table were a great many officials of the Department. They included the able Ambassador William Lacy who had negotiated the famous Lacy-Zaroubin Agreement, together with many Foreign Service officers. I told Bill Lacy, in front of all those present, that I regarded the agreement he had negotiated as one of the greatest—if not the greatest—single contributions to world peace in the postwar decade.

Despite progress, however, we have not really begun to get inside the Soviet Union. John Gunther wrote "Inside Soviet Russia Today," but we Americans have not really been inside that vast country or inside the Soviet mind. We have not really come to know the Soviet people, nor they us.

NEW COMMITTEE PRINT AVAILABLE

In this connection, I should like to cite to my colleagues a new 57-page booklet entitled "United States Exchange Programs With the Soviet Union, Poland, Czechoslovakia, Rumania, and Hungary."

This committee print shows the many delegations which have been exchanged between the countries during the last 1½ years in such fields as agriculture, education, music, the physical sciences, medicine, industry, and other fields.

ORIGIN OF BOOKLET IN MOSCOW VISIT

The booklet arose out of my own visit to Moscow and my study of the medical exchange program. I went there in my capacity as chairman of the Subcommittee on Reorganization and International Organizations of the Committee on Government Operations, conducting an international health study, as authorized under Senate Resolution 347, 85th Congress. Thereafter, I asked the State Department for a comprehensive report not only on the medical exchange, but on all other exchange programs under the agreement. The Department made the report and in a very helpful and informative fashion.

The material was turned over to the Committee on Foreign Relations; this subject logically falls within its vast and essential jurisdiction. Through the courtesy of the distinguished chairman, my able colleague from Arkansas [Mr. FULBRIGHT], the booklet was thereafter issued as a committee print by the Committee on Foreign Relations.

It is fitting that it was he who arranged this, because no single Member of the Senate has done more to awaken the people of the world to the value of exchange programs than has the famed author of the Fulbright Act.

Several thousand copies of the booklet have now been published. I would like to see one in the hands of every American university, for student exchanges are one of the most important programs. And I would like to see every American cultural organization see it, so as to stimulate their own thinking on future exchanges, formal and informal.

I cordially invite my colleagues to secure copies of the booklet. A supply may be obtained from the Committee on Government Operations. The Committee on Foreign Relations has kindly made available a large number of copies to that committee.

I hope, therefore, that after the Khrushchev visit exchanges will proceed full speed ahead and that there will be adequate money to finance travel by American exchange missions to the U.S.S.R.

PUBLIC LAW 480 FOREIGN CURRENCY LOAN REPAYMENTS

Mr. HUMPHREY. Mr. President, I have a brief statement in reference to the conference report on the amendment to Public Law 480, to clarify a point which was developed in that report.

The committee of conference did not adopt a provision in the Senate version which would have specifically authorized foreign currencies which are now beginning to come in through payments of principal and interest on loans made under section 104(g) of Public Law 480 to be used for assistance in the establishment and operation of binational foundations for the purpose of promoting education, health, and public welfare. This action by the committee does not mean that these foreign currency repayments are frozen from any use whatever. Rather, as I understand it, these foreign currency repayments, like the foreign currencies originally received on sales of surplus commodities under title I, may be used under existing law for the various purposes set forth in section 104 of Public Law 480—for example, to help develop new markets abroad for U.S. agricultural commodities, or possibly for binational foundations which will contribute to economic development. I described the possibilities under this section in my remarks of Friday, September 11, on page 17533, when I said, "Certain provisions under section 104 are maintained without change or interference * * * it should be understood that the use of foreign currencies is supplemental to, in addition to, regular appropriations."

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.

The PRESIDING OFFICER. The question is on agreeing to the amendments, as modified, of the Senator from Virginia [Mr. ROBERTSON].

Mr. MORSE. Mr. President, as I stated a few minutes ago, I think the pending amendment raises such an important problem of constitutional law that even though the chairman of the Committee on Appropriations and others on that committee are willing to take it to conference, I do not think it should go to conference until legislative history in much greater detail than has been made on it.

The Senator from Virginia [Mr. ROBERTSON] deserves great credit, thanks, and appreciation from the Senate for his sincere attempt to provide something in this law which, at least, will give us a procedure by which we may be able to obtain from administrative and regulatory bodies within the administration the information we need concerning the expenditure of appropriated funds.

But even the distinguished Senator from Virginia would be the first to admit that the language he brings to the floor of the Senate is not the language he would like to bring to the floor of the Senate. He would prefer to go much further.

The Senator from Oklahoma [Mr. MONRONEY] made the suggestion that we try to put some teeth into the amendment by making it perfectly clear that if there were received a certification by the President that he considered the disclosure of the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested to be contrary to the public interest, we would review the certificate and decide for ourselves whether or not the President showed good cause in the certificate for not making the information available.

If we should reach the conclusion that we were not satisfied with his certification, we would notify him that unless the material were to be submitted to us forthwith, any further expenditure of money from appropriated funds would, in effect, be stopped by Congress impounding the funds. Either we must come to grips with this issue, or, in my judgment, we shall be guilty of surrendering a very precious congressional power and right to an administration which already has taken us a long way down the dangerous road of government by the Executive.

