific charges were not made, constitutionally belongs to the legislative department. The argument made by the Executive in this case only seemed to arouse the ire of the House the more. It is true that the President had some stanch defenders in the House, but the great majority opposed him. This is seen in the vote on the first resolution dissenting from the doctrines enunciated in his first message to the Senate, viz, 87 to 40 (36th Cong., 1st sess., *Globe*, p. 1434).

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#### APPENDIX 9

##### *President Tyler*

In 1842 the House passed a resolution requesting certain information of President Tyler, namely, the names of such Members, if any, of the 26th and 27th Congresses, as have been applicants for office, with the details relating to such applications. Tyler refused, on the ground that, as the appointing power is vested solely in the Executive, the House could have no legitimate concern therein.

Tyler later complied with a similar request of the House in another matter but said:

Nor can it be a sound position that all papers, documents, and information of every description which may happen by any means to come into the hands of the President or the Heads of Departments must necessarily be subject to the call of the House of Representatives, merely because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of legitimate powers \* \* \* 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 exercised as not to impair those of others is applicable in its fullest extent to this question. (For review of this case see *Congressional Record*, 69th Cong., 1st sess., February 25, 1926, p. 4548.)

## APPENDIX 10

*President Polk*

President Polk, in 1846, refused the request of the House for information, pointing out the confidential nature of the information although admitting that the House could obtain information in a formal proceeding for impeachment, when its power would be plenary. He said further:

If the House as the grand inquest of the Nation should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation. (See Congressional Record, 69th Cong., 1st sess., p. 4548.) (Eberling, p. 146.)

## APPENDIX 11

*Senate resolution of 1886*

In January 1886 the Senate passed the following resolution:

*Resolved*, That the Attorney General of the United States, be, and he hereby is, directed to transmit to the Senate copies of all documents and papers that have been filed in the Department of Justice since the 1st day of January A. D. 1885, in relation to the management and conduct of the office of district attorney of the United States of the southern district of Alabama.

The Attorney General replied:

\* \* \* it is not considered that the public interest will be promoted by a compliance with said resolution and the transmission of papers and documents therein mentioned to the Senate in executive session.

The report submitted by the Senate Committee on the Judiciary vigorously asserted in the following language the right of Congress to receive, and the obligation of the executive branch to make available, the information requested:

The important question, then, is whether it is 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. It may be fully admitted that except in respect of the Department of the Treasury, there is no statute which commands the head of any department to transmit to either House of Congress on its demand any information whatever concerning the administration of his Department; but the committee believes it to be clear that from the very nature of the powers intrusted by the Constitution to the two Houses of Congress it is a necessary incident that either House must have at all times the right to know all that officially exists or takes place in any of the Departments of the Government (Congressional Record, vol. 17, p. 1585).

It is believed that there is no instance of civilized governments having bodies representative of the people or of states in which the right and the power of those representative bodies to obtain in one form or another complete information as to every paper and transaction in any of the executive departments thereof that does not exist even though such papers might relate to what is ordinarily an executive function, if that function impinged upon any duty or function of the representative bodies. A qualification of this general right may under our Constitution exist in the case of calls by the House of Representatives for papers relating to treaties, etc., under consideration and not yet disposed of by the President and Senate (p. 1585).

\* \* \* The practical construction of the Constitution in these respects by all branches of the Government for so long a period would seem upon acknowledged

principles to settle what are the rights and powers of the two Houses of Congress in the exercise of their respective duties covering every branch of the operations of the Government, and it is submitted with confidence that such rights and powers are indispensable to the discharge of their duties and do not infringe any right of the Executive, and that it does not belong to either heads of Departments or to the President himself to take into consideration any supposed motives or purposes that either House may have in calling for such papers, or whether their possession or knowledge of their contents could be applied by either House to useful purposes.

