of them; and the Comptroller General, or any of his assistant or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the revised statutes."

It will be noted that the only exception in section 313 relates to expenditures made under section 291, revised statutes (31 U.S.C. 07), which authorizes the Secretary of State to account for certain confidential expenditures in connection with intercourse or treaties with foreign nations by certificate where, in his judgment, he may think it advisable not to specify the details of such expenditure. Since that is the only exception stated and following the legal maxim that the specific setting forth of one type of exception precludes others from arising, it seems clear that the Comptroller General may require, and the departments are required to furnish, documents, etc., as to any other transaction or activity. Also, the language of section 313 itself (except as to the expenditures under 291 R.S.), in requiring the departments to furnish such information as the Comptroller General "may require of them" and its requirement that he be given access to any documents of the departments, clearly gives him access to all such documentation. If he has access to any document, he has access to all. The legislative background of the Budget and Accounting Act, 1921, makes no qualification as to what records can be required; the provision itself apparently being considered sufficiently specific. The legislative reports do bring out that one of the principal functions of the Comptroller General is to enable the Congress to be kept advised as to expenditures of the Government, and that the Comptroller General is expected to criticize extravagance, duplication, and inefficiency in executive departments. There is no doubt, in passing the act, the Congress did not intend that the executive agencies could, or would, withhold any books, documents, papers, or records needed by the Comptroller General. Otherwise, the very purpose of the act would be nullified.

The authority and duty of the Comptroller General was amplified by section 206 of the Legislative Reorganization Act of 1946 (31 U.S.C. 60), which authorized and directed him to make expenditure analyses of each agency in the executive branch of the Government which "will enable Congress to determine whether public funds have been economically and efficiently administered and expended" and to make reports thereon from time to time to the Committees on Government Operations, and Appropriations and other committees having jurisdiction over legislation relating to the operation of the agencies involved. The work of the Comptroller General, together with the activities of the Committees on Government Operations, were to serve as a check on the economy and efficiency of administrative management. See pages 6 and 7, Senate Report No. 1400 on the Legislative Reorganization Act of 1946.

The Congress has also directed that the Comptroller General in performing his duties give full consideration to the administrative reports and controls of the departments and agencies. The Government Corporation Control Act specifically provides in section 301 (a) (31 U.S.C. 866), "That in making the audits * * * the Comptroller General shall, to the fullest extent deemed by him to be practicable, utilize reports of examination of Government corporations made by a supervising administrative agency pursuant to law." The legislative reports on that act, Senate Report 694, page 10, contains the following significant language:

"The audit provisions are intended to give the Congress the independent audit reports of its agent, the Comptroller General, as to the operations and financial condition of every Government corporation in which the Government has a capital interest. * * * If the audit by the Comptroller General is to be a truly independent audit, he must not be restricted in such a way as to prevent him from examining into and reporting the transactions of any Government corporation to the extent deemed by him to be necessary.

"The Comptroller General has stated that in making his audits he will give full consideration to the effectiveness of the existing systems of internal accounts, procedures, and controls and of external examinations by an administrative supervisory agency. The bill includes a specific provision requiring the Comptroller General in making his audits to utilize, to the fullest extent deemed by him to be practicable, reports of examinations of Government corporations by a supervising administrative agency pursuant to law."

The Budget and Accounting Procedures Act of 1950 requires each executive agency to maintain systems of accounting and internal control and provides, in section 117(a) (31 U.S.C. 67(a)), that the Comptroller General in determining auditing procedures and the extent of examination to be given accounts and vouchers give consideration to "the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of the respective agencies."

The Comptroller General is required to audit the activities of the executive departments and agencies; to make expenditure analyses to determine whether funds have economically been expended; and to give consideration to the departments' internal audit and control and related administrative practices. To perform these duties he is given the clear statutory authority to require information of the departments and agencies regarding their organization, activities, and methods of business, coupled with the right to access to any books, documents, papers, or records of any such establishment (except as to the confidential State Department funds).

There have been no court cases construing the statutes giving the Comptroller General access to records. However, in 1925, the Attorney General in an opinion to the Secretary of War (34 Op. Atty. Gen. 446), concerning a request by the Comptroller General for information relative to an award of a contract showing that the lowest bid was accepted, or if otherwise, a statement for the reasons for accepting other than the lowest bid, advised, in part, as follows:

"It will be observed that the Comptroller General states that this requirement is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination. Moreover, section 313 of the Budget and Accounting Act provides (p. 26):

"'All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.'"

Questions as to whether the General Accounting Office has a right to access to records claimed to be confidential for security or other reasons have arisen from time to time and the General Accounting Office has always taken the position that it has the right to the information, even though certain provisions of law relating to disclosure might be applicable to it.

The General Accounting Office recognizes that certain of the functions of the inspectors general, such as criminal and personnel investigations, are of a confidential nature and it will normally accept summaries of facts contained in such reports to the extent they are needed in connection with its work. However, the inspectors general also have as a part of their respective missions and duties responsibility for conducting inspections, surveys, and examinations of the effectiveness of operations and overall efficiency of a command, installation, or activity. These functions may be performed on a periodic or special basis as directed by competent authority. The performance of these functions constitutes an important part of the process of management evaluations and internal reviews as distinguished from criminal or personnel investigations. They provide officials and appropriate personnel of authority with an independent appraisal of the effectiveness of operations and overall efficiency. Moreover, a very considerable part of the inspections and reviews made by the inspectors general involve reviews of procedures and policies and as such are an important segment of the internal reviews and control which the General Accounting Office, under section 117(a) of the Budget and Accounting Procedures Act of 1950 is required to consider and recognize in determining the audit procedures to be followed in its reviews.

The scope of inspection and survey programs of the inspectors general is similar in character to much of the work the General Accounting Office has scheduled in requirements, procurement, supply management, and research and development areas. The programs of the Deputy Inspector General for Inspection of the Air Force covering the period July 1, to December 31, 1958, include (1) a survey of Air Force procurement methods (advertising versus negotiation); (2) a survey of procurement quantitative and qualitative program changes; (3) a survey of procurement of commercial communications and utility services; (4) a survey of contract cost overruns; (5) a survey of maintenance programs; (6) a survey of modification programs; (7) a survey of the application of electronic data processing systems and other like subjects. All of these subjects represent internal and management evaluations which would clearly be a part of internal audit and control within the meaning of section 117(a) of the Accounting and Auditing Act of 1950. It is essential that such reports be made available to the General Accounting Office in order that it can evaluate the effectiveness of the department's system of internal control and to preclude unwarranted and unnecessary duplication of effort in the internal audit and the independent review made by this Office. The Air Force Inspector General's report on the ballistic missiles program clearly falls within the term internal audit and control.

The Secretary of the Air Force in refusing the Comptroller General access to the Inspector General's report on the ballistic missiles program stated that the Inspector General's reports are prepared solely for the use of responsible officials within the Air Force, and that the objective of self-criticism can be obtained only if the Inspector General's organization has the assurance that its reports will, without exception, be kept within the Department. The Secretary also stated that the report in quesion concerned the internal management of the Department, and was prepared solely for the benefit and use of those officers and employees of the Department who are responsible for its administration, and that the release of such reports to persons outside the Department

would have a serious effect on the effective administration of the Department. The Secretary concluded that these considerations compelled him to conclude that the public interest would best be served by not releasing the report.

It is our understanding that the position of the Secretary is premised on paragraph 151(b)(3) of the Manual for Courts-Martial (1951) which was prescribed by the President on February 8, 1951, through Executive Order 10214, pursuant to the act of May 5, 1950 (64 Stat. 107), and on the general basis that the heads of executive departments have the right to withhold information or papers which they deem confidential, in the public interest.

The Manual for Courts-Martial, 1951, Executive Order 10214, dated February 8, 1951, was issued pursuant to article 36 of the act of May 5, 1950 (64 Stat. 120). Article 36(a) provides:

"The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts, but which shall not be contrary or inconsistent with this code."

Article 151(b)(3) of the Manual for Courts-Martial provides:

"The inspectors general of the various Armed Forces, and their assistants, are confidential agents of the Secretaries of the military or executive departments concerned, or of the military commander on whose staff they may be serving. Their investigations are privileged unless a different procedure is prescribed by the authority ordering the investigation. Reports of such investigations and their accompanying testimony, and exhibits are likewise privileged, and there is no authority of law or practice requiring that copies thereof be furnished to any person other than the authority ordering the investigation or superior authority. However, when application is made to the authority by court-martial certain testimony, or an exhibit, accompanying a report of investigation, which testimony or exhibit has become material in a trial (to show an inconsistent statement of a witness, for example), he should ordinarily approve such application unless the testimony or exhibit requested contains a state secret or unless in the exercise of a sound discretion he is of the opinion that it would be contrary to public policy to divulge the information desired.

"In certain cases, it may become necessary to introduce evidence of a highly confidential or secret nature, as when an accused is on trial for having unlawfully communicated information of such a nature to persons not entitled thereto. In a case of this type, the court should take adequate precautions to insure that no greater dissemination of such evidence occurs than the necessities of the trial require. The courtroom should be cleared of spectators while such evidence is being received or commented upon, and all persons whose duties require them to remain should be warned that they are not to communicate such confidential or secret information.

Since the Manual for Courts-Martial was issued pursuant to the authority of the President to prescribe procedure for such trials, and article 151(b) MCM by its language is addressed to procedures of such courts, it obviously does not affect access by the General Accounting Office to inspectors general's reports determined by the Comptroller General to be necessary to the performance of his work, particularly where the report requested is not one dealing with personnel or criminal investigations.

Air Force Regulation 120-3, paragraph 9, October 11, 1954, and similar regulations provide:

"Disclosure of or access to matters pertinent to an inquiry or investigation will be limited to persons whose official duties require such knowledge. The Manual for Courts-Martial, 1951, states that inspector-general investigations are privileged information. The same privileged status applies to inquiries and investigations conducted under this regulation. Also paragraph 3, AFR 190-16, July 29, 1954, excludes investigative reports and reports of inspectors general and base inspectors from release to the public as information. Reports by investigators will not be released or disclosed outside the Air Force without approval of the Secretary of the Air Force."

Presumably these regulations were issued pursuant to section 161, Revised Statutes, title 5, United States Code, section 22, or similar authority, authorizing the head of a department to issue regulations, not inconsistent with law, for the conduct of his department and the custody and use of its records. Since under section 313 of the Budget and Accounting Act the Secretary is required to give the Comptroller General access to the records, any construction of the Air Force regulation denying the Comptroller General access is improper, and the regulation, to that extent being inconsistent with law, has no effect.

With reference to the right or privilege of the head of the executive branch of the Government to refuse to the legislative and judicial branch of the Government free access to records in the custody of the executive departments, support for such claim of right or privilege is found in 25 Op. Atty. Gen. 326, 40 Op. Atty. Gen. 45, and cases referred to therein.

Assuming, arguendo, that such right or privilege does exist, we do not believe it warrants an executive agency denying to the Comptroller General information or access to its documents in view of section 313 of the Budget and Accounting Act, which clearly provides that "all departments * * * shall furnish * * * information" required by the Comptroller General and that he shall have "access to and the right to examine any * * * documents of any such department." The opinion of the Attorney General in 1925, 34 Op. Atty. Gen. 446, discussed earlier, clearly recognizes the prerogative of the Comptroller General to determine what papers he should have to enable him properly to perform his audits and that the departments are required to furnish them.

The right or privilege asserted from time to time by the executive branch was considered in a study by the staff of the House Committee on Government Operations entitled "The right of Congress to obtain information from the executive and from other agencies of the Federal Government," committee print dated May 3, 1956, and in great detail by the House Committee on Government Operations in connection with Public Law 85-619 approved August 12, 1958, as were the court cases cited and relied upon by the Attorney General. See House Report No. 1461, 85th Congress, 2d session. Also, there was there considered a line of later decisions starting with *McGrain* v. *Daugherty*, 273 U.S. 135 (1927) which upheld the power of Congress to require information sought for legislative purposes. None of the cases relied upon by the Attorney General involved demands by the Congress for information from the executive agencies. This was considered in a study on the matter furnished the committee by the Attorney General. See page 2938 of the printed hearings before a subcommittee of the House Committee on Government Operations on June 20 and 22, 1956, on "Availability of Information From Federal Departments and Agencies" wherein, after citing and quoting from numerous court decisions, he stated, "None of the foregoing cases involved the refusal by a head of department to obey a call for papers or information. There has been no Supreme Court decision dealing squarely with that question."

As indicated, the precise question of whether the Congress has a right to obtain information from the Executive which it refuses to furnish because of its confidential nature has not been the subject of a court decision. Where information sought by Congress by an executive department has been refused, the Congress has, at times succeeded in bringing sufficient pressure to bear to obtain the information, or the executive department has, upon reconsideration relented and furnished it. At other times the Congress has not pressed the matter possibly because of its feeling that the President was in such a position that he should know whether the information should be withheld, or that the Congress had no machinery to force his compliance—and the information was not furnished. But, regardless of whether such right or privilege exists, it is clear that the Congress in passing on future appropriations and other legislation has a right to know whether the funds appropriated are being properly and efficiently used for the purposes it intended and that any information available in that regard should be available to the Comptroller General.

In view of the above, and in the absence of any judicial determination specifically dealing with the rights of the Comptroller General under section 313, we do not believe that the position of the Secretary of the Air Force that the report in question can be legally withheld is proper.

ROBERT F. KELLER,
General Counsel.

EXHIBIT IV-B

GAO BRIEF OF CASES CITED IN 40 OP. ATTY GEN. 45 (1941)

1. *Marbury* v. *Madison*, 1 Cranch 137 (February 1803):

William Marbury was issued a commission as justice of the peace for the county of Washington (Washington, D. C.). President John Adams signed the commission and the seal of the United States was affixed. James Madison, Secretary of State, refused to deliver the commission. Application was made to the Secretary of State inquiring as to whether or not the commission was signed. Explicit and satisfactory information was not given in answer to the inquiry, and Marbury, along with others similarly situated, brought action against Madison to show cause why a mandamus should not issue commanding him to deliver the commission.

The court laid down several constitutional principles in this ruling. Particularly of importance to the matter in issue was that the party who was acting as Secretary of State when the transaction took place could not be made to relate matters to the court which he had learned in his official capacity and which he felt were confidential. See page 144 of the report. Also, the court ruled that there was no power in the court to control an act of discretion by the President or his delegates. See page 165. See also at page 179 the court's ruling that any law repugnant to the Constitution is void.

All of the above-related principles have a general relation to the matter in issue. However, it must be remembered that what we are here concerned with is not a suit by a private citizen to force executive disclosure of information, as was the case in *Marbury* v. *Madison*, but it is an attempt by an agency of the Congress, in its official capacity, to obtain information that is needed to enable it to carry out its statutory duty.

2. *Totten, Administrator,* v. *United States,* 92 U.S. 105 (October 1875):

Case involved a suit by a private claimant for salary allegedly due claimant's intestate for services rendered pursuant to a secret contract between one William A. Lloyd and President Lincoln. Lloyd was hired by the President as a spy for the Federal forces during the Civil War. The court dismissed the petition because of the confidential nature of the contract. The reason given was that public policy forbids the maintenance of any suit the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.

3. *Kilbourn* v. *Thompson,* 103 U.S. 168 (October 1880):

An action for false imprisonment brought against the Clerk, Sergeant at Arms, and Speaker of the House of Representatives. A subpena was issued to Kilbourn to appear before a committee of the House of Representatives. He was commanded to bring with him certain papers. Kilbourn refused to produce the papers he was ordered to deliver. Kilbourn was taken into custody by the Sergeant at Arms and was placed in the district jail. During the time Kilbourn was imprisoned and arrested there was then pending in the District Court for the Eastern District of Pennsylvania an action concerning the subject matter over which the Congress had initiated its investigation. The court held that the subject matter of the investigation was, therefore, judicial, not legislative, and that the House of Representatives lacked power to compel Kilbourn to testify on the subject, or to present the papers demanded.

Of course, this case is one of the basic rulings on the matter of the separation of powers and the lack of authority in any one of the three branches to interfere with the function of another. Be this as it may, the ruling is premised on the basis of interference by the legislature with a matter pending before the judiciary. The matter at hand concerns a legitimate function of an agency of the Congress carrying out its statutory function; on this basis the Kilbourn case is distinguished from proper application.

4. *Vogel v. Gruaz,* 110 U.S. 311 (February 1, 1884):

Action brought to recover damages for the speaking and publishing of false, malicious, scandalous, and defamatory words, charging the plaintiff with being a thief and with having stolen the money of the defendant. Case goes to the privileged communication between attorney and client. The words complained of were spoken by the defendant when he approached the State's attorney and told him of his charge against the plaintiff. The court ruled that the defendant was seeking professional advice as to his right, and that of the public through him, to have a criminal prosecution commenced by the State's attorney. The court went on to say that "it is the duty of every citizen to communicate to his Government any information which he has of the commission of an offense against its laws; and that a court of justice will not compel or allow such information to be disclosed, by the informer himself, or by any other person, without the permission of the Government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

Here again we have a suit between private parties, and the case does not involve the availability of executive department records to the Congress or an agency of the Congress.

5. *In re Quarles and Butler,* 158 U.S. 532 (May 20, 1895):

The petitioners had conspired to do bodily harm to one Henry Worley because in his reporting them to the authorities for violating the internal revenue laws. The petitioners had been accused of carrying on the business of a distiller without having given bond as required by law. One of the principles laid down in the case is that a citizen has a constitutional right to inform the authorities of a violation of law and that any information thus given is a privileged and confidential communication. Case involves a suit by private parties, and does not in any way involve right of Congress or its delegates to executive information.

6. *Boske* v. *Comingore,* 177 U.S. 459 (April 9, 1900):

Action was instituted in a county court of Kentucky by the Commonwealth of Kentucky against Elias Block & Sons for the purpose of ascertaining the amount and value of a large amount of whisky which, it was alleged, the defendant had in their bonded warehouses for a named period, but had not been listed for taxation, and of enforcing the assessment of payment of State and county taxes. The collector of internal revenue had certain books and papers on file in his office that could prove to be of value to the Commonwealth in its action. A Treasury Department regulation forbade the dissemination of this information. When ordered to produce the books and records the collector refused and was fined and ordered to jail for contempt. The Supreme Court held that the regulation in question was proper under section 161 of the Revised Statutes giving the departments authority to issue regulations not inconsistent with law for the use and custody of its papers, and the collector was bound thereby and justified in his refusal to give out the information. The question of access to documents between Federal departments was not involved.

7. *In re Huttman,* 70 F. 699 (November 1, 1895):

Federal collector of internal revenue was called upon to testify in a State court with reference to something that transpired in his office between him and a citizen that related to enforcement of the revenue laws. The citizen had filed for a retail liquor dealer's stamp. Although the State did not attempt to secure the actual papers that were compiled incident to the application, the State did attempt to obtain testimony from the Federal officer which would disclose the information incorporated in the papers which by regulation could not be made available outside the Internal Revenue Service. It was held that the fact the information sought was felt necessary for the proper enforcement of the State's prohibitory liquor law could furnish no ground for ignoring a Federal regulation prohibiting departmental officers from disclosing records, and that if the records were not for disclosure, the information therein also was not for disclosure.

As in the *Boske* v. *Comingore* case, the matter in issue here was not a question involving the Congress and the executive agencies but dealt with the supremacy of laws and regulations having the effect of laws of the Federal Government over State laws.

8. *In re Lamberton,* 127 F. 446 (July 28, 1903):

A Federal deputy internal revenue collector refused to answer a question asked him in an action in a State court where the State was seeking information to enable it to punish persons for the violation of State laws. The Federal collector refused to answer these questions because he obtained the information sought by virtue of his official capacity and he was not allowed to disclose such information because of directives from his superior. The court held that the collector could not be forced to testify as to things he learned in his official capacity.

The case did not involve Congress seeking information from the executive department.