In the course of my remarks this afternoon I intend to discuss Marbury versus Madison, which is the constitutional landmark case of 1803. In my judgment, that case gave rise to the consideration of this problem.

I shall discuss some other legal precedents involving this very important constitutional point; but at the outset of the speech I wish to make it very clear that in my judgment the Robertson amendment does not meet the problem which confronts us. It is better than nothing, but that is about all I can say for it.

The amendment does make it clear that the Congress still has the right to follow appropriated funds and that it has the right to stop the expenditure of such funds if it cannot receive information from the administrators of the various departments as to how such funds are being spent.

HISTORY OF EXECUTIVE PRIVILEGE

Mr. President, the study most frequently referred to in the consideration of legislative-executive relations and the issue of withholding information sought by Congress is the one done by Herman Wolkinson which appeared in the Federal Bar Journal of April 1949.

Wolkinson goes through an interesting list of contests between the President and the Congress over information possessed by executive departments. He cites cases in the Washington, Jefferson, Jackson, Tyler, Polk, Buchanan, Cleveland, Theodore Roosevelt, Coolidge, Hoover, F. D. Roosevelt, and Truman administration which he claims demonstrate that the President has always won

Sept 12

out when he desired to withhold information from Congress.

This study was apparently the basis for a memorandum which the Attorney General furnished the President and which was in turn passed from the President to his Secretary of Defense in a letter dated May 17, 1954.

The President said to the Secretary of Defense on that occasion:

Within this constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation. * * * Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employees of your Department that in all appearances before the subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

Unfortunately, the study done by Mr. Wolkinson argues so completely from the executive point of view that it overlooks a very important fact about many of the issues he cited between the Executive and the Congress.

That fact is that in many of his own instances the President involved reiterated his right to withhold information under certain circumstances, but complied with the congressional request in the case at issue. At times when our Presidents have set forth their most ringing declarations of Executive powers they have at the same time decided that what Congress wanted, Congress was entitled to have.

In the hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on March 19, 1959, Mr. J. R. Wiggins, vice president of the Washington Post, went through the list of historical cases listed by Herman Wolkinson and pointed out how several of them fail to prove Mr. Wolkinson's conclusion.

I quote from Mr. Wiggins' statement, beginning on page 180 of the printed hearings:

In a memorandum on congressional powers previously referred to the Department of Justice has stated these propositions:

"(1) For over 150 years—almost from the time that the American form of government was created by the adoption of the Constitution—our Presidents have established, by precedent, that they and members of their Cabinets have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. * * *

"(2) Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion."

These sweeping propositions are not sustained by the argument made in this memorandum. The second proposition is not consistent with some of the cases cited above. The first proposition is not supported by the record of early presidential precedents on which it rests.

THE HISTORICAL PERSPECTIVE

The historical background for this sweeping claim of absolute privilege first appeared in the Federal Bar Journal of April 1949, in an article by Herman Wolkinson, entitled "Demands of Congressional Committees for Executive Papers." It is the source document for the statement which the Department of Justice submited in 1954, accompanying President Eisenhower's letter to the Secretary of Defense of May 17, 1954. It has been drawn upon for the somewhat enlarged memorandum which Attorney General Rogers submitted to the House Committee on Government Operations and to the Senate Subcommittee on Constitutional Rights. The Wolkinson article concluded with the statement:

"In the great conflicts which have arisen, in the administrations of Washington, Jackson, Tyler, Cleveland, Theodore Roosevelt, and Herbert Hoover, the executive has always prevailed."

This contention is simply not supportable even on the basis of the historical episodes to which Mr. Wolkinson alludes and which the Department of Justice has incorporated in its memorandum. Space does not permit or time allow the examination of all these historical incidents but it is worth while to examine at least the early episodes which were of such importance as precedents and on which the Wolkinson article and the Justice Department memoranda lay such stress. The memorandum of 1952 is the source of the quotations used in this effort to refresh historical perspective.

THE ST. CLAIR EPISODE

As the memorandum states, in March 1792, the House of Representatives passed the following resolution:

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

This resolution related to the disaster encountered by General St. Clair's force of 1,400 men on November 3, 1791, when it was surprised by an Indian attack near a Miami settlement, in which 900 men were lost and the command driven back in disorder.

Before establishing the Congressional committee of inquiry, the House had debated a resolution calling upon the President to undertake such an inquiry but had decided against this course.

Says the Attorney General's memorandum:

"When the committee was bold enough to ask the President for the papers pertaining to the General St. Clair campaign, President Washington called a meeting of his Cabinet."