\* \* \* \* \*

The Constitution of the United States was adopted in the light of the well-known history that even ministers of the English Crown were bound to lay before Parliament all papers when demanded on pain of the instant dismissal of such ministers on refusal, through the rapid and effectual instrumentality of a vote of want of confidence. And the Continental Congress had for more than ten years itself governed the country and had control of all papers and records, not by reason of anything expressed in the Articles of Confederation but by reason of intrinsic nature of free government. The jurisdiction of the two Houses of Congress to legislate and the power to advise or withhold advice concerning treaties and appointments necessarily involves the jurisdiction to officially know every step and action of the officers of the law and all the facts touching their conduct in the possession of any Department or even in the possession of the President himself. There was no need to express such a power, for it was necessarily an inherent incident to the exercise of the powers granted (p. 1586).

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# INDEX

---

	Page
Aandahl, Fred G., Department of the Interior-----	390, 391
Advisory Committee on Voluntary Foreign Aid-----	407
Agriculture, Department of-----	379-384
Agriculture and Forestry Committee, Senate-----	293
American Battle Monuments Commission-----	374
Anderson, Clinton P., United States Senator-----	350, 356
Ankeny, Mariing J., Bureau of Mines-----	392
Antitrust and Monopoly Subcommittee-----	351-353
Appropriations Committee, Senate-----	294
Armed Services Committee, Senate-----	293
Armstrong, J. Sinclair, Securities and Exchange Commission-----	415, 416, 417
Atomic Energy Commission-----	374-376
Back, Troy L., Federal Coal Mine Safety Board of Review-----	399
Beasley, D. Otis, Department of the Interior-----	387, 388, 389, 390
Bennett, James V., Bureau of Prisons-----	393
Banking and Currency Committee, Senate-----	295
Barnes, Wendell B., Small Business Administration-----	417
Bevis, Howard L., National Committee for the Development of Scientists and Engineers-----	409, 410, 411, 412
Board of Immigration Appeals-----	392
Boyd, Robert O., National Mediation Board-----	412
Brossard, Edgar B., United States Tariff Commission-----	418
Brownell, Herbert, Jr., Attorney General-----	353
Buchholz, Margaret P., National Security Training Commission-----	413
Bureau of the Budget-----	395-397
Bureau of Indian Affairs-----	391
Bureau of Mines-----	392
Bureau of Prisons-----	393
Bureau of Public Roads-----	385
Burns, Arthur F., Council of Economic Advisers-----	361
Byrd, Harry F., United States Senator-----	299
Carmichael, Leonard, Smithsonian Institution-----	417
Central Intelligence Agency-----	376
Chavez, Dennis, United States Senator-----	294, 372
Civil Aeronautics Administration-----	385
Civil Service Commission-----	378-379
Clark, Owen, Interstate Commerce Commission-----	408
Clements, Earle C., United States Senator-----	294-295
Coggeshall, Thomas, the Renegotiation Board-----	414-415
Commerce, Department of-----	385
Constitutional Amendments Subcommittee, Senate-----	351
Constitutional Rights Subcommittee Survey of Withholding of Information-----	287-428
Cook, H. E., Federal Deposit Insurance Corporation-----	400, 401
Council of Economic Advisers-----	379
Curtiss, C. D., Commissioner of Public Roads-----	385
Defense, Department of-----	385-387
Departments. ( <i>See</i> alphabetical listings.)	
District of Columbia Committee, Senate-----	298
District of Columbia Redevelopment Land Agency-----	395
Doerfer, John C., Federal Communications Commission-----	399, 400
Douglas, Paul H., United States Senator-----	375
Dulles, Allen W., Central Intelligence Agency-----	376-377
Eastland, James O-----	351
Eisenhower, Dwight D., President (letter)-----	271-277