9. *In re Valecia Condensed Milk Co.* v. *Warner,* 240 F. 310 (February 6, 1917):

The secretary of a State tax commission was served with a subpena to appear before a referee in bankruptcy to testify and produce all reports, etc., in the possession of the commission relating to the bankrupts. The secretary appeared and answered that the only papers of the kind required were the income tax returns of the respective bankrupts and that a State statute prohibited him from permitting such return to be examined by anyone and he refused to produce them. Court reversed the district court's ruling that the secretary was in contempt. This involved a suit against a State official. It did not involve an attempt by the legislature to secure the papers of the executive.

10. *Elrod* v. *Moss et al.,* 278 F. 123 (November 1, 1921):

In an action for alleged unlawful arrest and illegal search of a vehicle on suspicion that a man was transporting unlawful whisky, a sheriff testified he communicated to the defendant, Moss, a State constable, that plaintiff was transporting liquor. Case holds that the lower court properly refused to require the sheriff to disclose the source of this information, citing the *Vogel* v. *Gruaz* and *Quarles* cases. The case does not involve the right, or lack of a right, of the Congress to have access to executive papers.

11. *Arnstein et al.* v. *United States,* 296 F. 946 (February 5, 1924):

Appellants were indicted for a conspiracy for bringing into the District of Columbia stolen stock in violation of section 836(a) of the District Code. They were convicted and alleged error. Case holds, among other things, that statement made to an assistant district attorney in his official capacity while investigating a crime are privileged and disclosure cannot be compelled without the consent of the Government.

The case does not involve an attempt by the Congress or its agent to obtain papers belonging to or under the control of the executive.

12. *Gray* v. *Pentland,* 2 Sergeant & Rawles (Pennsylvania) 22 (September 1815):

Case arose because of a deposition made by Gray in which he alleged that Pentland was unfit to perform the duties of the officer of prothonotary of the court of common pleas because of his frequent intoxication. The deposition was sent to the Governor and the court attempted to make the Governor deliver the deposition. The Governor refused.

The court in effect ruled that the Governor best knows the circumstances under which the deposition had been delivered to him and consequently he should exercise his own judgment with respect to the propriety of producing the writing.

The case does not involve a congressional attempt to obtain papers from the executive.

13. *Thompson* v. *The German Valley Railroad Company,* 22 N.J. Equity Reports 111 (October 1871):

Governor of New Jersey failed to deposit a private bill with the secretary of State. A subpena duces tecum was served upon him ordering him to appear and to produce an engrossed copy of the bill. This the Governor refused to do stating by letter that although he had respect for the court he did not feel that they could force his compliance. The court held that the Governor cannot be examined as to his reasons for not signing the bill. No order was made upon the Governor to appear. If the Governor felt that he should testify he could do so of his own volition. The court could hardly entertain proceedings upon him by adjudging him in contempt. The court went on to say that there may be cases where the court might proceed against the Governor for contempt if he, without sufficient or lawful reasons, refused to appear and testify but such was not the case in the proceedings at hand.

The case did not involve an attempt by the legislature to obtain copies of papers in the possession of the executive.

14. *Worthington* v. *Scribner*, 108 Mass. 487 (March 1872):

Plaintiff was engaged in importing books into the United States. It is alleged that the defendants reported to the Treasury Department of the United States that the plaintiff had purchased books with the intention of bringing them into the United States at a fraudulent undervaluation. The plaintiff requested advice of the defendants if such was reported to the officials of the Treasury Department and if so, to state fully all that was done, and requested copies of all written communications, and the substance of all oral statements.

Court held that it was discretionary with the Government to decide whether or not to produce the information requested on grounds of public policy and that the discovery of documents which are thus protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogation at law.

Case did not involve attempt by Congress to obtain executive papers.

15. *Appeal of John F. Hantranft, Governor of the Commonwealth, et al.*, 85 Pa. 433 (November 1, 1877):

A subpena was issued against the Governor of Pennsylvania and other State officials to appear before a grand jury that was investigating a riot that occurred incident to a conflict between the State National Guard and a group of strikers in the employ of the Pennsylvania Railroad Co. in July 1877.

The State officials refused to comply with the subpena for the reason that any information which they might have that would be of value to the grand jury could be privileged.

The court held that the Governor is the absolute judge of what official communication to himself or his department, may or may not be revealed and is the sole judge of what his official duties are. Also, it was held that the Governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office and his immunity extends to his subordinates and agents when acting in their official capacity.

This was an attempt by the grand jury to get the information. It did not involve an attempt by the legislative to obtain the papers of the executive.

16. Volume 2, Robertson, Trials of Aaron Burr (pp. 533–536) (summer term of 1807):

This case involved the trial of Aaron Burr, former Vice President of the United States, arising from the so-called Burr Conspiracy.

Burr wanted to have produced into evidence a certain letter in the possession of the President which he felt might be of value in his defense. The President did not refuse to deliver the letter but simply turned it over to the U.S. attorney with the advice that he use his discretion as to what part, if any, of the letter should be produced. The U.S. attorney allowed part of the letter to be used but withheld other parts because he felt that those parts were confidential.

The court ruled that although generally the President may be subject to the general rules applicable to others, he may have sufficient motives for declining to produce a particular paper and those motives may be such as to restrain the court from enforcing the production of the papers which the President saw fit to withhold.

The President in the Burr case gave no reason at all for withholding the paper called for. The court said, "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 minds of others, which must be respected by the court."

This case, of course, involved the trial of Aaron Burr for treason. It did not involve an attempt by the Congress to obtain papers from the executive.

EXHIBIT IV–C

THE AUTHORITY AND DUTY OF THE COMPTROLLER GENERAL TO INQUIRE INTO EFFICIENCY AND ECONOMY IN THE GOVERNMENT DEPARTMENTS AND ESTABLISHMENTS AND A REPORT THEREON TO THE CONGRESS AND ITS COMMITTEES

The General Accounting Office unquestionably has the right and duty to inquire into the efficiency and economy in the use of public funds and property in Government departments and establishments and to make reports thereon to the Congress and its Committees on Government Operations and Appropriations. Such authority is spelled out in section 312 of the Budget and Accounting Act, 1921 (42 Stat. 25, 31 U.S.C. 53), and section 206 of the Legislative Reorganization Act of 1946 (60 Stat. 837, 31 U.S.C. 60), and the legislative history of those provisions.

Section 312(a) of the Budget and Accounting Act provides:

"The Comptroller General shall investigate, at the seat of Government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures."

House Report No. 14, 67th Congress, 1st session, on the bill H.R. 30, which with some modification became the Budget and Accounting Act, clearly indicates that criticism of wastefulness and inefficiency in the Government departments and agencies was the most cogent reason for creating the General Accounting Office. On pages 7 and 8 of the report the Select Committee on the Budget stated:

"The bill creates an independent establishment known as the General Accounting Office, * * *. Under the present plan the Congress has no power or control over appropriations after they have once been made. It has no knowledge as to how the expenditures are made under these appropriations, and inasmuch as the Comptroller of the Treasury and the six auditors owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments. * * *

"The only way by which Congress can hold a check on expenditures is to continue a control and audit of the accounts by an independent establishment. * * * The creation of this office will enable it to furnish information to Congress and to its committees regarding the expenditures of the Government. He [the Comptroller General] could and would be expected to criticize extravagance, duplications, and inefficiency in executive departments. He could do this without fear of removal. Under the present plan, neither the Comptroller of the Treasury nor the six auditors make such criticism. The reasons why they do not are apparent, yet opportunity for wholesome criticism abound in every department."

The debates on H.R. 9783, 66th Congress, an earlier form of the Budget and Accounting Act which was passed by the Congress but vetoed by President Wilson for reasons not connected with section 312 of the Budget and Accounting Act, indicate that section was intended to provide authority for inquiries as to inefficiencies in the use of public funds by Government agencies. Section 13 of that bill, prior to its amendment on the floor of the House, contained the phrase "receipt and disbursement of public funds" in the two places where the phrase "receipt, disbursement, and application of public funds," appear in section 312 as finally enacted. Congressman Luce expressed the view that, although the committee report stated that the Comptroller could and would be expected to criticize extravagance, duplication, and inefficiency, the bill did not tell him to do so. In the course of the debate, he stated:

"All I am asking is, if you mean to authorize this man to criticize, to study, and investigate for the purpose of securing economy that the committee shall, if they do not approve my way of directing it, suggest some way of their own, so that no man when he goes into that office can rely upon the statute and say, 'This law imposed on me but a purely ministerial function, made me a human adding machine, and my only duty is to total up the figures that are laid before me and transmit them to the Congress.' "

Congressman Luce therefore offered an amendment to change the language of the phrase to its present form. After a full discussion of the matter, appearing at 58 CONGRESSIONAL RECORD (pt. 7) 7291–7292, in which the intent of the Congress was fully explained the amendment was agreed to. The language as thus perfected was carried to the conference report and, following the Presidential veto of that bill, included in identical import in section 312 of the 1921 act.

A few selected remarks from the House debate on H.R. 9783 are attached.

Section 206 of the Legislative Reorganization Act of 1956, supra, is explicit in its direction that the General Accounting Office shall make inquiries concerning the economy and efficiency with which public funds have been administered or expended. That section reads as follows:

"SEC. 206. The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations), which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller General, from time to time, to the Committees on Expenditures in the Executive Departments, to the Appropriations Committees, and to the legislative committees having jurisdiction over legislation, relating to the operations of the respective agencies, of the two Houses."

The legislative history pertaining to the act indicates that section 206 was a part of the comprehensive reorganization of the Congress itself. Numerous witnesses appearing before the Joint Committee on Reorganization advocated that the Congress establish more effective machinery for the surveillance of budgetary estimates as well as execution of the laws, and advocated among other measures that the General Accounting Office be used to greater advantage for this purpose. For example, the following colloquy between Vice Chairman Monroney and Senator Burton, discussing the Heller report on strengthening the Congress appears at page 825 of the transcriptive hearings before the joint committee on the organization of Congress pursuant to House Concurrent Resolution 18, 79th Congress, 1st session:

"The VICE CHAIRMAN. I agree we need great many more auditors and accountants to help the committees, but I think the individual Members are in need of help through such agencies as the Comptroller General, so as to have access to inside reports as to the wisdom with which the money has been spent. * * *

"Senator BURTON. I do wish to commend the work of the Comptroller General. I think it is helpful and should be extended."

Particularly noteworthy also is Mr. Robert Heller's discussion of his report on page 856 of the hearings, as follows:

"Recommendation IX: Congress should insure that the General Accounting Office is an effective instrument for control of executive expenditures.

"1. By giving it audit power over all Federal Agencies, Departments, and Corporations.

"2. By insisting on current and useful reports from the Office.

"3. By establishing a Joint Committee on Public Accounts to insure action on these reports.

"A joint committee to review and obtain action on reports emanating from the General Accounting Office is favored, rather than having the Office report direct to the several regular standing committees for the following reasons:

"1. Since the joint committee would have no other duties, consideration of new legislation and other matters would not interfere with analysis of audit reports."

* * * * *

See, also, the comment on pages 7 and 8, 33, 525–550, particularly 536, 775, 984, and 1,000, of the hearings.

The bill resulting from these hearings, S. 2177, 79th Congress, provided for such a plan, except that, instead of a joint committee, the Committee on Expenditures in the Executive Departments[1] in each House was given the specific duty to receive and review reports of the Comptroller General and to study the operation of Government activities at all levels with a view to determining its economy and efficiency. To insure that these and other committees would receive necessary information, provision was made in section 206 for the making of expenditure analyses by the General Accounting Office, upon which such determinations could be based. This relationship is made clear on page 6 of Senate Report 1400, 79th Congress, which in pertinent part reads:

"A third group of provisions in the bill is designed to strengthen congressional surveillance of the execution of the laws by the executive branch. Congress has long lacked adequate facilities for the continuous inspection and review of administrative performance. * * *

"To remedy this situation, S. 2177 would authorize the standing committees of both Houses to exercise continuous surveillance of the execution of the laws by the administrative agencies within their jurisdiction. Armed with the power of subpena and staffed with qualified specialists in their respective provinces of public affairs, these committees would conduct a continuous review of the activities of the agencies administering laws originally reported by the legislative committees. * * *

"As a further check upon the financial operations of the Government and its care in handling public funds, the bill authorizes and directs the Comptroller General to make administrative management analyses of each agency in the executive branch, including Government corporations. Such analyses, with those made by the Bureau of the Budget, will furnish Congress a double check upon the economy and efficiency of administrative management. Reports on such analyses would be submitted by the Comptroller General to the Expenditures, Appropriations, and appropriate legislative committees, and to the majority and minority policy committees of the two Houses."

[1] The designation of each of these committees has since been changed to Committee on Government Operations.

The Budget and Accounting Procedures Act of 1950 in no way lessened the responsibility of the General Accounting Office to make inquiry concerning efficiency in the use of public funds and property. On the contrary, section 117(a) of the act (31 U.S.C. 67(a)) specifically provides that:

"Except as otherwise specifically provided by law, the financial transactions of each executive, legislative, and judicial agency, including but not limited to the accounts of accountable officers, shall be audited by the General Accounting Office in accordance with such principles and procedures and under such rules and regulations as may be prescribed by the Comptroller General of the United States."

Mr. Taylor, October 18, 1919:

"They will have to be cold blooded and cut down appropriations in every direction that they deem proper and eliminate duplication and any superfluous employees and antiquated methods and antiquated people and inaugurate efficiency and up-to-date business methods, and they have very great and far-reaching responsibilities, and they must have a free hand to properly perform their very great duties."

Mr. Hawley, October 18, 1919:

"Yes, he is our officer, in a measure, getting information for us, to enable us to reduce expenditures and to keep advised of what the spending departments are doing. If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from his office."

Mr. Fess, October 18, 1919:

"The auditing, then, is entirely independent of the spending departments."

Mr. Purnell, October 20, 1919:

"The third step, and a most important one, is the audit and control of the expenditures of the Government. Heretofore the executive branch of the Government has occupied the awkward position of auditing its own accounts. All are agreed that this is wrong in principle. It was the unanimous judgment of the committee that the power of audit and control should be lodged with the legislative rather than the spending branch of the Government. We propose to clothe the executive with full power to survey and determine the financial needs of the Government as well as make estimates therefor. We reserve to the Congress the power of making the appropriations and of seeing that the money is properly spent. This bill provides for an officer to be known as the Comptroller General, whose duty it shall be to audit and pass upon the legality of all Government expenditures. He shall be responsible only to Congress and shall be removable by Congress alone, and then only for cause. He and his assistant are to be appointed by the President, with the approval and consent of the Senate."

Mr. Good, October 21, 1919:

"The ideal system of Government finance, so far as appropriations and expenditures go, embraces two distinct and separate functions. In the first place, it is the duty of the office that pays out the money to make an estimate of what its requirements will be. Congress acts upon that estimate. Then comes this separate and distinct office, semijudicial in character, which determines whether or not expenditures made are legal, and then audits the account. That department is intended as a check against extravagance. That department is intended to have a reflex influence upon the Bureau of the Budget. The Bureau will know at all times that that department is watching it, and that for every appropriation that is made there will have to be a legitimate use."

Mr. Williams, October 20, 1919:

"The bill then provides for the appointment of an official termed the 'Comptroller General,' whose duty it is to follow every appropriation made by Congress and see that the money is properly spent. This will be of invaluable service to Congress, as this official, being entirely independent of every other branch of the Government, is directly responsible to Congress."

Mr. Lanham, October 20, 1919:

"The primary dual purpose of the proposed act is evidently to foster and promote economy and to discover and prevent duplication both in governmental effort and governmental expenditure. Conflicting claims and overlapping of functions is an expensive incident of our administrative system.

"It seems to me that the adoption of some such method as that here suggested will likely insure economy by enabling the discovery of duplication and extravagance."

Mr. Bland, October 21, 1919:

"Did not the committee contemplate that the Comptroller General might not only be brought into conflict with the executive department and with the executive branches of the Government, but sometimes with one side or the other of the aisle in Congress, and possibly both sides, in the impartial discharge of his duties?"

Mr. Good, October 21, 1919:

"Absolutely. That department ought to be independent and fearless to criticize wrong expenditures of money wherever it finds them. It ought to criticize inefficiency in every executive department where inefficiency exists, and one of the troubles with our present system is that the auditors dare not criticize. If they criticize, their political heads will come off."

EXHIBIT IV–D

MEMORANDUM OF LAW—RIGHT OF ACCESS BY THE COMPTROLLER GENERAL (AN AGENT OF THE CONGRESS) TO AN AIR FORCE INSPECTOR GENERAL'S REPORT ENTITLED "SURVEY OF MANAGEMENT OF THE BALLISTIC MISSILE PROGRAM"

(Prepared for the Special Subcommittee on Government Information of the Committee on Government Operations, House of Representatives)

I. JURISDICTION OF SPECIAL SUBCOMMITTEE ON GOVERNMENT INFORMATION

The Special Subcommittee on Government Information was chartered on June 9, 1955, by Congressman WILLIAM L. DAWSON, chairman of the Committee on Government Operations of the House of Representatives. He directed the subcommittee to study charges that Federal executive and independent agencies have withheld pertinent and timely information from the Congress, the press, and the public. His chartering letter to Congressman JOHN E. MOSS, subcommittee chairman, stated that the subcommittee's study was to cover the operations of "the executive branch at all levels" to determine the "efficiency and economy of such operation in the field of information." He stated that the subcommittee's reports should "fully and frankly disclose any evidence of unjustifiable suppression of information or distortion or slanting of facts" and concluded that the subcommittee was to "seek practicable solutions for such shortcomings, and remedies for such derelictions, as you may find and report your findings to the full committee with recommendations for action." (Subcommittee hearings, p. 20.)

II. SECRETARY OF THE AIR FORCE DENIES THE COMPTROLLER GENERAL ACCESS TO AN INSPECTOR GENERAL'S REPORT ENTITLED "SURVEY OF MANAGEMENT OF THE BALLISTIC MISSILE PROGRAM"

The Secretary of the Air Force has refused to give access or make available to the Comptroller General a final, official report made by the Inspector General of the Air Force entitled "Survey of Management of the Ballistic Missile Program." The Secretary has stated that "Inspector General's reports are

prepared solely for the use of responsible officials within the Department of the Air Force."

"In addition, the report which you requested is a report concerning the internal management of this Department, and it was prepared solely for the benefit and use of those officers and employees of this Department who are responsible for its administration. The release of such reports to persons outside the Department would have a serious adverse effect on the effective administration of the Department.

"These considerations compel me to conclude that the public interest would best be served by not releasing the report which you have requested." [2]

III. QUESTIONS OF LAW

This withholding of information by the Secretary of the Air Force from the Comptroller General raises some pertinent questions which warrant precise legal analysis. These questions involve:

1. The constitutional duties and functions of the Congress and the President.

2. The authority of the head of a department, created by Congress, to ignore, act contrary to, or to refuse to act in accordance with a law enacted by the Congress and signed by the President.

3. The authority of the head of a department to deny "access to, and the right to examine, any books, documents, papers, or records," to an agent of the Congress (the General Accounting Office) and an agent of the President (Bureau of the Budget), both specifically authorized by act of Congress for the purpose of securing such information.[3]

4. The authority of the head of a department considering the importance of the law here involved to act without seeking specific advice and instruction from the President of the United States who has the constitutional responsibility to "take care that the laws be faithfully executed."

5. The authority of the head of a department to ignore an opinion of the Attorney General specifically interpreting this law.

6. The authority of the head of a department to decide what books, documents, papers, or records are necessary to the proper performance of the duties and functions of an independent officer of the Government vested with the authority to make such determinations by statute.

7. The authority of the head of a department to prevent an independent review of matters "relating to the receipt, disbursement and application of public funds" under the control of the department head with the result that there is no review of the performance of that organization (Inspector General).

