[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?, U.S. Dept. of Justice (1958), *reprinted in* Staff of Subcomm. on Constitutional Rights of S. Comm. on the Judiciary, 85th Cong., 2d Sess., The Power of the President to Withhold Information From the Congress, Memorandums of the Attorney General (Comm. Print 1958).]

**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?**

**[\*1]** 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 pubic 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 with- hold 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 con- tests 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-**[\*2]** 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 subpena 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 subpena 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 subpenaed 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.

**[\*3]** Similarly, where a congressional committee issues a subpena to a Cabinet member, the proper practice appears to be to make an appearance and to divulge only such information as would not conflict with the President's direction, in the public interest.

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

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

summary of the constitution and the statutes

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

While Congress passed the laws creating the executive departments, that does not mean that the heads of those departments are subject to the orders of the House of Representatives or of the Senate. Congress can, by a law, duly passed and signed by the President, add to or change the duties of a particular department, or even abolish it altogether. It also has the power to deny appropriations to a department. But that is all it may do. It may not use its legislative power to compel a head of a department to do an act which the President must disapprove in the proper discharge of his executive power, and in the public interest. And any law passed by Congress, designed to compel the production of papers by heads of departments would necessarily have to comply with the constitutional requirement that the President is as supreme in the duties assigned to him by the Constitution, as Congress is supreme in the legislative functions assigned to it. In other words, Congress cannot, under the Constitution, compel heads of departments by law to give up **[\*4]** 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.

1. 1 Cranch, 137, 143-144. [↑](#footnote-ref-1)
2. 135 U.S. 1, 63. [↑](#footnote-ref-2)
3. 272 U.S. 132-135. [↑](#footnote-ref-3)