	Page
Ellender, Allen J., United States Senator	293
Emmons, Glenn L., Bureau of Indian Affairs	391
Executive Office of the President	395-398
Export-Import Bank of Washington	398
Farm Credit Administration	398
Federal Charters, Holidays, and Celebrations Subcommittee, Senate	353
Federal Civil Defense Administration	399
Federal Coal Mine Safety Board of Review	399
Federal Communications Commission	390-400
Federal Deposit Insurance Corporation	400-401
Federal Home Loan Bank Board	401
Federal Mediation and Conciliation Service	401
Federal Power Commission	401
Federal Reserve System Board of Governors	402
Federal Trade Commission	402
Fields, K. E., Atomic Energy Commission	374-376
Finance Committee, Senate	299
Finnegan, Joseph F., Federal Mediation and Conciliation Service	401
Floete, Franklin G., General Services Administration	403
Foreign Claims Settlement Commission	403
Foreign Relations Committee, Senate	299
Frear, J. Allen, Jr., United States Senator	297
Fulbright, J. W., United States Senator	295
General Services Administration	403
George, Walter F., United States Senator	299
Gilliland, Whitney, Foreign Claims Settlement Commission	403
Goff, Abe McGregor, Post Office Department	413-414
Gore, Albert, United States Senator	372
Government Employees' Security Program Subcommittee, Senate	362-371
Government Operations Committee, Senate	301-309
Gray, Gordon, Office of Defense Mobilization	397-398
Green, George S.	354
Green, Theodore Francis, United States Senator	373
Gulledge, William P.	298
Habermeier, Howard W., Railroad Retirement Board	414
Hauck, C. J., Jr., Department of Defense	385, 386, 387
Hayden, Carl, United States Senator	294
Health, Education, and Welfare, Department of	387
Hennings, Thomas C., Jr., United States Senator	54-56, 61-62, 292, 374
Holland, Spessard L., United States Senator	294
Hollister, John B., International Cooperation Administration	404, 405, 406, 407
Holt, Pat M.	299
Hoover, Herbert, Jr., Department of State	303-305, 312-314
Housing and Home Finance Agency	403
Humphrey, G. M., Department of the Treasury	360
Humphrey, Hubert H., United States Senator	301
Immigration and Naturalization Service	392
Improvements in Judicial Machinery Subcommittee, Senate	354
Indian Claims Commission	404
Interior, Department of	387-391
Interior and Insular Affairs Committee, Senate	340-350
International Cooperation Administration	404-407
International Development Advisory Board	408
Interstate Commerce Commission	408
Interstate and Foreign Commerce Committee, Senate	350
Johnston, Eric, International Development Advisory Board	408
Johnston, Olin D., United States Senator	354, 355, 362-371
Joint Atomic Energy Committee	356
Joint Committee on the Economic Report	357-361
Judiciary Committee	351
Justice Department:	
Study	63-146
Memorandum	271-277
Letters	25, 52, 56, 61, 278, 392