IV. NO SECURITY QUESTION, NAMES OF CONFIDENTIAL INFORMANTS, PERSONNEL OR CRIMINAL INVESTIGATIONS INVOLVED

It is important before proceeding with this legal analysis to note that the Secretary of the Air Force does not base his withholding of access to the Inspector General's Report on Executive Order 10501. Hence, there are no matters of security or national defense involved concerning the availability of this report to the Comptroller General. The chairman of the subcommittee requested the following question be answered in writing prior to this hearing:

"Does your refusal of access to the report stem in any way from the fact that the report is classified under Executive Order 10501? If so, explain fully and cite the statutory authority for withholding from the GAO on those grounds."

The Department of the Air Force replied:

"No. The Secretary of the Air Force did not base his refusal to furnish the report to the Comptroller General on the ground that it was classified under Executive Order 10501.

In addition, the chairman was specific in his question relative to the names of confidential informants as follows:

"Does the report include the names of confidential informants?"

The Department of the Air Force replied:

"The report does not include the names of confidential informants."

With respect to personnel or criminal investigations the chairman asked:

"Does the report involve a personnel or criminal investigation?"

The Air Force replied: "No." [4]

It is significant to note that in this particular instance no claim has been made or referred to relating to the President's unique role as Commander in Chief of the Army and the Navy.[5]

V. CONSTITUTIONAL GRANTS OF POWERS, DUTIES, AND RESPONSIBILITIES TO THE CONGRESS

For the purpose of this legal analysis it is deemed advisable to consider the grants of power, duties, and responsibilities conferred by the Constitution on the Congress and to ascertain if the Congress has made laws to carry out its responsibilities. The sections of the Constitution which are considered to be pertinent to this subject matter (withholding of information by Air Force Secretary) and the availability of information to the Comptroller General are as follows:

(a) "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"; [6]

(b) "All bills for raising revenue shall originate in the House of Representatives"; [7]

(c) "Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States"; [8]

(d) "The Congress shall have power to lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States"; [9]

(e) [The Congress shall have the power] "To make rules for the government and regulations of the land and naval forces"; [10]

(f) [The Congress shall have the power] "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." [11]

(g) "No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." [12]

To perform its constitutional responsibilities as set forth in the above-quoted sections of the Constitution and "to make the laws," it is absolutely essential that Congress have access to or establish the means to obtain, information and that such information should be accurate, pertinent, factual, timely, and authentic. No one will deny that most of the information needed by Congress to enable it to perform its legislative functions on "appropriation" and "expenditure of the public money" must necessarily come from departments and agencies of the Government. Congress has provided the necessary laws and machinery for the President and for itself to obtain the information on which to base recommendations or legislative proposals. It is not for the heads of Federal departments and agencies, all created by Congress, to determine what information the Congress needs or requires to perform its constitutional functions. Under the Constitution, it is incumbent and mandatory upon the President and the heads of departments and agencies to comply with and take care that laws enacted by the Congress be executed in accordance with the law.

VI. CONGRESS MAKES THE LAW—"BUDGET AND ACCOUNTING ACT, 1921"

The Congress in 1921, and in accordance with the above-quoted paragraphs (a) and (f) of its constitutional powers, enacted the Budget and Accounting Act, 1921, entitled, "An act to provide a national budget system and an independent audit of Government accounts, and for other purposes." [13] The legislative history of this act makes it abundantly clear that its main purpose was to establish Presidential and congressional duties and responsibilities which should lead to greater economy and efficiency in the administration and operation of Government departments and agencies.

By this act the Congress provided the necessary law and machinery to enable it to carry out the constitutional grants of powers as quote above in paragraphs (b), (d), (e), and (g). For example, section 201 states:

"The President shall transmit to Congress * * * (a) estimates of the expenditures and appropriations necessary in his judgment for the support of the Government for the ensuing year; * * * (c) the expenditures and receipts of the Government during the last completed fiscal year; (d) estimates of the expenditures and receipts of the Government during the fiscal year in progress; * * *."

Section 202(a) provided:

"If the estimated receipts for the ensuing fiscal year contained in the budget * * * are less than the estimated expenditures for the ensuing fiscal year contained in the budget, the President in the budget shall make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency."

It is interesting to note that with respect to the budget preparation the Congress provided the necessary means and machinery for the President to execute the law and obtain all the necessary information, books, documents, papers, or records, to carry out its direction. Section 207 of the act created a Bureau of the Budget and stated:

"The Bureau, under such rules and regulations as the President may prescribe, shall prepare for him the budget."

In addition, section 209 provided:

"The Bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of public service) should be made in (1) the existing organization, activities, and methods

[2] See letter of July 30, 1958, from Secretary of the Air Force to the Comptroller General (p. 3572).

[3] Public Law 13, 67th Cong., Budget and Accounting Act, 1921 (42 Stat. 20).

[4] See letter to chairman, Government Information Subcommittee, Committee on Government Operations, dated Oct. 27, 1958, and attachment (p. 3740).

[5] Constitution of the United States, art. II, sec. 2.

[6] Constitution of the United States, art. I, sec. 1.

[7] Id., sec. 7.

[8] Id., sec. 7.

[9] Id., sec. 8.

[10] Id., sec. 8.

[11] Id., sec. 8.

[12] Id., sec. 9.

[13] Public Law No. 13, 67th Cong., approved June 10, 1921, 42 Stat. 10.

of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular services, or (4) the regrouping of services."

The Congress to insure that this law was to be properly executed and to enable an executive agent of the President to have access to all information provided in section 213:

"Under such regulations as the President may prescribe (1) every department and establishment shall furnish to the Bureau such information as the Bureau may from time to time require, and (2) the Director and the Assistant Director, or any employee of the Bureau when duly authorized, shall for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment."

Note that the law does not provide for any exceptions in departments and agencies; it specifically states "every." Neither does the law provide that the head of any department or agency may decide or judge what information the Bureau "may from time to time require" to perform its statutory functions prescribed in accordance with law. Nowhere in the entire legislative history of this act did any Member of Congress object or question these sections of the act, nor did the President.

Now consider the position the Secretary of the Air Force has taken as set forth in his letter of July 30, 1958, to the Comptroller General, as compared with the law, the "Budget and Accounting Act, 1921." The Secretary states that the report is entitled "Survey of Management of the Ballistic Missile Program." Such a report clearly falls within section 209 of the act. It certainly must contain items connected with the Budget and with "economy and efficiency" in the Department of the Air Force. Yet, the Secretary writes to the Comptroller General: "Inspector General's reports are prepared solely for the use of responsible officials within the Department of the Air Force." Does he mean by this statement that such reports would not be made available to the Bureau of the Budget or that even the President cannot have access to this "Survey of Management of the Ballistic Missile Program"? Every head of a department is responsible for knowing the law he administers, and its legislative history. He is also under oath to support the Constitution, including the recognition that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land." [14] In this case the law is crystal clear: No exception has been made for Inspector General's reports. Legally there is but one inescapable interpretation or conclusion; namely, said report should and ought to be made available outside the Department of the Air Force, if it is requested by proper authority.

The attention of the President and all officials in the departments and agencies of the Government should be directed to another section of this act. Section 212 reads:

"The Bureau shall, at the request of any committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request."

This language is clear and concise. It was enacted without any qualification by either House of Congress or any objection from the President of the United States. The legislative history is devoid of any criticism by any Member of Congress or executive official. It is also to be noted that the language in this section does not give any discretion to the Bureau of the Budget to withhold any information it possesses from the proper congressional committees. Only the Congress and its committees can decide what information they desire from the Bureau of the Budget. Thus Congress unequivocally established its right to obtain from the Bureau of the Budget all of the information it empowered the Bureau to secure.

VII. CREATION OF THE GENERAL ACCOUNTING OFFICE

The Budget and Accounting Act, 1921, created the General Accounting Office, and section 301 specifically stated: "There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States." As well as other functions, duties, and responsibilities, the act specifically enumerated statutory requirements which are germane to the subject matter under consideration, namely:

"SEC. 312. (a) The Comptroller General shall investigate, at the seat of Government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

"(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

"(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time.

We have already considered how Congress by law created the necessary means and machinery for the Bureau of the Budget and the President to have access to information, books, documents, papers, or records, of any department or establishment. Let us now consider the law on this subject as it pertains to the Comptroller General. In language almost identical to that relating to the Bureau of the Budget, the law reads as follows:

"SEC. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes."

The difference between section 313 and section 213 is significant and should be noted. Section 213 limits the Bureau of the Budget's access to information by the phrase "such regulations as the President may prescribe." It does not, however, limit the President. On the other hand, section 313 does not limit the Comptroller General's access to information by Presidential regulation; rather it imposes a duty on all departments and establishments to furnish information which "he [the Comptroller General] may from time to time require of them."

VIII. LEGISLATIVE HISTORY

In addition to the statutory law, any legal analysis without a full and thorough study of the legislative history and intent of the Congress would be incomplete and could be misleading. With respect to the availability of and access to, any books, documents, papers, or records of any department or establishment, by the General Accounting Office and the committees of Congress, the record is demonstrably clear. (The only exception being to sec. 291 of the Revised Statutes, applying to confidential State Department funds.) It should be noted here that there is a legal maxim applicable, viz, expressio unius est exclusio alterius.[15] It must be emphasized that every Member of Congress and the President was in accord with this provision of the law (sec. 313). The chairman of the select committe on page 7085, CONGRESSIONAL RECORD dated October 17, 1919, with reference to the establishment of the Comptroller General's position stated:

"At present Congress has no power or control over appropriations after they are once made. This control passes to the executive departments, and these departments practically audit their own expenditures, and the legality of expenditures by an executive department is passed upon by an official appointed, and who can be removed at any time, by the Executive. After appropriations are once made by Congress, the control over expenditure of the money appropriated passes from Congress. * * * The position is a semijudicial one and the tenure of office is made secure so long as the official performs his work in a fearless and satisfactory way. * * * Congress and its committees will at all times be able to consult with officials of this department (GAO) regarding expenditures and from it will be able to obtain the most reliable information regarding the use to which any appropriation has been put or the efficiency of any department of the Government. * * * If duplication, inefficiency, waste, and extravagance exist as the result of any expenditure, the President will be held responsible therefor if he continues to ask for appropriations to continue such practices. The knowledge on the part of every executive and bureau chief that such an independent and fearless department exists, and that every act and deed they perform will come under the closest scrutiny of this department, will in itself force a much higher degree of efficiency in every department of the Government. * * * The creation of an independent auditing department will produce a wonderful change. The officers and employees of this department will at all times be going into the separate departments in the examination of their accounts. They will discover the very facts that Congress ought to be in possession of and can fearlessly and without fear of removal present these facts to Congress and its committees."

[14] Constitution of the United States, art. VI, clause 2.

[15] *U.S.* v. *Barnes*, 222 U.S. 513 (the expression of one thing is the exclusion of another.)

Another Member of Congress, Mr. Madden, of Illinois, on page 7094, CONGRESSIONAL RECORD dated October 17, 1919, stated:

"I predict that with this measure enacted into law economy in Government expenditures will result, system will be inaugurated where chaos now reigns, and opportunity for information to the American people, such as has never been afforded before, will be at the disposition of any man who cares to know about the finances of his country. And there can be no doubt that a system of economy is bound to result when we throw the limelight of publicity upon the acts not only of the Congress and of its individual Members, but on the President and every man who owes allegiance to him in the executive branches of the Government. I thank you."

One of the most pertinent exchanges which took place during the debate on this act and which emphatically shows the legislative intent in creating the General Accounting Office appears on page 7132, CONGRESSIONAL RECORD dated October 18, 1919:

"Mr. CLARK of Missouri. The chiefs of departments, the heads of bureaus, and all that kept exceeding the appropriations here until Congress had to pass a law making it a criminal offense for them to do it.

"Mr. GOOD. Yes; that is true.

"Mr. CLARK of Missouri. Is this Comptroller General, or whoever or whatever he is going to be, supposed to be more economical than the rest of these departments?

"Mr. GOOD. Absolutely so. This department is created to put a stop to that sort of thing in the executive department, and the only way you can do it is to have men going out through these other departments 365 days in the year to bring the Congress the information as to the real status in those departments. That is, in part, the purpose of this department."

The importance of the position of the Comptroller General and the requirement that he have access to all the information he determines is necessary and that Congress intended he should have such information is amply set forth on page 7136, CONGRESSIONAL RECORD, October 18, 1919:

"Mr. FESS. How independent do you make the auditing system?

"Mr. HAWLEY. Absolutely independent from the spending departments. We give it a judicial status. It examines questions as a court examines questions, upon the law and upon evidence. * * * Yes; he is our officer, in a measure, getting information for us, to enable us to reduce expenditures and to keep advised of what the spending departments are doing."

Mr. Hawley emphasized the point further on page 7138, CONGRESSIONAL RECORD, October 18, 1919, by stating:

"With the independent auditing system, we can get immediate information. Every committee will have in the auditor's department a staff that can be put, in case of need, to gathering information quickly. We will not have to introduce a resolution in the House, have it considered, send it down to a department, and, after waiting a time, politely inquire whether or not they received our letter; and then, when we do get the information, have it practically of no value. We will have an expert accounting department that will quickly submit authentic information. That will increase the power of Congress over appropriations, but at the same time it will increase our responsibility in the matter of making appropriations."

Mr. Andrews, of Nebraska, on page 7199, CONGRESSIONAL RECORD, October 20, 1919, during his discussion of this act stated:

Efficiency

"This idea of efficiency is an indispensable factor in correct accounting. The primary duty of the accounting system is to enforce a strict abservance of legal methods in the collection and disbursement of public revenues. The proper discharge of that duty make it necessary for the officers and clerks entrusted with that business to possess clear, accurate knowledge of statutes, regulations, and methods of public business. These facts cannot be repeated too frequently or emphasized too strongly, because a great many public officials act upon the assumption that the accounting offices are chiefly, if not exclusively, engaged in the posting of debts and credits that have been previously journalized by someone else. They do not seem to think that a knowledge of law, regulations, and Government business is of any consequence whatever. But whether they do or not those who are charged with the development of ways and means to promote the efficiency of the service should take into account actual conditions and facts and formulate plans accordingly."

Again Mr. Parrish, on page 7204, CONGRESSIONAL RECORD, October 20, 1919, stated his views concerning the Comptroller General and his duties:

"In other words, under the present system Congress makes appropriations and the money is turned over to the heads of the various departments of Government, and unless expensive investigation is ordered, Congress does not know whether the money was expended according to its wishes or not, but under the auditing system there will be made by the Comptroller General a careful audit of all expenditures of the Government, and the effect will be to advise Congress and the people whether or not those intrusted with the expenditures of public money have carried out the wishes of Congress and the people, and it goes without saying that this check, no doubt, will encourage caution and economy in the public expenditures."

During consideration of the bill in the House, Representative Byrns, of Tennessee, ranking minority member of the House Select Committee on the Budget, which had initiated similar legislation in the preceding Congress, and later chairman of the Committee on Appropriations, majority leader, and Speaker of the House, said:

"The Comptroller General is the representative of Congress. He does not represent the Executive in any sense of the word, and the whole idea of the Budget Committee was to make him absolutely and completely independent of the Executive" (61 CONGRESSIONAL RECORD 1081).

The above-quoted statement by Congressman Byrns to the effect that the Comptroller General is to be an arm of Congress was categorically emphasized and affirmed by Congressman Good (chairman, Select Committee on the Budget, in charge of the bill on the floor of the House), as follows:

"Under the law it is his duty to come to the committees of Congress that have jurisdiction over appropriations, expenditures, and revenues, and explain to them at all times when there is any inefficiency, when there is a waste or a lack of economy; and when the Commissioner from the Bureau of the Budget, or the President's staff, come and explain the budget, sitting right there they are brought to face the Comptroller General of the United States; and if a representative of the Bureau of the Budget states something that is not true, if he fails to state the whole truth, the Comptroller General sits there with the Committee on Appropriations as an arm of Congress and can supply the desired information" (61 CONGRESSIONAL RECORD 982).

Congressman Bankhead stated:

"This office of Comptroller General which we are seeking to establish is not a constitutional one. It is clearly within the jurisdiction and province of the Congress to establish an office of this character, and it may be that without any constitutional restraint Congress itself could name the official to administer the law. But be that as it may, it is a safe provision to allow this man who is to perform the great duties of Comptroller General to be absolutely free and independent of any restraint by Executive interference. If he is to exercise the functions of that office independently, if he is to carry out the will of Congress as proposed in this House bill, and protect the Treasury and interest of the taxpayers, he should be free and untrammeled from any sort of interference from any source" (61 CONGRESSIONAL RECORD 986).

IX. PRESIDENT WILSON VETOES H.R. 9783 AND STATES REASON

H.R. 9783 was the original Budget and Accounting Act. In his veto message, the only objection raised by the President concerned the constitutionality of the removal authority pertaining to the Comptroller General's position. President Wilson's message, contained on page 8610, CONGRESSIONAL RECORD, June 4, 1920, States:

"To the House of Representatives:

"I am returning without my signature H.R. 9783, an act to provide a national budget system, an independent audit of Government accounts, and for other purposes. I do this with the greatest regret. I am in entire sympathy with the objects of this bill and would gladly approve it but for the fact that I regard one of the provisions contained in section 303 as unconstitutional. This is the provision to the effect that the Comptroller General and the Assistant Comptroller General, who are to be appointed by the President with the advice and consent of the Senate, may be removed at any time by a concurrent resolution of Congress after notice and hearing, when, in their judgment, the Comptroller General or Assistant Comptroller General is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment.

"The effect of this is to prevent the removal of these officers for any cause except either by impeachment or a concurrent resolution of Congress. It has, I think always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution * * *. I am returning this bill at the earliest possible moment with the hope that the Congress may find time before adjournment to remedy this defect.

"WOODROW WILSON.

"THE WHITE HOUSE, *June 4, 1920.*"

The message of the President does not object to any other provisions in the bill. It must be assumed, without fear of contradiction, that all other duties and responsibilities vested by the bill in the President, the Bureau of the Budget, and the General Accounting Office were acceptable. In fact, the language of the President gives every indication that all other features in the bill were perfectly acceptable, including the provisions relative to "access to any books, documents, papers, or reports."

The objection raised by President Wilson was considered by the Congress and the section was changed to provide for a joint rather than a concurrent resolution of Congress. This particular section 303 now reads in the Budget and Accounting Act, 1921, as follows:

The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearings, when, in the judgment of Congress the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for

no other cause and in no other manner except by impeachment."

The legal effect of a joint resolution of Congress is that such a resolution is sent to the President for approval. With this minor modification the Budget and Accounting Act, 1921, was enacted and sent to President Warren G. Harding who approved it on June 10, 1921. Thus we find two Chief Executives, Presidents Wilson and Harding, approving section 313 of the act as written.

X. ATTITUDE OF PRESIDENT WILSON

President Woodrow Wilson, who was one of the greatest supporters of the establishment of a national budget system and who had the opportunity to consider and object to this law concerning the availability of information to the Congress, its communities, and its agent, the Comptroller General, believed in the principles established in this act. His attitude is significant because research fails to reveal any instance wherein he ever refused or denied access to information requested by Congress although he was the Chief Executive during World War I. As recently as 1953 the United States Supreme Court in *United States* v. *Rumely*,[16] quoted President Wilson as follows:

"Unless Congress has and uses every means of acquainting itself with the acts and disposition of the administrative agencies of Government, the country must be helpless to learn how it is being served and unless Congress both scrutinizes these things and sifts them by every form of discussion the country must remain in embarrassing and crippling ignorance of the very affairs it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function."

XI. ADDITIONAL ACTION BY CONGRESS CONCERNING THE COMPTROLLER GENERAL

Twenty-five years after the enactment of the "Budget and Accounting Act, 1921," Congress again clearly set forth its intention on the duties and functions of the Comptroller General in the Legislative Reorganization Act of 1946, section 206 of Public Law No. 601, enacted August 2, 1946 (79th Cong., 2d sess.) provides:

"The Comptroller General is authorized and directed to make an expenditure analyses of each agency in the executive branch of the Government (including Government corporations) which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller General from time to time, to the Committees on Expenditures in the Executive Departments, to the Appropriations Committee, and to the legislative committees have jurisdiction over legislation relating to the operations of the respective agencies, of the two Houses."

During the hearings before the Joint Committee on the Organization of Congress, 79th Congress, 1st session, the following statement was made by Comptroller General Lindsay C. Warren (p. 530):

"And by increasing use of the General Accounting Office on particular maters relating to the expenditure and application of funds, the Congress could better inform itself as to how expenditures have been made and as to the soft spots in the organization or activities of the agencies requesting funds. This information would be available for use when the agencies appeared before the Appropriations Committees requesting funds. In other words the committee would have both sides of the story. While the present manpower situation and the tremendous job the General Accounting Office now has, due to war expenditures and the new corporations audit work enjoined upon us by the George Act, would make it impossible for the General Accounting Office to undertake the job immediately on a governmentwide basis, this function could be developed gradually and, I sincerely believe, would in time become a great aid to the Congress and its committees dealing with appropriations and expenditures." [17]

Congress thus reaffirmed and thereby strengthened the statutory authority of the Comptroller General. The Congress in no way authorized the President, the head of a department or any officer of the Government to decide what information the Comptroller General should have to perform his statutory duties.

The Congress by Public Law No. 784, enacted September 12, 1950, amended the act, and reiterated and reemphasized a congressional intent of 29 years. The Budget and Accounting Procedures Act of 1950 provided in section 111:

"It is the policy of the Congress in enacting this part that—

* * * * *

"(d) The auditing for the Government conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations, or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers."

The House Committee on Expenditures in Executive Departments, under Chairman William L. Dawson, issued House Report No. 2556, to accompany H.R. 9038, which became the public law stated, at page 2 thereof:

"The auditing of the Federal Government's financial transactions will continue to be conducted by the Comptroller General of the United States, as an agent of the Congress, under provisions permitting more comprehensive and more selective audits, to be developed in line with improved agency accounting systems, internal controls, and related administrative practices."

And at page 16, under the heading "Conclusions," it was stated:

"The continuation of the functions of the General Accounting Office, as an agency of the Congress, is essential to the maintenance of adequate appropriation and expenditure control by the Congress over the Federal Government * * *.

"It is also the opinion of your committee that there is an urgent need for the improvement of budgeting, accounting, and financial reporting of the Government. These fields should be simplified, modernized, and made effective to the maximum extent possible * * *. While H.R. 9038 provides the means for accomplishing these objectives it does not in any way lessen the control over public expenditures which is exercised by the Congress itself and by its agent, the General Accounting Office."

During the debate on H.R. 9038, the following statement was made by Congressman HOLIFIELD, a member of the committee:

"The bill incorporates all of the recommendations of the Hoover Commission report on budgeting and accounting with a single exception, that for the appointment of an Accountant General in the executive branch with authority over the prescribing of accounting systems and the supervising of accounting operations. That recommendation is contrary to a consistent congressional policy that the Comptroller General, as agent of the Congress, prescribe accounting requirements for the executive agencies so that appropriate audits may be made of the agencies and that Congress may exercise control over appropriations and expenditures.

"We know because that has been attempted before. In 1932 and 1937, I believe, such a proposal was attempted legislatively and was turned down by Congress. We members of the committee knew that the Congress would not relinquish this arm of the Congress, and the Comptroller General is the arm of the Congress, the watchdog of the Congress on expenditures in the executive departments." [18]

The importance of this legislative history must not be overlooked or minimized by anyone because section 313 of the Budget and Accounting Act, 1921 has remained intact and unchanged throughout 37 years. Research fails to reveal any attempt by a Member of Congress or an executive officer of the Government to recommend that section 313 be amended or modified in any way. It is also significant to note at this point that no exception has been made or even claimed for Inspector General's reports. Later in this memorandum of law we will discuss the fact that there is an Attorney General's opinion specifically interpreting the Budget and Accounting Act, 1921 for the then Secretary of War.

XII. CONSTITUTIONAL GRANTS OF POWERS, DUTIES, AND RESPONSIBILITIES TO THE PRESIDENT

We have considered the constitutional responsibilities and duties of the Congress and the law enacted in compliance thereof and also the legislative history establishing the intent of the Congress. Now we should consider the constitutional responsibilities and duties of the President which directly relate to the withholding of access to an Air Force Inspector General's report from the Comptroller General by the Secretary of the Air Force. The following sections of the Constitution are considered pertinent:

(h) "The executive power shall be vested in a President of the United States of America." [19]

(i) "he 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," [20]

(j) "He shall from time to time give to the Congress Information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." [21]

(k) "He shall take care that the laws be faithfully executed." [22]

To attempt to define or enumerate all the "executive power" vested in the President is beyond the scope of this memorandum. We are not concerned with such matters as emergency powers, or where Congress has taken no legislative action and a void exists which the President may attempt to fill by executive power, or where a legislative act needs "filling in." Rather we are concerned here with the Budget and Accounting Act in which the Congress has established specific rules by law for the guidance of the President and the Comptroller General, a statute which needs no "filling in." More specifically, we are concerned with the exercises of "executive power" as it relates to section 313 of the Budget and Accounting Act, 1921. In this context we should consider the consti-

[16] *U.S.* v. *Rumely*, 345 U.S. 41.

[17] H. Rept. No. 1884, 85th Cong., 2d sess., p. 231.

[18] Ibid. at p. 231.

[19] Constitution of the United States, art. II, sec. 1.

[20] Constitution of the United States, art. II, sec. 2.

[21] Constitution of the United States, art. II, sec. 3.

[22] Ibid.

tutional grants set forth above in paragraphs (h), (i), (j), and (k).

The Supreme Court in the Neagle case interpreted the "executive power" with respect to the take-care clause in the following language:

"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, * * * 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 department, * * * 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.'" [23]

The Neagle case was decided in 1889 and was quoted extensively by the Supreme Court in *Myers* v. *United States,* handed down in 1926. In the Myers case, Mr. Chief Justice Taft, speaking for the Court, concerning the "executive power," stated:

"The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the law. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court.[24]

In this same case Mr. Chief Justice Taft stated that the "executive power" was not an unlimited grant in these words:

"The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed." [25]

Thus, the sections and clauses quoted above in paragraphs (h), (i), (j), and (k) are specific terms where "emphasis was regarded as appropriate." The sections and clauses quoted in paragraphs (a) through (g) in section V of this memorandum are direct expressions "where limitation was needed." Consequently, we find that the "executive power" is limited by the Constitution with respect to the President's own duties as well as by those enumerated in article I of the Constitution.

As recently as 1952 the Supreme Court in the Youngstown Steel seizure case set forth in no uncertain terms the limit of executive power and the effect of an "Executive order" which is most appropriate for the matter under consideration, namely, access to information, documents, and records. The Court stated:

"And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in article II which say that 'The executive power shall be vested in a President'; that 'he shall take care that the laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.' * * * In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first article says that 'All legislative powers herein granted shall be vested in a Congress of the United States.' After granting many powers to the Congress, article I goes on to provide that Congress may 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.'" [26]

With respect to the "Executive order" which the President had issued in the Steel Seizure case and which is quite similar to the position taken by the Department of Defense when it issued DOD Directive 7650.1 dated July 9, 1958 (to be discussed later in this memorandum), the Supreme Court stated:

"The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a Government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry the policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. * * * The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." [27]

The Court in this opinion emphasized the fundamental basis of the Constitution and hence the very core of our system of government in these words:

"The founders of this Nation entrusted the lawmaking power to Congress alone in both good and bad times. It would do no good to recall the historical events, that fears of power and the hopes for freedom that lay behind their choice." [28]

Mr. Justice Douglas in his concurring opinion in the Youngstown case relative to the sections and clauses of the Constitution quoted above in paragraphs (h), (j), and (k) of this memorandum made the following relevant statement:

"Article II which vests the 'executive power' in the President defines that power with particularity. Article II, section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, section 3 provides that the President shall 'from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.' The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, section 3 also provides that the President 'shall take care that the laws be faithfully executed.' But, as Mr. Justice Black and Mr. Justice Frankfurter point out, the power to execute the laws starts and ends with the laws Congress has enacted." [29]

The statements of Mr. Justice Jackson, a former Attorney General, in his concurring opinion in the Youngstown case have particular significance with respect to the refusal of the Secretary of the Air Force to give the Comptroller General access to the Inspector General's report. After referring to himself as one "who has served as legal adviser to a President in time of transition and public anxiety." [30] he stated:

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. (Footnote omitted.) Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." [31]

Thus we find the Supreme Court interpreting the "executive power" grant in the Constitution and stating unequivocally that the President does not have an unlimited discretionary power. The President is bound to faithfully execute the law as enacted by the Congress under its constitutional authority.

XIII. EXECUTIVE PRIVILEGE PLEADED

In this particular case the Secretary of the Air Force is refusing the Comptroller General access to a document or report not on the basis of any statutory law or judicial precedent. In fact the decision of the Secretary is bordering closely on action contrary to law. The Secretary bases his action on a nebulous claim of so-called executive privilege. This claim is allegedly "derived from the constitutional power of the President, which we are claiming now. We are claiming it by and through the authority of the President." [32] This language implies that the Secretary of the Air Force is acting in this matter as an agent of the President; the language does not convey the understanding that the decision to refuse access to the report was done at the specific direction of the President or that the matter was even submitted to the President for his consideration. Therefore, we must assume that this decision to refuse the Comptroller General access to the report was made by the Secretary in his capacity as an officer of the Government charged with the duty "to take Care that the Laws be faithfully executed." The validity and weight which should be accorded "the myth of executive privilege" [33] has been amply described by Mr. Justice Jackson, in the Youngstown case, in his statement:

"The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

"Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of Presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers,

[23] In re Neagle, 135 U.S. 63.

[24] *Myers* v. *U.S.,* 272 U.S. 117; *Wilcox* v. *Jackson,* 13 Peters 498, 513; *United States* v. *Eliason,* 16 Peters 291, 302; *Williams* v. *United States,* 1 Howard 290, 297; *Cunningham* v. *Neagle,* 135 U.S. 1, 63; *Russell Co.* v. *United States,* 261 U.S. 514, 523.

[25] Ibid., at p. 118.

[26] *Youngstown Sheet & Tube Co., et al.* v. *Sawyer,* 343 U.S. 587, 588.

[27] Ibid. at p. 588.

[28] Ibid. at p. 589.

[29] Ibid. at pp. 632, 633.

[30] Ibid. at p. 634.

[31] Ibid. at pp. 637, 638.

[32] Hearing record (p. 3691).

[33] CONGRESSIONAL RECORD, 85th Cong. 2d sess., vol. 104, No. 145, p. A7448.

'plenary' powers, 'war' powers, and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings.

"The vagueness and generality of the clauses that set forth Presidential powers afford a plausible basis for pressures within and without an administration for Presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted Presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test." [34]

XIV. 34 OPINIONS ATTORNEY GENERAL 446 (1925) V. DOD DIRECTIVE 7650.1

Bearing in mind the above-quoted words of Mr. Justice Jackson, we should now consider the evidence and circumstances which resulted in an opinion of the Attorney General specifically interpreting section 313 of the Budget and Accounting Act of 1921. Although research fails to reveal any judicial decision concerning this act, we have available a 1925 Attorney General's opinion. This opinion is a construction of the statutory law and is most important because in the exact words of the distinguished General Counsels of the Department of Defense, including the Air Force, an Attorney General's opinion "is controlling within the executive branch." These words are:

"The Attorney General is the legal adviser to the President under title 5, United States Code, section 306, and on the basis of selective requests as distinguished from day-to-day operating advice, he is the adviser to the heads of departments under title 5, United States Code, section 304. On matters of the President's powers is opinion is controlling within the executive branch." [35]

We should now consider whether an opinion of the Attorney General is in fact "controlling within the executive branch." In a letter dated January 2, 1925, from the Secretary of War to the Attorney General the Secretary asked:

"Since the statutes governing the purchase of supplies and engagement of services under the War Department repose judgment and discretion in the contracting officers in procuring supplies to the extent that they 'shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered' (act of June 30, 1902, 32 Stat. 514), and, as to Quartermaster supplies, that 'the award in every case shall be made to the lowest responsible bidder for the best and most suitable article' (act of July 5, 1884, 23 Stat. 109), it seems to this Department that the accounting officers may not assume to exercise in any degree a supervision over the exercise of such judgment and discretion as appears to be contemplated by the Comptroller General's decisions. There appears to be no more justification for the review of such matters in the General Accounting Office than there would be for a like review or supervision of other matters purely of administration such as the prescribing of specifications or the receipt of supplies and their application to Government uses. Will you, therefore, oblige me with your opinion as to whether, according to law, I am bound to furnish to the General Accounting Office the information relative to the awarding of contracts by officers under this Department, as indicated in that part of the Comptroller General's decision of March 8, 1924." [36]

The Secretary enclosed with his letter an opinion of the Judge Advocate General, which conclues:

"This office is clearly of the opinion that the General Accounting Office has no authority to review the decisions of the contracting officers under the War Department made in the exercise of their judgment and discretion in connection with making of awards for contracts, and that consequently the Comptroller General had no power to require the furnishing of data necessary for such review. In order, however, that the controversy may be authoritatively disposed of, it is recommended that this question be submitted to the Attorney General for his opinion." [37]

On March 21, 1925, the Attorney General Specifically laid down the rule of law, for the guidance of the heads of departments, relative to section 313 of the Budget and Accounting Act (31 U.S.C. 54) in these cogent words:

"You request an opinion 'as to whether, according to law,' you are bound to furnish this information.

"It will be observed that the Comptroller General states that this requirment is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination. Moreover, section 313 of the Budget and Accounting Act provides (p. 26):

"'All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.'

"Respectfully,

"JOHN G. SARGENT." [38]

It has been contended that this Attorney General's opinion was a very limited decision as indicated by the following colloquy:

"Mr. MITCHELL. On the question Mr. FASCELL just asked you—there is a law involved. The Comptroller General has a statutory responsibility under that law. We had testimany that this law had been interpreted by the Attorney General who stated:

"'You requested an opinion as to whether, according to law, you are bound to furnish this information. It will be observed that the Comptroller General states that this requirement is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination.'

"And then the opinion goes on to quote the access section 313, of the Budget and Accounting Act. In view of the lack of any other ruling, by a court or otherwise, is that not a compelling interpretation of the Budget and Accounting Act?

"Secretary DOUGLAS. I am sorry. I do not hear the whole question and Mr. Golden said he would like to answer it.

"Mr. GOLDEN. May I?

"Mr. MITCHELL. Yes.

"Mr. GOLDEN. You are talking about an opinion of Attorney General in 1925?

"Mr. MITCHELL. Yes.

"Mr. GOLDEN. The Attorney General was there asked a very limited question which involved the situation where a low bidder had been rejected. The Comptroller General wanted to know the reason for the rejection of the low bidder and the award to the second low bidder. The Comptroller General did make the statement you said. However, there was no assertion of any executive privilege in this case. It was a limited situation involving the property of award of a contract. We routinely give this kind of information to the General Accounting Office every day." [39]

We submit that even a casual reading of the Secretary of War's letter, the attached Judge Advocate General's opinion and the resulting Attorney General's opinion clearly refutes the contention that the decision was in any way limited. The question arises here as to whether the Department of Defense and the Secretary of the Air Force are relying solely on the Attorney General's opinion on its face for their interpretation of the decision. If the letter of the Secretary of War and the attached Judge Advocate General's opinion were not considered, then the construction of the Attorney General's opinion is unfortunate and inexcusable.

We should now consider if the Department of Defense adequately considered this Attorney General's opinion before DOD Directive 7650.1 was issued on July 9, 1958. On June 16, 1958, the Committee on Government Operations considered and approved House Report No. 1884 relative to information practices in the Department of Defense. Included in this report is a staff memorandum entitled: "Statutory Authority of the General Accounting Office in Relation to Information from Executive Departments and Agencies" (pp. 228–234). On July 9, 1958, the very day the directive was issued the Hébert subcommittee of the House Armed Services Committee specifically questioned Mr. Robert Dechert, General Counsel of the Department of Defense relative to this 1925 Attorney General's opinion and the following colloquy ensued: [40]

"Mr. HÉBERT. Was that opinion taken—rather, that opinion of the then Attorney General taken into consideration, Mr. Dechert, when you were figuring out a way how you were going to supplement the law, or implement the law, or circumvent the law? We will use all the words to be sure we cover everything.

"Mr. DECHERT. Yes, sir. The situation which is presented in that opinion is one in which we follow exactly the lines there laid down. That opinion arose from a question of whether the proper person had received a contract.

"But the problems inherent in this new directive, and particularly amendment to the other directive on the question of security information (to which Mr. Courtney was directing my attention), are vastly beyond that limited situation.

"Mr. COURTNEY. But, under the directive 7650.1, which was signed today, dealing with unclassified information, you would have the right, whether it be intended to be exercised or not—you would have the right to withhold the very information which Attorney General Sargent said the Comptroller General had the full responsibility for determining?

"Mr. DECHERT. Yes, sir."

It is evident that the Department was aware of the Attorney General's decision as written, but what about the Secretary of War's letter and attachment thereto?

The Secretary of Defense by his action in issuing DOD Directive 7650.1 severely impeded and prevented the Comptroller General from carrying out his statutory duties, as

[33] U.S., at pp. 646, 647.
[34] Hearings, pt. 7, Department of Defense, Dec., p. 1981.

[36] See exhibit IV–E, p. 3791.
[37] Ibid. at p. 3796.
[38] 34 Op. Atty. Gen. 446, exhibit IV–E, p. 3796.

[39] Hearing record, pp. 3690–3691.
[40] Hearings, Special Subcommittee No. 6 of the Committee on Armed Services, p. 194.

required by law, and the Comptroller General so notified the Secretary on June 26, 1958, prior to the issuance of the directive.[41] Since an Attorney General's opinion is "controlling within the executive branch" the least that one could expect before such a directive is issued would be for the Secretary to seek the advice of the Attorney General. The issue of the right of an independent officer of the Government to "have access to and the right to examine any books, documents, papers, or records" as provided by law, was not an emergency situation, and if any doubt existed concerning the 1925 opinion, clarification should have been sought from the Attorney General. No evidence has been made available that such advice was sought or obtained.

On March 10, 1958, and before this directive was issued, Mr. Robert Dechert, General Counsel of the Department of Defense, testified before the Hébert subcommittee concerning the General Accounting Office as follows: [42]

"Mr. COURTNEY. Let me ask you specifically: We are interested for the record here, as to the interpretation of the Department, specifically, of the statute relating to the General Accounting Office.

"Its authority is initially from the Budgeting and Accounting Act of 1921, and I refer specifically to section 53, which is a mandate to the Comptroller General, and says:

" 'To investigate at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds.'

"Now do I take it within the interpretation which you have given that the matter of relevancy in relation to such an inquiry would be determined, in your opinion, within the Department or would the question of relevancy never arise?

"Mr. DECHERT. The question of relevancy, I hope, would never arise. If it did arise, it would be a matter of joint determination.

"Mr. COURTNEY. Is the matter of relevancy in your opinion, and as you conduct your office now, a matter to be determined within the Department of Defense?

"Mr. DECHERT. I think this issue hasn't arisen, Mr. Courtney, and therefore I think I cannot answer it.

"Mr. HÉBERT. May I suggest you be responsive to the question?

"Mr. DECHERT. I say, I think this hasn't arisen and therefore I can't answer from the point of view of precedent.

"Mr. HÉBERT. We have asked you for an opinion. Now what is your opinion?

"Mr. DECHERT. I want to be sure I get it correctly.

"As I understand it, the question is, Suppose that an issue arose between the General Accounting Office and the Department of Defense as to whether a particular paper was or was not relevant?