	Page
Juvenile Delinquency Subcommittee, Senate-----	354
Kefauver, Estes, United States Senator-----	351, 354
Kennedy, John F., United States Senator-----	339
Kennedy, Robert F.-----	307
Kerr, Robert S., United States Senator-----	372
Kuykendall, Jerome K., Federal Power Commission-----	401
Labor and Public Welfare Committee, Senate-----	362
Labor, Department of-----	393
Langer, William, United States Senator-----	351
Lee, Dorothy McCullough, Subversive Activities Control Board-----	417-418
Leedom, Boyd, National Labor Relations Board-----	412
Leffler, Ross, Department of the Interior-----	391
Lehman, Herbert, United States Senator-----	297
Magnuson, Warren, United States Senator-----	350
Marcy, Carl-----	300
Martin, William McChesney, Jr., Federal Reserve System Board of Governors-----	402
Mason, Walker, Housing and Home Finance Agency-----	403-404
McClellan, John L., United States Senator-----	301-339
Meader, George, United States Congressman-----	56, 58-61
Merriam, Robert E., Bureau of the Budget-----	395, 396, 397
Mitchell, James P., Department of Labor-----	360-361
Mollenhoff, Clark R.-----	278
Morgan, Gerald D.-----	278
Morse, True D., Department of Agriculture-----	379-384
Morse, Wayne, United States Senator-----	298
Murphy, Andrew P.-----	146
Murray, James E., United States Senator-----	344, 347, 348, 362
National Advisory Committee for Aeronautics-----	408-409
National Capital Housing Authority-----	409
National Committee for the Development of Scientists and Engineers-----	409-412
National Labor Relations Board-----	412
National Mediation Board-----	412
National Science Foundation-----	413
National Security Training Commission-----	413
National Penitentiary Subcommittee, Senate-----	354
Hill, Robert C., Department of State-----	394, 395
North, Thomas, Brig. Gen., United States Army, American Battle Monu- ments Commission-----	374
O'Connell, James T., Department of Labor-----	393
Office of Defense Mobilization-----	397-398
O'Mahoney, Joseph C., United States Senator-----	350, 352, 354, 355
O'Marr, Louis J., Indian Claims Commission-----	404
Panama Canal Company-----	413
Patents, Trademarks and Copyrights Subcommittee, Senate-----	355
Patman, Wright, United States Congressman-----	358-361
Patterson, John S., Veterans' Administration-----	419
Peterson, Val, Federal Civil Defense Administration-----	399
Perkins, John A., Department of Health, Education, and Welfare-----	387
Permanent Subcommittee on Investigations, Senate-----	301-339
Philips, Christopher H., Civil Service Commission-----	378-379
Post Office Department-----	413
Post Office and Civil Service Committee, Senate-----	362-371
President's Advisory Committee for Government Organization-----	398
Privileges and Elections Subcommittee, Senate-----	372
Public Works Committee, Senate-----	372
Pyle, James T., Civil Aeronautics Administration-----	385
Railroad Retirement Board-----	414
Remon, John A., District of Columbia Redevelopment Land Agency-----	395
Richardson, Scovel, United States Board of Parole-----	393
Ring, James, National Capital Housing Authority-----	409
Renegotiation Board-----	414
Robertson, Albert J., Federal Home Loan Bank Board-----	401
Robertson, A. Willis, United States Senator-----	295

	Page
Rockefeller, Nelson A., President's Advisory Committee on Government Organization-----	398
Rogers, William P., Attorney General-----	2-48, 52-54, 56, 61, 62, 392
Rules and Administration Committee, Senate-----	373
Russell, Richard B., United States Senator-----	293
Saulnier, Raymond J., Council of Economic Advisers-----	379
Scott, W. Kerr., United States Senator-----	372
Scribner, Fred C., Jr., Department of the Treasury-----	418
Secrest, Robert T., Federal Trade Commission-----	402
Securities and Exchange Commission-----	415-417
Select Committee on Small Business, Senate-----	298
Small Business Administration-----	417
Smithsonian Institution-----	417
Sparkman, John, United States Senator-----	295, 373
State, Department of-----	394, 395
Stennis, John, United States Senator-----	293
Subversive Activities Control Board-----	417-418
Symington, Stuart, United States Senator-----	293-294
Taft, Charles P., Advisory Committee on Voluntary Foreign Aid, International Cooperation Administration-----	407
Tariff Commission-----	418
Tennessee Valley Authority-----	419
Tootell, R. B., Farm Credit Administration-----	398
Trading with the Enemy Act Subcommittee, Senate-----	355
Treasury Department-----	418
United States Board of Parole-----	393
Veterans' Administration-----	419-428
Veterans' Education Appeals Board-----	428
Victory, J. F., National Advisory Committee for Aeronautics-----	408-409
Vogel, Herbert D., Tennessee Valley Authority-----	419
Walsh, Lawrence E., Department of Justice-----	278-287
Waterman, Alan T., National Science Foundation-----	413
Waugh, Samuel C., Export-Import Bank of Washington-----	398
Weeks, Sinclair, Department of Commerce-----	360
Whitman Merrill, Panama Canal Company-----	413
Wilkey, Malcolm, Department of Justice-----	279-284
Wilson, C. E., Department of Defense-----	305, 306
Wolkinson, Herman-----	147-270
Young, Philip, Civil Service Commission-----	366-367

X