"I think if the Department of Defense, after a joint consultation, felt that its view was correct, the only thing it could do would be to refer it to the President."

In view of this testimony and the fact that the Comptroller General had requested the Inspector General's report on June 13, 1958, we can only conclude that DOD Directive 7650.1 was ill-advisedly issued. In this context we should consider and ponder the words of Mr. Justice Jackson.

"But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. * * * If not good law, there was wordly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

"The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law." [43]

The Congress did not let the legislative power slip through its fingers in this case, because it had enacted clear and precise rules for the preparation and submission of the national budget and at the same time created an independent officer of the Government, the Comptroller General, as an agent of the Congress to "have access to and the right to examine any books, documents, papers, or records of any such department or establishment. In no sense of the word was there an emergency connected with the issuance of the directive unless it be a self-serving one. It is interesting to note that the official request of the Comptroller General for access to the Inspector General's report titled "Survey of Management of the Ballistic Missile Program" was made to the Secretary of the Air Force on June 13, 1958. The DOD Directive 7650.1 restricting access to Inspector General's reports was issued on July 9, 1958.[44] The official refusal of access, relying on this directive, was made by the Secretary of the Air Force in a letter to the Comptroller General dated July 30, 1958.[45]

XV. DOD DIRECTIVE 7650.1 BASED SOLELY ON EXECUTIVE PRIVILEGE

There is no doubt that the DOD Directive 7650.1 was based on executive privilege. The directive itself does not cite any statutory authority. In fact, the directive itself makes not the slightest claim to so-called constitutional, Presidential, or Secretary of Defense powers, implied, inherent or whatever word might best fit a self-serving document which by its very issuance over the signature of the Secretary of Defense should be binding on officers and employees of the Defense Establishment.

During the course of the subcommittee's hearings with the Secretary of the Air Force on this subject matter, the chairman finally pinpointed the alleged authority as being executive privilege in the following colloquy:

"Secretary DOUGLAS. May I just say one word one that. I think the regulation which says that the reports will not be released except with my approval rests solely for its validity on executive privilege.

"Mr. Moss. Would you quote for me the pertinent section of the Constitution?

"Mr. Golden?

"Mr. GOLDEN. We are relying primarily—and I think it would be almost impertinent for me as General Counsel, not to so rely—upon the opinions of the Attorney General in this matter.

"We rely upon the well-known opinion of the Attorney General—40th Opinions of the Attorney General, page 45. We also rely on the May 17, 1954, letter, which had enclosed with it, as you know, a memorandum to the President from the Attorney General.

"Now, both of these are based upon the constitutional power of the President.

"The Attorney General has ruled that this privilege exists. I certainly, as General Counsel of the Air Force, am bound by his interpretation of the law and his ruling on the law. I am also bound by the President's acceptance of that interpretation.

"Mr. Moss. Can you quote the pertinent section of the Constitution?

"Mr. GOLDEN. I can quote the pertinent section of the Constitution that the Attorney General relies upon.

"Mr. Moss. Would you do so, please?

"Mr. GOLDEN. Those sections of the Constitution are that an executive power is vested in the President and that the President shall take care that the laws are faithfully executed.

"Mr. Moss. We are talking now about a law that has been written, and it says that the Comptroller General shall have access to all records.

"Mr. GOLDEN. You are now asking about the rationale of the Attorney General's decision and how he concludes from those provisions what the law is?

"Mr. Moss. No. You are now testifying and giving the Secretary's views as counsel to the Secretary of the Air Force.

"Mr. GOLDEN. Yes, sir.

"Mr. Moss. I don't think he has sought an Attorney General's opinion in that instance.

"Mr. GOLDEN. No.

"Mr. Moss. I would be interested in what you are relying upon, particularly what constitutional provision.

"Mr. GOLDEN. The Attorney General's opinions that deal with questions of legal principles do not have to be reiterated in every case that arises.

"Mr. Moss. Well—

"Mr. GOLDEN. I might add that when the President accepted the Attorney General's opinion on May 17, 1954, and recognized the confidential nature of communications among the employees of the executive branch, it seems to me to fit this case like a glove.

"Mr. Moss. This is not a communication. This is an official report reflecting an official judgment.

"Secretary DOUGLAS. Mr. Chairman; if you are requesting the authority for the Defense Department regulation, there is every reason to take that up with the Secretary of Defense and with the General Counsel of the Defense Department.

"I have no difficulty myself in reading the regulation issued by the Secretary of Defense and saying that I am given the authority in operating the Air Force under his direction and control, to withhold Inspector General's reports. The regulation does not even state it on the basis that I can withhold; the regulation is on the basis that they shall not be given unless I approve their release

"Mr. Moss. I am quite conscious of that Mr. Secretary.

"Secretary DOUGLAS. Right.

"Mr. Moss. And I might also say that I am in sharp disagreement with the basis for the authority. I am mindful of the statement of the courts in the *Youngstown Sheet & Tube* v. *Sawyer:*

" 'In the framework of our Constitution the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.'

"We are talking now of a law which says that this information shall be available, and here we have departments laying down the rules and saying what you can have.

"How broad is the authority to withhold notwithstanding a clear statutory expression by Congress?

"Secretary DOUGLAS. I would not like to get into the problem of personal appraisal of the scope of presidential discretion.

"I might express the view that I would think it complete. But I don't have to do that, because I have a very clear authority given to me with respect to this kind of a report.

"I will try to exercise it as I am, as reasonably as possible." [46]

It is appropriate at this time to recall to mind the words of Mr. Justice Story in the Orono case.

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[41] Hearing record, exhibit VI–A through J, p. 3799 through p. 3827, specifically p. 3826.

[42] Hearings, Special Subcommittee No. 6 of the Committee on Armed Services, p. 19.

[43] 343 U.S. at p. 654.

[44] Hearing record, exhibit VI–A, p. 3799.

[45] Hearing record, p. 3572.

[46] Hearing record, pp. 3691–3693.

"For the executive department of the Government, this court entertains the most entire respect; and amidst the multiplicity of cares in that department, it may, without any violation of decorum, be presumed, that sometimes there may be an inaccurate construction of law." [47]

XVI. JUDICIAL DECISIONS AND OTHER COMMENTS ON THE MYTHICAL DOCTRINE OF EXECUTIVE PRIVILEGE

We have already noted the statements of Mr. Justice Jackson in the Youngstown case which are pertinent to the claim of executive privilege in political controversy. The Justice also stated that such claims are unadjudicated. He also cautioned that actual reliance on such nebulous claims stops short of provoking a judicial test. The Justice is factually accurate when he states that such claims have never been adjudicated on the Federal level probably, because of the exercise of good judgment by the parties concerned and the fact that a specific statutory law has rarely, if ever, been involved as it is in this particular case.

The Justice was probably unaware of a 1951 decision of the Supreme Judicial Court of Massachusetts. This case arose out of an attempt by an executive official to withhold a report from the Senate of Massachusetts on the basis that "the legislature may not attempt to interfere with action taken by the executive department, which includes the department of labor and industries and the Massachusetts Development and Industrial Commission set up therein." [48] This claimed privilege of the executive to a power to withhold documents from the legislature (or in the case we are dealing with, an independent officer, as an agent of the Congress) on the ground of official privilege was squarely presented to a court. The court expressly repudiated the gratuitous assumption of such a power in the executive to frustrate the Senate's access to a report in these words:

"None of the reasons given by Del Monte (chairman, Massachusetts Development and Industrial Commission) for not producing the report was valid. The attempt of the Senate to secure such information as might be contained in the report was not an interference with the executive department of the government. It was a permissible exercise of an attribute pertaining to legislative power. If the legislative department were to be shut off in the manner proposed from access to the papers and records of executive and administrative departments, boards, and commissions, it could not properly perform its legislative functions." [49]

No contention has been made that the Congress when it enacted section 313 of the Budget and Accounting Act was not exercising a permissible attribute pertaining to legislative power.

There exists a fallacious theory running rampant throughout the executive departments today that availability or access to government information, papers, documents, and reports is an interference with the executive duty to take care that the laws be faithfully executed. This is probably due to the legally unsupportable—and as Mr. Justice Jackson said, unadjudicated—claims of executive privilege set forth by President Eisenhower in his letter to the Secretary of Defense on May 17, 1954, and the attached memorandum by Attorney General Brownell, at the time of the Army-McCarthy hearings. In fact, the Secretary of the Air Force and his counsel have specifically relied on his very questionable document as authority to withhold the Inspector General's report from the Comptroller General. The exact statement is:

"We also rely on the May 17, 1954, letter, which had enclosed with it, as you know, a memorandum to the President from the Attorney General.

"Now, both of these are based upon the constitutional power of the President.

"The Attorney General has ruled that this privilege exists. I certainly, as General Counsel of the Air Force, am bound by his interpretation of the law and his ruling on the law. I am also bound by the President's acceptance of that interpretation." [50]

It is to be noted that the instance which caused the issuance of the May 17, 1954, letter did not concern an interpretation of any statutory law. Furthermore, the occasion pertained basically to conversations among executive officials about which a Senate subcommittee was endeavoring to have the General Counsel of the Army testify. From a legal point of view it is most important to note that the matter was submitted to the President on a specific point, on a specific occasion, with reference to a specific subject matter and his direction was to a specific person. What is more important is the fact that the President himself has subsequently clarified his letter in words which are extremely significant and have particular relevance to this case; namely, the Comptroller General's access to the Inspector General's report. The President said:

"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." [51]

In this case national security is not involved, by admission of the Secretary of the Air Force.[52] What is involved is a final, official act by the Inspector General [53] in a report strictly concerned with the expenditure of public funds appropriated by the Congress.[54]

In addition, Gerald D. Morgan, special counsel to the President, stated in a letter:

"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." [55]

Without admitting that such alleged right exists in the President, we must point out that the question of access to this Inspector General's report was not, insofar as the subcommittee has been able to ascertain, submitted by the Secretary of Defense or Secretary of the Air Force to the President for decision. It is strongly doubted that the President was made aware of the facts involved in this case or the fact that access to the report is specifically provided for by section 313 of the Budget and Accounting Act. It must also be recognized that the President was asked very general questions at a press conference which alluded to this subject matter. There is, however, no record that this entire matter was presented to him for his decision.

Since in this section of this memorandum we are concerned with the question of executive privilege, it is deemed appropriate to consider some remarks made on the subject on the floor of Congress. Congressman GEORGE MEADER, a distinguished member of the Committee on Government Operations, who has represented the Republican minority at hearings of this subcommittee and who, before his election to Congress, served as chief counsel for the Senate War Investigating Committee, has made some cogent remarks concerning executive privilege which warrant our consideration. Congressman MEADER said:

"Mr. Speaker, last Thursday, the Attorney General of the United States, the Honorable William P. Rogers, appeared before the Senate Judiciary Subcommittee on Constitutial Rights to present his views on the power of Congress to obtain information from the executive branch of the Government. His statement asserted a privilege in the executive branch of the Government to withhold information from the Congress in such broad terms that it should not go unanswered.

"Increasingly, in recent years, as the executive bureaucracy has grown in power and in numbers of officials, there has been a parallel tendency to assert limitations and restrictions upon the investigative power of the Congress and its committees with respect to documents, papers, and information in the possession of the executive branch of the Government.

"I fully realize that silence on the part of Congress has no legal significance in fortifying these executive assertions. Yet such statements, often enough repeated, create a public impression of congressional acquiescence.

* * * * *

"The net effect of the Attorney General's statement is that the executive branch of the Government will give to the Congress or its committees such information as the executive branch chooses to give, and no more.

"I wonder if the American people and their elected representatives in Congress appreciate the significance of this latest pronouncement of the executive branch of the Government. If this is sound constitutional doctrine, then it is permissible, without amending the Constitution, for the huge executive bureaucracy we have built up over the years to become the master, not the servant of the people. It places within the sole and unfettered discretion of an organization of well over 2 million persons in the executive branch of the Government the power either wholly to deny Congress access to facts about the public business, or to make known only on such terms, at such times, and under such conditions as the Executive sees fit, those portions of the total picture which the Executive wants the public or the Congress to know. The latter course makes possible a rigged, distorted, slanted factual foundation for the formulation of public opinion, and thus grants the Executive greater power over policymaking than is healthy under a system of self-government by the people.

* * * * *

"Mr. Speaker, it is difficult to prove that a nonexistent thing does not exist. That is the dilemma with the so-called Executive privilege. The burden of proof should be upon those who assert that there is Executive privilege which, of course, is nowhere mentioned in the Constitution or in any court decision in any controversy concerning the investigative power of the Congress.

* * * * *

"When, therefore, there is an attempt to destroy, impair, or weaken the investigative power of the Congress, the capacity to legislate intelligently is undermined. Asserting an Executive privilege to deny to Congress facts and information which Congress in its legislative judgment believes it needs, is to attack the legislative power itself.

"It is amazing to me that a nonexistent, imaginary, so-called Executive privilege, nowhere recognized in the Constitution, in

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[47] The Orono, 18 Fed. Cas. No. 10,585 (Cir. Ct. D. Mass. 1812).

[48] Opinion of the Justices, 328 Mass. 656.

[49] Ibid., at p. 661.

[50] Hearing record, p. 3692.

[51] Hearings, House Government Information Subcommittee, pt. 7: Department of Defense, second section, p. 1988.

[52] See hearing record, p. 3641.

[53] See hearing record, p. 3652.

[54] See hearing record, pp. 3683–3684; also exhibit I–C, p. 3711.

[55] Hearings, House Government Information Subcommittee, p. 47; Department of Defense, 2 ed., p. 1989.

statutes or in court decisions, can seriously be advanced to destroy the expressly vested legislative power, as well as the investigative power which inheres in it, so clearly established in the Constitution and in an unbroken line of court decisions throughout the entire history of our Government.

* * * * *

"The doctrine of separation of powers can have no relationship to the problem at hand unless it is assumed that the power of Congress to obtain information is an invasion of the powers and prerogatives of the executive branch of the Government. Congressional access to information within the possession of the executive branch would not seem, in and of itself, to interfere in any way with the orderly discharge of the responsibilities and duties of officials of the executive branch. The mere possession of information is not tantamount to making administrative decisions, directing and supervising officials in the executive branch, employing or discharging subordinates, or performing any of the functions commonly associated with executive or administrative authority. It is difficult to see how mere knowledge of facts within the possession of the executive branch—not associated with any further action whatever on the part of Congress—could constitute legislative invasion of executive power.

* * * * * *

"As to the latter, it is clear that what the Congress created by statute, it may destroy or modify. Frequently, in statutes creating agencies, a provision is included that reports be made to the Congress from time to time. The validity of such provisions has never been challenged, to my knowledge. If the Congress may create an agency in such form as it desires, it obviously can provide as a feature of the agency it creates that the files, records, and papers in its possession should be available to the Congress and its committees upon such terms as the Congress may specify. The Congress can repeal or amend any statutes creating agencies and specifically provide for congressional access to information in the agency's possession. I see no reason why, if it should be necessary, Congress could not pass a general statute applicable to all agencies created by statute specifying that, and the terms upon which, the Congress and its committees should have access to information in the possession of such agencies. This power resides in the Congress wholly aside from its power, through subpena or otherwise, to make inquiries.

* * * * *

"The Attorney General, whose statement I am now analyzing, succeeded me as chief counsel for the Senate War Investigating Committee, and then stayed on with the Senate after the expiration of that special committee and served as chief counsel for the Investigations Subcommittee of the Committee on Expenditures in the Executive Departments.

"We all know of the important role a committee counsel plays in the preparation of committee reports.

"While Mr. Rogers, the present Attorney General, was chief counsel for the Investigations Subcommittee, a report was filed September 4, 1948, on an investigation of Federal employees loyalty program. On page 19 of that report—Senate Report No. 1775, 80th Congress, 2d session—is the following interesting passage:

"'*Nondisclosure policy of the executive branch on loyalty information*

"'Under our constitutional form of government, Congress has the duty to enact laws for the public welfare. To perform this duty intelligently, it must have the complete facts upon which to base its judgment. Congress is entitled to learn by direct investigation whether present laws are satisfactory or, if not, then in what respects they fail. Under our system of checks and balances Congress should not be placed in the position of enacting legislation merely at the request of the executive branch of the Government and solely for reasons advanced by it. Congress is entitled to know the facts giving rise to the requests and to satisfy itself by firsthand information that the reasons furnished are valid. Any other course blinds the legislative branch and permits action only when the President provides a "seeing-eye dog" in the form of a request for legislation desired by the Executive. Good legislation and ignorance of the facts are incompatible. President Truman, in discussing the importance of congressional investigations on the floor of the Senate when he retired as chairman of the War Investigating Committee, forcefully emphasized this basic fact by saying: "An informed Congress is a wise Congress; an uninformed Congress surely will forefeit a large portion of the responsibility and confidence of the people."'"[56]

To paraphrase the above question, Congress, with respect to the National Budget System, has through the Budget and Accounting Act and the Comptroller General provided for a "seeing-eye dog" and has by this law attempted "to satisfy itself by firsthand information" that the requests for, control of, and expenditure of public funds is valid.

XVII. RULES APPLICABLE TO DEPARTMENT OF DEFENSE

The Congress, when it enacted the Budget and Accounting Act, 1921, did not except the Army and the Navy from the provisions of the laws. Neither did it except the Department of Defense and the Department of the Air Force after they were created. In fact, as the law states, it is applicable to "all departments and establishments" of the Government. In this context we should consider the quote set forth in paragraph (e), section V of this memorandum and with particular reference to the applicability of section 313 of the Budget and Accounting Act.

Mr. Justice Jackson, in the Youngstown case, summed up the rule of law which is applicable in this manner:

"There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries, and its inhabitants. He has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the Army and Navy, only Congress can provide him an Army or Navy to command. It is also empowered to make rules for the 'Government and regulation of land and naval forces,' by which it may to some unknown extent impinge upon even command functions."[57]

The law and the legislative history of the Budget and Accounting Act, and amendments, sharply indicate that Congress meant the Comptroller General to have access to any books, documents, papers, or records necessary for him to carry out his statutory duties and responsibilities. Since the Department of Defense Establishment was not excepted from the provisions of the law, the Congress was exercising its constitutional responsibility to make rules for the "Government and Regulation of land and naval Forces." This law is one of the rules it has established.

XVIII. VOLUME 40 OPINIONS OF THE ATTORNEY GENERAL, PAGE 45 (APRIL 30, 1941)

This opinion was also referred to as authority to support the theory of Executive privileges.[58] The opinion was concerned with the availability of investigative reports of the Federal Bureau of Investigation. The Secretary of the Air Force has not contended that the Inspector General's report in any way concerns the FBI files nor that this report is of the investigatory type, such as personnel security or criminal investigations.[59] In fact, the report is entitled "Survey of Management of the Ballistic Missile Program." With respect to the relevancy of the court cases relied upon by the Attorney General in this opinion we are at a loss to comprehend their significance because none of them pertain to information or records as far as availability to Congress, or its agent, is concerned. The General Accounting Office has furnished the subcommittee with an analysis of each of the cases cited and relied upon by the Attorney General in his opinion.[60]

Although this particular opinion has no relevancy with respect to the right of access to the Inspector General's report, as established by statutory law, we should consider it because the opinion has not withstood the supreme test of judicial review. In the opinion one of the broadest claims for Executive privilege was made in these terms:

"This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the Executive to produce such papers when, in the opinion of the Executive, their production is contrary to the public interest. The courts have also held that the question whether the production of the papers would be against the public interest is one for the Executive and not for the courts to determine."[61]

The author of this statement in 1941, when he was Attorney General, was none other than Mr. Justice Jackson, who, in the Youngstown case in 1952, practically obliterated and repudiated his own words.[62] (Already quoted in this memorandum.) Furthermore, Mr. Justice Jackson in 1953 in the leading case of *U.S. v. Reynolds*[63] concurred with the statement of Circuit Judge Maris who spoke for a unanimous court in these words:

"Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one Government department head has already made. It is but a small step to assert a privilege against any disclosure records merely because they might prove embarrassing to Government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed, the privilege against disclosure might gradually be enlarged by Executive determinations until, as is the case in some nations today, embraced the whole range of governmental activities.

"We need to recall in this connection the words of Edward Livingston: 'No. nation ever yet found any inconvenience from a close an inspection into the conduct of officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible, only because the means of publicity had not been secured.' And it was Patrick Henry who said that 'to cover with the veil of secrecy the common routine

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[56] CONGRESSIONAL RECORD, MAR. 10, 1958, pp. 3280–3284.

[57] 343 U.S., at pp. 643, 644.

[58] Hearing record, pp. 3962–3694, also exhibit III–A, p. 3741.

[59] Hearing record, exhibit III–A, p. 3740.

[60] Hearing record, exhibit IV–B, pp. 3760 through 3761.

[61] 40 Ops. Atty. Gen. 49.

[62] 343 U.S. at pp. 646–647.

[63] 345 U.S. 1.

business, is an abomination in the eyes of every intelligent man and every friend of his country.' " [64]

In addition, Dean Wigmore flatly rejected the above-quoted statement in these words:

"But the solemn invocation in the precedents above chronicled, of a supposedly inherent secrecy in all official acts and records, has commonly been only a canting appeal to fiction. It seems to lend itself naturally to mere sham and evasion. * * * But the vast extension, in modern times, of administrative laws regulating the affairs of the individual citizen, is presenting a large scope for this claim of privilege. The possibilities of such abuse are plainly latent in this supposed privilge. * * * The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is solidly entrenched in precedent." [65]

The best summation which can be made with respect to this Attorney General's opinion is to refer to the famous case of *Jencks* v. *U.S.* decided in 1957.[66] The issue in this case dealt squarely with the problem of access to files of the Federal Bureau of Investigation. There is no need in this memorandum to set forth any facts or belabor the point we are considering, namely, the so-called unlimited discretion in executive officials, based on a claim of Executive privilege, to withhold access to a Government report. This case was decided on June 3, 1957, and within a matter of weeks the Attorney General, Mr. Brownell, appealed to Congress for a statutory law to protect the FBI files. Congress acted promptly and enacted Public Law 85-269.[67] This act provided for an orderly procedure for the production of statements and reports of witnesses. The law did not state that the files of the FBI or any other agency could be kept from disclosure by virtue of a claim of "executive privilege."

To paraphrase the words of Mr. Justice Story, we think the Secretary of the Air Force is inaccurate in his citation of this Attorney General's opinion.

IX. CITATION OF MANUAL OF COURTS-MARTIAL 1951

The Air Force cited the Manual of Courts-Martial in support of their refusal to make available the Inspector General's report. The irrelevance of this citation was established by this colloquy:

"Mr. MITCHELL. Mr. Golden, I have a couple of detailed questions about your citation of the Courts-Martial Manual.

"Paragraph 151(b)(3), Manual of Courts-Martial, 1951, has been cited as an authority for refusing information to the General Accounting Office (exhibit III-A, reply to question 10). The paragraph states that the Inspectors General are confidential agents of their departments and that reports of their investigations are privileged. The Manual of the Courts-Martial prescribes procedures for military trials, including investigations. How does the prohibition against disclosing investigative reports apply to the ballistics missile survey, which is a review of management operations and does not deal with criminal or personnel operations?

"Mr. GOLDEN. In the first place you note our primary reliance is on the Attorney General and we cite 40 Opinions of the Attorney General No. 8.

"We cited just before the paragraph to which you referred the President's letter to the Secretary of Defense, May 17, 1954, which enclosed another Attorney General's memorandum of law. All we are saying is that the treatment of this report in the Manual of Courts-Martial is in consonance—we were referring to Inspector General reports generally—it is in consonance with the Attorney General's opinions cited above.

"We had just referred to the Attorney General's opinion, the President's letter, and the reference to the memorandum of law of the Attorney General's support for our action in our discretion. And then I cited it.

"We wanted to show the special nature of the Inspector General report. This was a reference to one particular type of Inspector General's report and we so indicated when we referred to the Manual for Courts-Martial.

"Mr. MITCHELL. But it does not involve this particular case whatsoever?

"Mr. GOLDEN. No; it does not. We wanted to show how the Inspector General's reports were treated by the Manual for Courts-Martial approved by the President.

"Mr. MITCHELL. The Manual for Courts-Martial was laid out by Congress in an act; was it not?

"Mr. GOLDEN. I believe so.

"Mr. MITCHELL. It is in 64th U.S. Statutes at Large, page 107. Executive Order 10214 was issued under another law of Congress. Is the GAO under the jurisdiction of the Department of Defense with respect to courts-martial?

"Mr. GOLDEN. I almost do not have answer that, Mr. Mitchell. I think your statement answers the question itself.

"Mr. MITCHELL. Well; what is the answer?

"Mr. GOLDEN. Certainly not.

"Mr. MITCHELL. I think that disposes of the answer to the chairman with respect to this.

"Mr. GOLDEN. Yes." [68]

XX. MAY 17, 1954, LETTER AND ATTACHED MEMORANDUM BY THE ATTORNEY GENERAL [69]

The completely irrelevant, inadequate, legally unsupportable and unadjudicated position of the Department of Defense and the Secretary of the Air Force in reliance on the May 17, 1954, letter and the attached memorandum from the Attorney General has already been made manifest in this memorandum of law. However, for record purposes we should consider some pertinent facts.

1. This document is not an opinion of the Attorney General in the legally considered sense of an Attorney General's opinion. It is simply and solely what it purports to be: "a memorandum from the Attorney General for the President." [70]

2. The President did not even make reference to it in his letter of May 17, 1954, to the Secretary of Defense, nor did he dignify it by directing the attention of the Secretary of Defense to it. Actually, we can only presume it may have been attached to the letter.

3. The memorandum fails to cite any court decisions or even refer in any way to any legally supportable claims of privilege.

4. The memorandum is nothing more than recitations of instances where previous Presidents have withheld information or records from Congress.

5. The memorandum is absolutely incomplete because it fails to set forth the instances wherein Congress has demanded information and records from past Presidents and received them.

6. The reference in the memorandum to so-called historical precedents as a legal basis for any Presidential powers or claims of executive privilege implied from the Constitution, has been thoroughly repudiated by the Supreme Court in the Youngstown Steel Seizure case.

7. The memorandum fails to cite a single incident wherein a statutory law requiring access to reports or records was involved when any President refused information to Congress. In fact the memorandum is silent with respect to any statutory law.

8. The memorandum "was lifted almost word for word from a law review article which had appeared some years previously." [71]

9. The document on which the memorandum relies for alleged authority was transmitted by the then Deputy Attorney General, Mr. Rogers, to the Special Subcommittee on Government Information voluntarily [72] on June 18, 1956, and is entitled, "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?" [73] This same document speaks for itself in these words: "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." [74]

XXI. "MARBURY V. MADISON" [75]

This famous case of *Marbury* v. *Madison* seems to be the cornerstone for all the fallacious claims for "executive privilege" advanced by the individuals who seem to think that such a doctrine exists. This case involved an original mandamus proceeding in the Supreme Court by Marbury to require Mr. Madison, then Secretary of State, to deliver a commission signed by President Adams which showed his appointment, under an act of Congress dated February 27, 1801, as justice of the peace for the District of Columbia, "to continue in office for 5 years." The act contained no provision concerning removal. The Court considered Marbury's right to demand the commission and affirmed it. In this case Mr. Chief Justice Marshall said:

"It is, therefore, decidedly the opinion of the Court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State."

The Court then went on to determine that mandamus was a proper remedy but that such action does not lie within the province of the Supreme Court.

The Court did lay down one rule of law which is applicable to the matter we are considering. Research fails to reveal where the following principle has ever been overruled by a court and we consider it to be decisive for the instant issue:

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden;". [76]

One of the basic rulings of *Marbury* v. *Madison* is that "The President cannot authorize a Secretary of State to omit the performance of duties which are enjoined by law." [77]

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[64] *Reynolds* v. *U.S.*, 192 F. 2d 995.

[65] VIII Wigmore on Evidence, 3d edition, sec. 3267, 3279. Also earlier sections.

[66] 353 U.S. 657.

[67] 71 Stat. 595.

[68] Hearing record, p. 3205.

[69] Hearing record, House Government Information Subcommittee, Pt. 7: Department of Defense, 2d section, p. 1981.

[70] Hearings, House Government Information Subcommittee, p. 47, Department of Defense, 2d ed., p. 1981.

[71] See Bishop. 66 Yale Law Journal 477, 478 (1957) and Wolkinson, 10 Federal Bar Journal 103, 223, 319.

[72] Hearing record, House Government Information Subcommittee, Pt. 12: Panel Discussion With Government Lawyers, p. 2694.

[73] Ibid., at p. 2892.

[74] Ibid. at p. 2938.

[75] 1 Cranch 1.

[76] Ibid., at p. 171.

[77] Ibid., at p. 137.

The Budget and Accounting Act has imposed upon the Secretary of Defense and the Secretary of the Air Force the duty by an act of Congress to make available and give access to the Comptroller General the Inspector General's report. The statutory law and its legislative history is such that the President cannot lawfully forbid access to the report.

For the purpose of emphasis we quote Mr. Chief Justice Marshall who laid down the underlying philosophy of our form of government. He stated:

"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

In our opinion the statutory law established in the Comptroller General a vested legal right to the Inspector General's report.

XXII. U.S. V. RUMELY [78]

The case of *U.S.* v. *Rumely* was raised in the course of the hearings with the Secretary of the Air Force. A mere recitation of the facts involved will show that it has no relevancy concerning the Comptroller General's access to the Inspector General's report. The facts as stated by the Court are:

"The respondent Rumely was secretary of an organization known as the Committee for Constitutional Government (a nongovernmental organization) which, among other things, engaged in the sale of books of a particular political tendentiousness. He refused to disclose to the House Select Committee on Lobbying Activities the names of those who made bulk purchases of these books for further distribution." [79]

Rumely was a private citizen, not an executive officer of the Government, as contrasted with the matter we are considering.

XXIII. CONCLUSIONS OF LAW

The foregoing material of this memorandum of law has demonstrated clearly the validity of these conclusions:

1. The Special Subcommittee on Government Information of the Committee on Government Operations is clearly within its legislative jurisdiction to investigate and consider this particular withholding from the Comptroller General of access to an Air Force Inspector General's final, official report.

2. The Congress when it enacted the Budget and Accounting Act of 1921, and in particular section 313, was exercising its constitutionally granted legislative powers set forth in article I as quoted.

3. The Congress when it enacted the Budget and Accounting Act of 1921 laid down specific directions for the President and all executive officers within the Government.

4. The Congress when it enacted the Budget and Accounting Act of 1921 created as its agent an independent officer of the Government, the Comptroller General, established his specific statutory responsibilities, and provided the statutory means for him to carry out his duties.

5. There exists no legal authority for the head of a department, created by Congress, to ignore, act contrary to, or to refuse to act in accordance with a law enacted by the Congress and signed by the President.

6. The President cannot legally direct the head of a department to ignore, act contrary to, or permit him to refuse to act in accordance with a law.

7. There exists no legal authority for the Secretary of Defense or the Secretary of the Air Force to deny "access to, and the right to examine, any books, documents, papers, or records" which the Comptroller General determines may be necessary for the performance of his statutory duties.

8. The President, the Secretary of Defense, and the Secretary of the Air Force have the constitutional duty to "take care that the laws be faithfully executed."

9. The Secretary of Defense and the Secretary of the Air Force act as agents of the President and as such can exercise no power in their own right except from the President.

10. There exists no legal authority for the President, the Secretary of Defense and the Secretary of the Air Force to decide what "books, documents, papers, or records" are necessary to the proper performance of the duties and functions of an independent officer of the Government (the Comptroller General) who is vested with the authority to make such determinations by statute.

11. There exists no legal authority for the Secretary of Defense and the Secretary of the Air Force to prevent an independent review of the performance of the Inspector General's organization.

12. The constitutional duties and functions of the Congress and the President are such that the President may not, contrary to the expressed direction of a validly enacted law, interfere with congressional direction concerning the availability of information to an independent officer of the Government.

13. The power of the head of a department is restricted by the Constitution to the observance of such laws as Congress validly enacts.

14. The Budget and accounting Act of 1921 requires that information requested by the Comptroller General from any department or establishment be furnished (with one exception as noted).

15. The Attorney General in 1925 specifically interpreted the Budget and Accounting Act of 1921 as requiring the departments to furnish information which the Comptroller General determined was required. This determination is binding on all executive officers of the Government.

16. The Congress by the Budget and Accounting Act of 1921 has determined that it is in the public interest to make "any books, documents, papers, or records" available to the Comptroller General which he determines necessary for the proper performance of his statutory duties.

17. The Congress has determined that disclosure to the Comptroller General of a report is the public interest and no head of a department has any discretion to declare as a basis for withholding that such disclosure would not be in the public interest.

18. In the only court case of record we have been able to find, where the issue involved access by the legislature to an executive report, it was decided in favor of the legislature. It was determined that securing of information in a report was not an interference with the executive department of the Government (Opinions of the Justices, 328 Mass. 661 (1951)).

19. The mythical doctrine of "executive privilege" itself is not supported by law. The court decisions discussed in this memorandum reject the existence of such a claim. In addition Dean Wigmore flatly repudiates such a claim as "executive privilege." The court cases cited by the proponents of this "executive privilege" do not support their contention.

20. The citation of the Attorney General Opinion (40 Ops. Atty. Gen. 45 (1941)) is irrelevant and has not withstood the test of judicial review.

21. The citation of the Courts-Martial Manual is irrelevant as applying to the Comptroller General, and is so admitted by the Air Force.

22. The President and the Secretary of Defense have no constitutional or legal authority to issue DOD Directive 7650.1 restricting access of the Comptroller General to Inspector General's reports, documents, or papers.

23. The issuance of DOD Directive 7650.1 was ill advised and based on an incorrect construction of the ruling in 34 Opinions of the Attorney General 446 (1925).

(24). The promulgation of DOD Directive 7650.1 is not based on statutory authority or on powers delegated to the Secretary of Defense and contravenes a validly enacted statutory law; viz, the Budget and Accounting Act of 1921.

25. The Comptroller General has determined that in order to perform his statutory duties, as required by law, he should have access to the Inspector General's report and he alone can make such a determination.

26. The May 17, 1954, letter and the memorandum reciting historical precedents has no validity in law and is an incongruous attempt to establish an alleged claim of "executive privilege."

JOHN J. MITCHELL,
Chief Counsel, Special Subcommittee on Government.

EXHIBIT IV–E

Contracts—Lemmond—pz/red—J.A.G. 16

JANUARY 2, 1925.

The Honorable the ATTORNEY GENERAL.

MY DEAR MR. ATTORNEY GENERAL: Under a decision of the Comptroller General of March 8, 1924 (3 Comp. Gen. 604), subsequently adhered to in a decision dated November 6, 1924, a copy of which is among the enclosures herewith, this Department is called upon by the General Accounting Office to furnish information relative to contracts such information to show to the satisfaction of the accounting officers either that the lowest bid was accepted, or if otherwise a detailed statement of the reasons for accepting other than the lowest bid. Under section 3743, Revised Statutes, a copy of all contracts involving Government expenditures is required to be deposited in the General Accounting Office and it is in connection with such copy of contracts that the Comptroller General asserts that it is competent for his office to prescribe the papers which shall constitute or accompany the contract so deposited, including a statement in detail of the reasons for not accepting the lowest bid in cases where other than the lowest bid was not accepted. Since the statutes governing the purchase of supplies and engagement of services under the War Department repose judgment and discretion in the contracting officers in procuring supplies to the extent that they "shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered" (act of June 30, 1902, 32 Stat. 514), and, as to Quartermaster supplies, that "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article" (act of July 5, 1884, 23 Stat. 109), it seems to this Department that the accounting officers may not assume to exercise in any degree a supervision over the exercise of such judgment and discretion as appears to be contemplated by the Comptroller General's decisions. There appears to be no more justification for the review of such matters in the General Accounting Office than there would be for a like review or supervision of other matters purely of administration such as the prescribing of specifications or the receipt of supplies and their application to Government uses. Will you, therefore, oblige me with your opinion as to whether, according to law, I am bound to furnish to the General Accounting Office the information relative to the awarding of contracts by officers under this Department as indicated in that part of the Comptroller General's decision of March 8, 1924, reading as follows:

[78] 345 U.S. 41.
[79] Ibid., at p. 42.

"The acceptance by an administrative officer of other than the lowest bid would ordinarily not be questioned if the reasons assigned for that action appeared satisfactory, but the action in that respect by administrative officers is not conclusive on the accounting office. It appears, therefore, that a satisfactory audit of expenditures, whether pursuant to formal or informal contracts, requires at least an affirmative showing that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

"The information thus considered necessary may be provided either by furnishing the accepted proposal and all rejected proposals or copies thereof, or by furnishing the accepted proposal and an abstract of rejected proposals, or by a certificate on the voucher by one having knowledge of the facts that the accepted bid, attached or otherwise deposited, was the lowest bid, if that be a fact, or if the fact be otherwise, a detailed statement as to the reasons for accepting other than the lowest bid. Such requirement appears to be reasonable and is deemed necessary to a proper audit of the expenditures; therefore, the items here in question will be continued in suspension for a reasonable period of time awaiting receipt of the necessary information."

For your information, attention is invited to the enclosed opinion of the Judge Advocate General on the subject.

Sincerely yours,

———— ————,
Secretary of War.

2ND IND.—WAR DEPARTMENT, J. A. G. O., 29 DEC. 1924, TO THE ADJUTANT GENERAL

(Contracts—Lemmond—pz/red—J. A. G. 163).

1. Reference 1st Indorsement, 160 (11–26–24) (Misc.) AGO, December 4, 1924, to this office on QM 161 A–G (General) Office of the Quartermaster General, November 26, 1924, subject: "Decisions of Comptroller General—data in connection with contracts: *Lowest* bidder, and lowest *responsible* bidder."

2. You have referred to me for remark The Quartermaster General's communication and inclosures relative to a recent decision of the Comptroller General to the effect that as to all contracts involving expenditures, executed on and after November 15, 1924, the General Accounting Office will require an affirmative showing that the lowest bid was accepted, or if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

3. On March 8, 1924, the Comptroller General rendered a decision (3 Comp. Gen. 604) in connection with the audit of certain open-market purchases by the Public Printer in which he held (quoting the syllabus):

"A satisfactory audit of expenditures pursuant to formal or informal contracts, requires an affirmative showing that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid."

This decision appears to be based upon the following provision of section 3743, Revised Statutes, as amended (made applicable to the General Accounting Office by section 304 of the Budget and Accounting Act, 42 Stat. 24):

"SEC. 3743. All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the auditors of the Treasury, according to the nature of the contracts."

The Comptroller General's reasoning and conclusions were thus stated:

"The requirement of section 3743, Revised Statutes, as amended, that all contracts shall promptly be deposited in this office is obviously for the purposes of a satisfactory audit of the expenditures pursuant thereto, and in connection therewith it is competent for this office to prescribe the papers which shall constitute or accompany the contracts to be so deposited.

"The acceptance by an administrative officer of other than the lowest bid would ordinarily not be questioned if the reasons assigned for that action appeared satisfactory, but the action in that respect by administrative officers is not conclusive on the accounting office. It appears, therefore, that a satisfactory audit of expenditures, whether pursuant to formal or informal contracts, requires at least an affirmative showing that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

"The information thus considered necessary may be provided either by furnishing the accepted proposal and all rejected proposals or copies thereof, or by furnishing the accepted proposal and an abstract of rejected proposals, or by a certificate on the voucher by one having knowledge of the facts that the accepted bid, attached or otherwise deposited, was the lowest bid, if that be a fact, or if the fact be otherwise, a detailed statement as to the reasons for accepting other than the lowest bid. Such requirement appears to be reasonable and is deemed necessary to a proper audit of the expenditures; therefore, the items here in question will be continued in suspension for a reasonable period of time awaiting receipt of the necessary information."

Pursuant to the said decision, the General Accounting Office proceeded to call upon the Quartermaster General of the Army, by numerous letters, to supply information relative to the awarding of contracts to the "lowest responsible bidder," each such letter containing the following statement:

"The contract bears a certificate signed by the contracting officer to the effect that the award of the contract was made to the lowest responsible bidder, but it is not shown however that the lowest bid was actually accepted. An affirmative showing should be made that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid should be furnished. See 3 Comptroller General 604 as to the information considered necessary to meet the above requirement.

"Prompt compliance with the requirement is requested in order to avoid suspension of payments in the disbursing officer's account."

The Quartermaster General replied by letter to the General Accounting Office dated October 24, in which, after referring to the laws and regulations under which the existing practice had become established of showing only by certificate that award was made to the lowest responsible bidder, he said:

"It is generally admitted that the making of a contract is purely an administrative function, and that appropriate exercise of administrative discretion is a matter not open for review by the accounting officers. The laws and regulations relative to the business of the Quartermaster Corps provide, generally, that contracts shall be made with the lowest responsible bidder for the best and most suitable article. Determination in this respect can only be regarded as an administrative function. In conformity with requirements an appropriate certificate by the contracting officer is appended to the number of the agreement to be furnished to the General Accounting Office. Distinction must be made between the terms 'lowest responsible bidder,' as applied to the Quartermaster Corps, and 'lowest bidder', as may be prescribed by law pertaining to some other branch or branches of the Government service. Therefore, it is regarded that certificates furnished with the contracts, and as has been followed in long established practices, meet requirements and ought to be sufficient for the General Accounting Office.

* * * * *

"It is the policy of this office to cooperate with the General Accounting Office, and in view of the explanation set forth above request is made that such exceptions as you have taken to the contracts in question, as well as any similar ones noted before consideration of this letter, be withdrawn."

To the latter communication the Comptroller General replied, in a letter to the Secretary of War, November 6, 1924, that the provision of the act of July 5, 1884 (23 Stat. 109), requiring that awards for the purchase of Quartermaster supplies be made to the "lowest responsible bidder" is but declaratory of the general requirement applicable alike to all, though not expressly required of all; and further—

"The fact that a showing as to the acceptance of the lowest bid, or a statement of the reasons for accepting a higher bid, was required only in specific cases is no reason why the accounting officers could not have made that a general requirement as to all purchases. I believe that the requirement as announced in 3 Comp. Gen. 604, is a salutory one, in the interests of the United States, reasonable, and with full warrant in law; and must be adhered to.

"You are advised, however, in view of the past practice, the time will be extended so that the requirements generally will be insisted upon only as to contracts executed on and after November 15, 1924, unless a particular need therefor arises in specific cases."

4. In order to protect, for the time being, contracting and disbursing officers the Quartermaster General has issued instructions that the information thus required by the Comptroller General be furnished; and in submitting this matter to The Adjutant General for examination and such further action as may be deemed advisable, he states that the requirements thus set up by the Comptroller General are regarded by his office as "an unwarranted encroachment upon the administrative prerogative and not essential to the audit of accounts," and he suggests whether in case the Comptroller General's ruling be acceded to there will not follow efforts to assume jurisdiction over other administrative features in contract matters. In this connection he further states:

"(e) It appears to be well settled that the making of contracts is an administrative function—one with which the accounting officers have nothing to do; and that the accounting officers are concerned only to the extent of the legality of the contract for the purpose of passing payments thereunder, and that the agreement contains terms adequately set forth so as to admit of proper audit. With those points in view, and giving consideration to the language of the law of 1884, it is regarded by this office that determination as to who is 'the lowest responsible bidder for the best and most suitable article' is purely an administrative function, and that certificate by the contracting officer in that respect, and as to advertising for proposals (in accordance with the blank therefore upon the approved contract form) is all that should be required by the General Accounting Office. Similar information should be submitted in cases of informal contracts awarded after competition."

5. The Comptroller General does not base his decision upon any express authorization in section 3743, Revised Statutes, or any other statute. He states that the requirement of that section (R.S. 3743) is obviously for the purpose of satisfactory audit, and that in connection therewith it is competent for his office to prescribe the papers which shall constitute or accompany the

contract. It may be granted that the General Accounting Office is entitled to have furnished to it all information necessary for a proper audit of accounts; but without undertaking to say what would constitute a proper audit of contract accounts, I think the authorities are clear to the effect that the accounting officers have not the duty or the responsibility of reviewing, for purposes of approval or disapproval, matters of administration or the decision of questions requiring the exercise of judgment and discretion. All purchases and contracts for supplies or services for the military service are required to be made by or under the direction of the Secretary of War (R.S. 3714), and he has a responsibility to see that contracts are properly made and faithfully executed (*U.S.* v. *Adams*, 7 Wall. 465, 477). Pursuant to the act of April 10, 1878 (20 Stat. 36, as amended by the act of March 3, 1883, 22 Stat. 487) Article I, Army Regulations, 1913, embodies the rules prescribed for the government of contracting officers. The following paragraphs are pertinent for consideration here:

"541. Proposals will be opened and read aloud at the time and place appointed for the opening (bidders having the right to be present), and each proposal will then and there be numbered and entered on an abstract, the articles being entered, after the reading of all proposals, and with the least practicable delay, in the order in which they are to appear on the returns. Articles to be procured by contract will be abstracted separately from these to be procured on written acceptance. If the number of proposals is large, those relating to specific articles or classes of articles may be entered on separate abstracts. The number of each proposal, with the quantities and prices of articles offered and dates of delivery, will appear in the proper columns, and a copy of the advertisement or notice under which the proposals are received, with a copy of the specifications, if any, will be attached to the upper lefthand corner of the abstract. When two or more sheets are used for the abstract, they will be properly fastened together and paged on the upper righthand corner.

* * * * *

"543. When proposals are received at a post, unless by an officer authorized to make the award, as in cases involving small expenditures, they and the abstract will be forwarded to department headquarters, with the recommendations of the receiving officer and the post commander as to the person to whom the award should be made. When a purchasing officer, acting under the direct supervision of a chief of bureau, has invited and received proposals, he will make the award and execute the necessary papers, unless otherwise directed by the chief of bureau.

"544. When proposals for supplies for the general service of a department are received at its headquarters, the chief officer of that branch of the staff to which they pertain will submit them to the department commander, and, under his supervision, will make the award and execute the necessary papers, unless under existing orders the action of higher authority is necessary.

"545. Except in rare cases, when the United States elects to exercise the right to reject proposals, awards will be made to the lowest responsible bidder, provided that his bid is reasonable and that it is in the interest of the Government to accept it.

"546. Slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid, but the interests of the Government will be fully considered in making the award.

"547. When no guaranty is required, bidders must, if called upon by the awarding officer, furnish satisfactory evidence, before the award is made, of their ability to carry their proposals into effect.

"548. The accepted quantity and price will be noted on the abstract of proposals in the column of 'Remarks,' opposite the name of the bidder. If a bid is rejected and one at a higher price accepted, the reason for the rejection will be written in the column of remarks. When contracts are made, the fact will be stated in the abstract.

"549. Abstracts and duplicate numbers of proposals will be forwarded to the proper bureaus of the War Department when specially directed by the heads of such bureaus or required by the regulations thereof.

* * * * *

"564. The number of the contract for the Auditor for the War Department will be sent to him by the head of the bureau to which the contract pertains, and in case of a purchase made by an officer of the Quartermaster Corps after public notice of 7 days or more, this number must be accompanied by a copy of the advertisement, a certificate of the contracting officer as to the time and manner of its publication, and his certificate that the award was made to the lowest responsible bidder for the best and most suitable article."

The Act of June 30, 1902 (32 Stat. 514), provides that, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the Army shall only be made after advertisement, "and shall be purchased where the same can be purchased the cheapest, quality, and cost of transportation and the interests of the Government considered." An earlier statute (Act of June 5, 1884, 23 Stat. 109) requiring purchases by the Quartermaster and Commissary Departments to be made only after public notice except in case of emergency, provides that:

"The award in every case shall be made to the lowest responsible bidder for the best and most suitable article * * *."

There are other statutes regulating purchases, including section 3709, Revised Statutes, but they are all to the same intent and in furtherance of the same policy (28 Ops. Atty. Gen. 384, 388). Under these statutes the contracting officer has to consider several factors other than the price bid, and his decision, in good faith, involves the exercise of his judgment and discretion. These are the decisions that the Comptroller General would have reviewed and approved or disapproved in the General Accounting Office. That the accounting officers have no authority to exercise any such supervision over contracting officers' decisions of this character is, I think, conclusively established by numerous decisions and opinions, some of which will be here cited.

In *United States* v. *Speed* (8 Wallace 77), the validity of a contract was attached on the ground that the statute (now R.S. 3709) requiring advertisement for bids had not been complied with. The Supreme Court said:

"But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance. It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

The case of *United States* v. *Jones* (59 How. 93), involved the right of the accounting officers to review and disapprove the action of the Secretary of Navy in exercising his discretion in providing for the medical care and treatment of a naval officer in France. In deciding that the accounting officers had no such authority the Supreme Court said, inter alia:

"The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers contracted to him. His date and decisions, on subjects submitted to his jurisdiction and controlled by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annuling the orders of the heads of departments."

To the same effect is *United States* v. *Johnston* (124 U.S. 236, 252).

In *United States* v. *Waters* (133 U.S. 208. 215), the Supreme Court in considering the powers and duties of the accounting officers said:

"The Comptroller of the Treasury Department decides whether or not the items are authorized by statutes, and are legally chargeable. He has no power to review, revise, or alter items expressly allowed by statute, nor items of expenditures or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money and making the allowances. His duty extends no further than to say that the officers charged with that duty have authorized the expenditures or made the allowances."

In 1853 Attorney General Cushing held (6 Ops. Atty. Gen. 226):

"A head of a department advertising according to law for proposals for stationery is the competent and only judge of the matters of fact involved in the acceptance and rejections of any of the proposals. In a matter which the law confides to the pure discretion of the executive the decision by the President or proper head of the department of any question of fact involved, is conclusive, and is not subject to revision by any other authority in the United States."

In 1894 the Attorney General, in an opinion (21 Ops. Atty Gen. 57) rendered to the Secretary of the Navy, in the matter of an award for supplies, said:

"The lowest bidder who fills the other requirements is entitled to an award of the contract, although you are the person charged with the duty of ascertaining the facts in this regard, and your decision is not reviewable in any court."

The same principle has been applied by the Comptroller of the Treasury in 3 Comptroller's Decisions 242, it was held that in the absence of evidence to the contrary the accounting officers will, in the settlement of salary accounts assume that the civil-service law and rules have been complied with by the officer having the power of appointment To the same effect is 4 Comp. Dec. 72. The same authority held that the question whether a contractor has properly complied with the terms of his contract in executing the work thereunder is one of fact upon which the decision of the head of the department made in good faith is conclusive (2 Comp. Dec. 242).

6. By section 3744, Revised Statutes, Congress has made provision for safeguarding the Government against fraud in connection with the making of Government contracts by requiring information in regard to such contracts to be filed in the Returns Office, Department of the Interior, and by section 3745, the contracting officer is required to make a sworn statement as to his good faith in making the contract. Speaking of this statute, Attorney General Wickersham said (29 Ops. Atty. Gen. 297):

"The purpose of the statute with reference to making returns (act of June 2, 1862, 12 Stat. 411), was, as the title thereof stated, 'to prevent and punish fraud on the part of officers entrusted with making of contracts for the Government.' This object Congress aimed to accomplish by requiring the data with respect to the making of such contracts, bids, offers, proposals, and advertisement to be filed with the contract, and making the whole of it open to inspection. Such an inspection would show whether the provisions of law governing the making of any such contract had been complied with."

If it had been the intention of Congress that similar information should be filed in the General Accounting Office, it is reasonable to suppose that legislation to that effect would have been enacted.

7. This Office is clearly of the opinion that the General Accounting Office has no authority to review the decisions of the contracting officers under the War Department made in the exercise of their judgment and discretion in connection with making of awards for contracts, and that consequently the Comptroller General has no power to require the furnishing of data necessary for such review. In order, however, that the controversy may be authoritatively disposed of, it is recommended that this question be submitted to the Attorney General for his opinion. A draft of a letter to the Attorney General, for the signature of the Secretary of War, is enclosed.

J. A. HULL,
Major General, The Judge Advocate General.

[34 Op. Atty. Gen. 446]

DEPARTMENT OF JUSTICE,
March 21, 1925.

THE SECRETARY OF WAR.

SIR: Your letter of January 2, 1925, states that under a decision of the Comptroller General your Department is called upon by the General Accounting Office to furnish information relative to contracts showing that the lowest bid was accepted or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

The decision referred to is that of March 7, 1924 (3 Dec. Comp. Gen. 604). In it reference is made to the statute providing that all contracts requiring the advance of money or in any manner connected with the settlement of public accounts shall be deposited in the General Accounting Office (R.S. 3743, sec. 304, Budget and Accounting Act of June 10, 1921, 42 Stat. 24), and it was held (p. 605):

"The requirement of section 3743, Revised Statutes, as amended, that all contracts shall promptly be deposited in this office is obviously for the purposes of a satisfactory audit of the expenditures thereto, and in connection therewith it is competent for this office to prescribe the papers which shall constitute or accompany the contracts to be so deposited.

"The acceptance by an administrative officer of other than the lowest bid would ordinarily not be questioned if the reasons assigned for that action appear satisfactory, but the action in that respect by administrative officers is not conclusive on the accounting office. It appears, therefore, that a satisfactory audit of expenditures, whether pursuant to formal or informal contracts, requires at least an affirmative showing that the lowest bid was accepted or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid."

You request an opinion "as to whether, according to law," you are bound to furnish this information.

It will be observed that the Comptroller General states that this requirement is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination. Moreover, section 313 of the Budget and Accounting Act provides (p. 26):

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

"Respectfully,

"JOHN G. SARGENT."

MEMORANDUM OF LAW

CASES INVOLVING ATTEMPTS TO CONTRAVENE, MODIFY, OR AMEND STATUTES BY EXECUTIVE ACTION [79]

This memorandum of law discusses the chief legal issue relative to the controversy which has arisen concerning the right of access by the Comptroller General to an Air Force Inspector General's report entitled "Survey of Management of the Ballistic Missile Program." The fundamental legal questions involve whether the Secretary of Defense may promulgate and publish a directive which, by its terms, is binding on all employees of the Department [80] if the directive—

(1) was issued without statutory authority;

(2) before issuance, was objected to in writing by an independent officer of the Government, the Comptroller General; and

(3) has the effect of contravening and modifying a statute enacted by Congress, thus preventing the Comptroller General from fulfilling his statutory responsibility and duties.

The Department of Defense and its component agencies are of statutory origin and in no way can the Department be considered to be of constitutional origin. The Constitution states that Congress shall have the power "To raise and support armies * * * to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces." [81] Hence, the Secretary of Defense's only powers flow from statutes and delegations of authority contained therein. The Congress has delegated authority to the Secretary of Defense and the Secretaries of the military services to prescribe "rules and regulations." [82] Only Congress has the authority to amend or modify a statute and can delegate that authority to the President or officers of the executive branch only by legislative action.

There have been numerous attempts on the part of the President and officers of the executive branch to contravene, modify, and amend duly enacted statutes by proclamation, Executive order, or rules and regulations—just as the Department of Defense in its directive is attempting to contravene and modify a statute. The following cases were submitted by the Special Subcommittee on Government Information to the General Accounting Office and were summarized by James Masterson, GAO attorney:

I. Cases involving attempts by executive officials with statutory authority to promulgate rules and regulations for the conduct of their offices to use such rules and regulations to contravene, modify, or amend statutes

Gilchrist et al. v. *Collector of Charleston* (10 F. Cas. 355, No. 5420): Case involved a writ of mandamus against a customs inspector at the Charleston, S.C., port.

The ship *Resource* arrived in Charleston port at a time when a lengthy stay could result in the destruction of its bottom by worms which infested that harbor during the summer months. An embargo that would detain the ship was in effect and an attempt was made to secure cargo which would justify the ship sailing to a more northern port (Baltimore) where the worms would not be a danger. A cargo of cotton was obtained. The ship needed ballast to enable safe negotiation; so it was agreed that it would take on 140 barrels of rice, freight free, to enable it to make its northern voyage. The customs inspector refused debarkation papers on the suspicion that the rice transport was an attempt to circumvent the law. Mandamus was sought and granted. The act under which detention was sought was to prevent a sailing to one American port under the subterfuge of sailing to another. Here the inspector knew and believed that Baltimore was the port of destination. The instruction of the President which allowed detention for some other purpose was of no effect. The court said, "All instructions from the Executive which are not supported by law are illegal, and no inferior officer is bound to obey them." The Treasury Department instruction was to detain (1) if the cargo of a ship was for a port where the cargo was not needed for consumption and (2) for a port that usually exports that article. This instruction did not follow the law and therefore lacked authority of law.

McElrath v. *United States* (102 U.S. 426): After allegedly going a.w.o.l. McElrath, a Marine Corps lieutenant, tendered his resignation. The Secretary of the Navy refused to accept the resignation and McElrath was dismissed. The President nominated one Haycock to vice McElrath. Haycock was appointed by and with the consent of the Senate. Thereafter, McElrath obtained a letter from his commanding officer saying he was not a.w.o.l. but was granted permission to leave his ship. The Secretary of the Navy revoked the dismissal and accepted the resignation as of the date of McElrath's appeal. Suit was for the pay for the intervening period; i.e., from the dismissal to the accepted resignation.

The court did not allow payment for the intervening period. It was held that at the date the Senate approved the Haycock appointment the allowed number of Marine lieutenants was complete and that the attempted subsequent restoration and acceptance of resignation of McElrath by the Secretary of the Navy was of no effect.

Muir v. *Louisville and Nashville R.R. Co.* (247 F. 888): This was an action in tort agianst the L. & N. by the administrators of the estates of persons killed in a train accident. The railroads had been seized by the United States, so one of the defenses was that the United States must be a party to the action and, as the United States had not consented to suit, the action could not lie.

The court in its opinion stated that while Congress may authorize heads of executive departments or other officials to make regulations within certain limits—and when made within those limits such regulations have the force and effect of law—the delegation of authority to make regulatory orders gives

[79] This memorandum supplements memorandums entitled "Right of the Comptroller General to Access to a Report of the Inspector General of the Air Force Entitled 'Survey of Management of the Ballistic Missiles Program'" and "Right of Access by the Comptroller General (an Agent of the Congress) to an Air Force Inspector General's Report Entitled 'Survey of Management of the Ballistic Missile Program,'" hearings, pt. 16, exhibits IV–A and IV–D, pp. 3753 and 3764.

[80] Ibid. at p. 3799.

[81] Constitution of the United States, art. I, sec. 8.

[82] Hearings, pt. 11, pp. 2588–2589.

no power to add to, take from, or modify the limitations prescribed by Congress. As the act only authorized the President to take possession of and assume control of the transportation system through the Secretary of War and made no provision for a Presidential proclamation providing an elaborate scheme of control, such proclamation had no force as law.

Panama Refining Co. v. *Ryan* (293 U.S. 388): Suit was brought by the owners of oil refining companies to restrain Federal officials from enforcing a regulation prescribed by the Secretary of the Interior under the National Industrial Recovery Act.

The act established no guide for the President for his use in issuing his Executive orders. The court said that this was an unauthorized delegation of legislative power to the President. Therefore, the Executive order and regulations under it did not have constitutional authority.

United States v. *Ashley Bredd Co.* (59 F. Supp. 671): A statute provided that the power of allocation shall be exercised "in such manner, upon such conditions, and to such extent as he [the President] shall deem necessary or appropriate in the public interest and to promote the national defense."

A regulation was issued pursuant to this statute which provided that no bakery products could be "resumed" by a bakery. An informaton was issued stating that the defendant "did * * * willfully resume possession of * * * bread previously manufactured by the said defendant."

The court held that this regulation was beyond the authority of the War Food Administrator to establish and therefore was invalid.

United States ex rel. Hirshberg v. *Cooke* (336 U.S. 210): A sailor was in a Japanese prison camp and was detailed to work fellow prisoners. He was discharged from the Navy and then reenlisted. About a year after his reenlistment he was charged in a court-martia proceeding with the maltreatment of two fellow prisoners.

The court held that when the enlistment in which the alleged wrong was done terminated all military control over his action ended. The Navy could not reopen the case in a subsequent enlistment, it being generally the law that a court-martial proceeding will not lie against a person discharged from the service. The Army and Navy regulations on this matter differed, although their statutes were substantially the same. The court said that Congress had not intended to allow the various military units to make their own rules in regard to this matter. The Congress must set the standards.

II. Cases involving attempts by the President or other executive officers to contravene, modify, or amend statutes by proclamation, executive order, directive, or rules and regulations

Little et al. v. *Barreme* (2 Cranch 169): Case involved an award of damages to the owner of a Danish ship after it had been captured by two ships of the United States.

The capture was made because it was assumed that the Danish vessel was proceeding in a manner in conflict with the act of February 9, 1799 (an act for the suspension of all intercourse between France and the United States.)

The court held that a commander of a ship of war of the United States in obeying his instructions from the President acts at his own peril and if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. The act did not authorize the seizure upon the high seas of any vessel from a French port; it provided for the seizure of vessels of the United States "* * * bound or sailing to any port or place within the French Republic, or her dependencies." Therefore, the orders of the President could not justify a seizure of a ship coming from a French port upon suspicion of a violation of the "nonintercourse legislation."

Gelston et al. v. *Hoyt* (3 Wheat. 246): Suit of an alleged trespass for taking and carrying away the ship *American Eagle.*

The defense to the action was that this ship was attempted to be armed for employment in the service of a foreign state, that it was being outfitted for the service of the Petion forces of St. Domingo against the Christophe forces of St. Domingo and that the seizure was pursuant to Presidential direction.

The act complained of was an actual seizure of the vesel. The court said that the seventh section of the act of 1794 (ch. 50), was not intended to apply, except to cases where a seizure or detention could not be enforced by the ordinary civil power, and it was necessary in the President's opinion to employ naval or military power. The court went on to say that it could not have been the intention of Congress that such a power should be allowed as a shield to the seizing party, in cases where that seizure might be made by the ordinary civil means.

Ex parte Milligan (4 Wall. 2): This is the famous habeas corpus case arising from an action of a military tribunal against a citizen of the United States during the Civil War.

Milligan was a citizen and resident of Indiana. He was tried and convicted by a military board under the auspices of martial law. The argument was made by the Government that the President had judged that, under the circumstances, a military tribunal alone could safely act.

The court held for Milligan because Congress had not specified for a military trial where civil courts were functioning and the lack of trial by jury was, in Milligan's case, unconstitutional.

Blake v. *United States* (103 U.S. 227): Statute provided for appointment of officers of the Army—"by and with the consent of the Senate."

An Army chaplain submitted a letter which was construed as a resignation. The resignation was accepted by the President. Later it developed that the chaplain was not of sound mind when the resignation was submitted. The President attempted to reinstate after the resignation by an Executive order. The court said, "He was not entitled to pay as post chaplain from the date his successor took rank. Having ceased to be an officer in the Army, he could not become a post chaplain except under a new appointment, which by law had to be 'by and with the advice and consent of the Senate.'"

In re Schuster et al. (192 N.Y.S. 357): A statute provided that only the President could authorize the naturalization of alien enemies.

The statute provided for the investigation and recommendation to the President by the Department of Justice. The President tried, by Executive order, to delegate his personal supervision of applications to the Justice Department.

The court held that the act provided for the personal determination by the President, in each case, of whether an alien enemy shall be excepted from a certain classification, which power is clearly of a judicial character and the execution of which cannot be delegated.

United States v. *Western Union Tg. Co.* (272 F. 311, affirmed 272 F. 893; 260 U.S. 754): Western Union had entered into a contract with a British firm to make a connection with a submarine cable off Cuba. The Federal Government by executive action refused to allow Western Union to go beyond the 3-mile limit. The court said that the President is without constitutional power, in the absence of authority from the legislature, to prohibit the landing of a cable from a foreign country on the coast of the United States or otherwise connect with its internal system. While conceding that the Congress had, by long acquiescence, impliedly given authority to the Executive to prevent such a landing by a foreign corporation, the court said that authority does not extend to a domestic corporation which had a Federa franchise under the Post Roads Act and which for many years had operated cables between Florida and Cuba constructed by the express provision of the act and over which Congress had at various times exercised its authority directly and through the Interstate Commerce Commission, in regulating rates over both its internal lines and its cable connections.

Hood Rubber Co. v. *Davis* (151 N.E. 119): Case held that since the Lever Act conferred upon the President powers to regulate the prices and the distribution of coal as a war measure, an Executive order, that was in no way connected with war but restored a suspended order of the Fuel Administration of January 1918 regulating contracts for coal was beyond the powers conferred.

Johnson v. *Keating ex rel. Tarantino* (1 F. 2d 50): An immigration case of an alien returning to the United States from Italy He was excluded upon his return. The Court held that the power given the President by the War Act to impose by proclamation additional restrictions on the departure of persons from and entry into the United State continued in effect "until otherwise provided by law," and those powers were terminated as to immigrants by a subsequent act which carefully revised the immigration laws.

United States ex rel. Swyston v. *McCandless* (24 F. 2d 211, 33 F. 2d 832): An alien was ordered to be deported because his visa had not been properly signed by an officia The Court held that the alien had been in the United States for more than 3 years and under the statute could not be deported. A proclamation of the Chief Executive required a visa and proclaimed deportation as the consequence of a failure to comply with the requirement. However, the act under which the President issued that proclamation had not been kept in force as to the authority to deport so the order of deportation was not lawful.

United States v. *Pan-American Petroleum Co.* (55 F. 2d 753, 287 U.S. 612): Case involved the Teapot Dome scandal. That part of the Court's ruling that is akin to the problem at hand in the other cases digested here is the Court's upholding a lower court ruling that the Executive order of May 3, 1921, attempting to transfer the administration of the naval petroleum reserves from the Secretary of the Navy to the Secretary of the Interior, was invalid in view of the act of June 4, 1920, which directed the Secretary of the Navy to take possession of all properties within naval petroleum reserves which are or may become subject to the control and used by the United States for naval purposes.

Zeiss v. *United States* (23 C.C.P.A. 7 (U. Court of Customs and Patent Appeals). When Tariff Commission did not confine its investigation to the differences in the cost of production of foreign and similar domestic optical instruments of the class or type used by the Armed Forces as stated in its public notice, but went further and included the differences in costs of production of instruments suitable for use by the Armed Forces, its findings were without authority of law. Also, the proclamation of the President containing no finding that the binoculars were of a class of type used by the Armed Forces, was without authority of law because the Senate resolution under which the investigation was made restricted the investigation to those "used by" the Armed Forces.

United States ex rel. Von Heymann v. *Watkins* (159 F. 2d 650): An alien German was brought to the United States from Costa Rica and interned under an act which gave the President authority to remove where an alien refused or neglected to depart. The court held that this restraint was unlawful insofar as voluntary departure was interfered with by the Government and the alien had not refused nor neglected to depart for reasons other than the forced detention by the authorities.

Schechter Corporation v. *United States* (295 U.S. 495): In the Schechter case, the Congress, by the enactment of the National Industrial Recovery Act, delegated to the President the power to approve various codes of fair competition. The act provided for the creation by the President of administrative agencies to assist him, but the action of reports of such agencies were to have no sanction beyond the will of the President who would accept, modify, or reject their suggestion as he pleased.

The court held that this act was an unconstitutional delegation of legislative power to the Executive.

Youngstown Sheet & Tube Co. v. *Sawyer* (343 U.S. 579): The President by Executive order directed the Secretary of Commerce to seize and operate the steel mills. The order was not based upon any statutory authority. The Congress had provided other methods through the Taft-Hartley Act to handle such a need.

The court held that the Executive order was not issued pursuant to the Constitution or to a statute, and it was, therefore, of no effect. Moreover, in its consideration of the Taft-Hartley Act the Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes.

Cole v. *Young* (351 U.S. 536): The 1950 act provided for the dismissal of security risks where employees were on classified work. The President, pursuant to the act, by Executive order, extended it to all Government jobs. The defendant was not on classified work, and he did have veteran's preference. He was restored because the standards prescribed by the Executive order and its application by the Secretary were not in conformity with the act.

III

The following statements from Supreme Court decisions clearly enunciate the law with respect to the powers of the President and other executive officers to exercise an unexpressed constitutional power for the promulgation of a directive, such as the Department of Defense directive, which attempts to contravene, modify, or amend an existing statute. In the famous case of *Marbury* v. *Madison,* Chief Justice Marshall said: [83]

"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 intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Again, in *U.S.* v. *Kendall,* the Supreme Court said: [84]

"The executive power is vested in a President; as as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not and certainly cannot be claimed by the President.

"There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."

In the present case the statements of Mr. Justice Jackson, a former Attorney General, in his concurring opinion in the Youngstown Steel Seizure decision have particular significance with respect to the power of the President and those who seek to claim his authority for their acts. After referring to himself as one "who has served as legal adviser to a President in time of transition and public anxiety," [85] he stated: [86]

"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can reply only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. [Footnote omitted.] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

Mr. Justice Douglas in his concurring opinion in the Youngstown case referred to the Constitution and stated: [87]

"Article II which vests the 'executive power' in the President defines that power with particularity. Article II, section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, section 3 provides that the President shall 'from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.' The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, section 3 also provides that the President 'shall take care that the laws be faithfully executed.' But, as Mr. Justice Black and Mr. Justice Frankfurter point out, the power to execute the laws starts and ends with the laws Congress has enacted."

CONCLUSIONS OF LAW

I. No executive officer can use his statutory authority to prescribe rules and regulations for the conduct of his office to issue a directive, rule, or regulation which contravenes, modifies, or amends a statute.

II. No executive officer can use the alleged constitutional power of the President, either by expressed or assumed delegation, to issue a directive, rule, or regulation which contravenes, modifies, or amends a statute.

III. A proclamation or Executive order issued by the President is invalid if it contravenes, modifies, or amends a statute.

Mr. MONRONEY. I also ask unanimous consent that the last phrase of the suggested amendment which appears as the second paragraph in the third column on page 17738 of the CONGRESSIONAL RECORD for Saturday, be corrected so as to read "the limitation on the use of funds provided in subsection (d) shall be applicable, notwithstanding the certification by the President."

The PRESIDING OFFICER. Without objection, it is so ordered.

AGRICULTURAL RESEARCH

Mr. STENNIS. Mr. President, it has been brought to my attention that scientists in the Department of Agriculture have made a major breakthrough in basic agricultural research. It is my understanding that this discovery, made at Beltsville, Md., is receiving exciting interest throughout the scientific world.

Researchers for the first time in history have identified and isolated the chemical substance that controls plant growth. This discovery will have far-reaching implications and will set the stage for revolutionizing research in the field of plant growth. Much of this will be basic studies that will help scientists gain a more complete understanding of how a plant grows and its reaction to light and other growth factors.

With increased knowledge of pigments, research workers believe they will be able to modify plants at will and thereby influence fruiting habits and other basic characteristics. I visualize this as giving scientists a new tool to fit scientific needs and provide means for higher yields, improved quality and insect and disease control. It will lead to better food, fiber and raw materials and in all probability greatly reduced cost of production.

Mr. President, this new discovery is an important milestone for agricultural research and reconfirms my strong belief that funds spent for research are our soundest investment. I request unanimous consent that the news release published by the Department of Agriculture be printed in the RECORD.

There being no objection, the release was ordered to be printed in the RECORD, as follows:

USDA SCIENTISTS FIND HOW LIGHT CONTROLS PLANT DEVELOPMENT

The triggering mechanism for all plant development has just been found by U.S. Department of Agriculture scientists. The discovery promises to be the key to man's

[83] Cranch 165.

[84] Peters 610.

[85] *Youngstown Sheet & Tube Co. et al.* v. *Sawyer,* 343 U.S. 634.

[86] Ibid. at 637, 638.

[87] Ibid. at pp. 632, 633.

complete control of plant growth from seed germination through plant flowering and fruiting.

The scientists have recovered the pigment forms from corn plants and have removed some of the impurities. The material isolated is a protein, and functions as an enzyme. The pigment forms can be converted from one to the other outside of the plant, and this action can be detected by laboratory instruments. In the past conversion of one form to the other was detected only by plant response. Now the presence of each can be detected by absorption of red or far-red light.

As the pigment forms are purified further, the scientists believe that they will be able to identify and modify them at will, and thereby influence the character of plant growth.

For scientists the discovery opens the door to further research on this triggering action to enable man to tailor make plants for his needs. Possible results are crops of special heights for better harvesting, flowering of plants at times convenient to man, or for better control of plant pests.

Dr. Byron T. Shaw, Administrator of USDA's Agricultural Research Service, hails the discovery as an outstanding basic research achievement. "It is the kind of discovery envisioned when the Department's new pioneering research laboratories were established. It provides means for the better control of plant development for specific purposes—for better food, fiber, and industrial raw material," he said.

Drs. Harry A. Borthwick and Sterling B. Hendricks, at the Agricultural Research Center, Beltsville, Md., made the discovery in studying the effects of differences in the color and intensity of light on growth responses such as flowering, seed germination, elongation, and color production. Associated in the research also were Harold W. Siegleman, of the Agricultural Research Service, and Carl Norris and Warren Butler, both of the Agricultural Marketing Service.

It has long been known that light controls the reddening of apples by governing the formation of the coloring material. The side of the apple facing out from the tree is usually redder than the side facing the center of the tree.

Recently the scientists found the critical range of light for apple coloring to be in the red region of 6,200 to 6,900 Angstrom units. Above this region the amount of reddening of the apple declines rapidly as the wavelength of light increases toward far-red.

With soybeans growing on short days and long nights, an extremely short exposure to red light during the night will prevent the plant from flowering. Conversely, an equally short period of far-red light causes the plant to flower. However, if the intensity of far-red light is increased 100 times, the plant again fails to flower.

Drs. Borthwick and Hendricks have found growth responses to be governed by a reversible chemical reaction that is controlled by the color and intensity of light acting upon two pigment forms present in plants in invisible quantities.

One form of the pigment absorbs red light and the other far-red light. The pigment form that predominates in a plant depends upon the color of light to which the plant is exposed. The form produced by the action of red light regulates plant growth and can absorb far-red light. However, if this form absorbs far-red light it is converted back to the red-absorbing form that does not regulate plant growth.

To obtain the various colors of light for the experiment, the scientists directed white light from a high-intensity electric arc through a prism to break it into all the colors of the spectrum as is a rainbow. The portion of light used in this work was the red part of the spectrum from yellow (5,800 A.) to far-red (near the limit of visible red light (7,000 to 7,500 A.), which is near the range of infrared or heat energy). An Angstrom unit, a measure of wavelength of light, is one millionth of a centimeter.

Colors in the yellow and orange range of 5,800 to 6,300 A. are absorbed largely by the red-absorbing pigment form, moving the photoreaction toward the production of the growth regulating form.

The red-absorbing form can utilize more light in the 6,300 to 6,700 A. region, red-orange to red than in other ranges. Therefore, this is the range requiring the least amount of light energy to convert this pigment form to the regulating pigment. Both pigment forms are present in this range of colors, but the regulating type predominates.

Both forms of pigment are present in about equal amounts in the 6,700 to 7,200 A. (red) region, with the midway point in the reaction about 6,950 A. At longer wavelengths the reaction moves toward the red-absorbing form and the shorter wavelengths (toward yellow) stimulate the production of the growth regulating form.

In the far-red region of 7,200 to 7,800 A. light absorption by the regulating form of pigment is at maximum, moving the reaction toward the reformation of the red-absorbing form.

It is the selective absorption of the various colors of light by the two pigment forms that apparently governs many phases of a plant's development, including flowering, germination, and elongation, and that promises to add even more knowledge of plant development.

Maximum suppression of germination of Great Lakes lettuce seed takes place near 7,000 A. The scientists also found that elongation of the lettuce root was controlled by the color of light. Elongation was found to be suppressed at 6,100 A. (orange) and stimulated by exposure to light in the far-red region of 7,500 A.

The intensity of light also has a marked effect on the germination of lettuce seed. Exposed to light of 7,500 A., for example, an intensity of 0.8 microwatts per square centimeter results in about 70 percent germination. An increase to 2 microwatts gives about 35 percent germination, while 30 microwatts reduces the germination to almost zero.

These differences, the scientists point out, vary according to the wavelengths of light being used in the experiment. Below wavelengths of 6,800 A. there are no appreciable differences in germination between the three levels of light intensity (0.8 to 30 microwatts).

LONGER TERM LEASES OF CERTAIN INDIAN LANDS—CONFERENCE REPORT

Mr. ANDERSON. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6672) to authorize longer term leases of Indian lands on the Agua Caliente (Palm Springs) Reservation. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER. The report will be read for the information of the Senate.

The legislative clerk read the report.

(For conference report, see House proceedings of today.)

The PRESIDING OFFICER. Is there objection to the present consideration of the report?

There being no objection, the report was considered and agreed to.

MUTUAL SECURITY APPROPRIATIONS, 1960

The Senate resumed the consideration of the bill (H.R. 8385) making appropriations for mutual security and related agencies for the fiscal year ending June 30, 1960, and for other purposes.

Mr. GORE. Mr. President, I voted for the civil rights bill in 1957. I did so with a deep conviction that the passage of that moderate civil rights bill constituted progress in a vexatious field of human relations in which the existence of injustice and discrimination would no longer permit inaction, but in which we must beware of the dangers of using force to push beyond the tolerance of public conscience and acceptance.

I thought passage of the civil rights bill of 1957 was a victory for the forces of reason and moderation, and a defeat for the forces of extremism. I voted for it with a deep conviction that the problems could not and should not longer be ignored by Congress, and that a public examination of the facts and conditions affecting the civil rights of all citizens would serve well the cause of freedom, equality, and justice throughout the United States.

I think it is a grave error, Mr. President, for Senators to regard civil rights as strictly a sectional problem. The problem is a national one. It exists in one form or another and in varying degrees of acuteness in many States. Moreover, there are some disturbing signs that tensions between groupings of our people may be tending to increase rather than abate. Perhaps these indications are misleading. I hope so; but prudence and a decent social conscience require recognition and action.

The Civil Rights Commission has now submitted its report to the Congress and to the President. To me, this report is disappointing. The Commission has included in its report statements which are obviously based on hearsay evidence and which, indeed, are admittedly unverified. This applies to some statements in the report with respect to conditions in the State of Tennessee. I would like to make it plain that I believe every qualified citizen should not only be permitted to vote, but should be encouraged to vote. The prevalence of contrary conditions in some communities, however, does not justify the publication of untrue, hearsay evidence or unverified rumor.

The Commission has included in its report recommendations of far-reaching import. The fact that several of these recommendations do not have the endorsement of the majority of the Commission indicates immature, if not hasty, conclusions.

Even so, the report is not without merit. Some of the suggestions merit serious consideration by the Congress and the American people. The Commission quite properly concerned itself with the question of State laws relative to the qualifications of voters and has undertaken to examine administration of such laws, to ascertain whether discrimination exists. Please permit me to repeat my oft-stated conviction that the right to vote is one which should not be de-