A description of this meeting (there were really two meetings) is taken from Jefferson's notes, which repeat this conclusion of the Cabinet:

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

This account of the Cabinet's conclusion was obtained from Thomas Jefferson's writings, but it is not a full account. Thomas Jefferson, in relating the episode, in addition to the matter reported above, said:

"Hamilton agreed with us in all these points except as to the power of the House to call on the heads of departments. He observed that as to his department, the act constituting it had made it subject to Congress in some points, but he thought himself not so far subject as to be obliged to produce all the papers they might call for. They might demand secrets of a very mischievous nature. (Here I thought he began to fear they would go on to examining how far their own members and other persons in the Government had been dabbling in stocks, banks, etc., and that he probably would choose in this case to deny their power; and in short, he endeavored to place himself subject to the House, when the Executive should propose what he did not like, and subject to the Executive when the House should propose anything disagreeable.) Finally agreed to speak separately to the members of the committee, and bring them by persuasion into the right channel. It was agreed in this case, that there was not a paper which might not be properly produced; that if they should desire it, a clerk should attend with the originals to be verified by themselves."

Mr. President, one would think that was not 1792, but 1959, because the problem of contest between Congress and the Executive over the issue of Executive privilege has existed as long as our Republic has existed.

I also want to stress the great difference on this issue between this administration and previous administrations, going back to the time of Washington, Jefferson, and Madison. Those early Presidents—in fact, the Presidents throughout our history, until we have reached this almost blanket mandate from the Eisenhower administration—have taken the position that their right of privilege was discretionary with the President, and that the President would not exercise it unless he, as President, decided that the national interest involved in the request was of such a nature that he had the executive duty to deny the congressional request.

I have no objection to that. In fact, I have taken a position, time and time again in support of the right of Presidents to exercise the doctrine of executive privilege. It is inherent in the separation of powers doctrine.

If we are to have three independent branches of Government, and we must have them for our form of self government and to preserve our independence, then I will not support any proposal which seeks to take away or encroach upon the Executive privilege of any President of the United States, I care not who he is. If I understand the Senator from Virginia [Mr. ROBERTSON] correctly, that is exactly his position.

COMPLAINT OF CONGRESS IS WITH THE ABUSE OF EXECUTIVE PRIVILEGE

But what we are objecting to is that this administration, through its Attorney General, has, in effect, sought to delegate a constitutional power of a President to all the administrative officers of his administration. That I contend, is beyond his power. President Eisenhower does not have the constitutional power to give blanket authority to his Cabinet officers, to the heads of the various departments, to the subordinates in those departments, to

the regulatory agencies, to exercise for him the doctrine of Executive privilege. Certainly this earliest Cabinet in our history together with the first President, set forth that very doctrine and acted on it, as well.

Moreover, when we get to discuss Marbury against Madison later, it will be seen that the very first case in our constitutional history helps clarify and support this doctrine, namely, that the use of executive privilege is personal to the President and calls for personal action by the President whenever an issue is raised between Congress and the executive branch of the Government over a request by Congress for information.

That is a power which resides with the President, an elected representative of all the people of the Nation. It was not intended as a power which he could delegate to some bureaucrat who never stood for election; or who, if he did stand for election, was defeated and was then appointed by the President to fill some adminstrative office. With that type of bureaucrat this administration is honeycombed.

The legal argument I make this afternoon is based on the premise that executive privilege is personal to the President. When he exercises it personally, he will never find a stronger defender of that principle than the senior Senator from Oregon. I have defended it over and over again.

I remember that I defended it at the time of the MacArthur hearings, when I was a member of the Committee on Armed Services, and an attempt was being made to get a statement, through testimony, from General Bradley on one occasion, and Secretary of State Acheson on another, as to what was said at conferences held at the White House prior to the action which President Truman took in connection with the MacArthur incident.

Those witnesses took the position, and rightly so, that they did not feel that they were free to testify as to what happened in the meetings with the President of the United States at the White House, without the approval of the President. That was a perfectly sound position for them to take. They contended that the committee, therefore, could not press against the witnesses, but could only seek from the President the authority for them to tell, with the permission of the President, what transpired at the White House conferences. The RECORD will speak for itself.

When it was suggested that perhaps the committee should have considered holding the witnesses in contempt because of their refusal to disclose what happened in the White House conferences, we had, in respect to one of the instances, quite a discussion and a vote, and a majority of us sustained the doctrine of executive privilege.

We could have taken the next step, and could have sought to get the President to give permission for them to testify about what was said at the White House conference. But we did not do so, because all of us recognized that we were dealing with a matter which obviously was one in which a President would not give such consent, and should not be expected to do so; and we thought that, under the circumstances, it would be an affront to him to ask him to do so.

I refer to this matter only to point out that the Congress has been a great respecter of executive privilege. It seems to me that in the discussions of the matter of executive privilege, there is sometimes sought to be created in the public mind the impression that Congress lies in ambush, waiting to embarrass an administration by seeking to obtain from it information which good, commonsense would indicate Congress should not request, whereas if Senators really believed in the doctrine of the separation of powers—and, Mr. President, if we do not, of course we have no place in this body, because the doctrine of the separation of power is one of the most precious of the constitutional checks— they should not ask the President to make available to them any material which might fall within the prerogatives of the President under the doctrine of executive privilege.

NO EXECUTIVE PRIVILEGE AT ISSUE IN ECONOMIC AID

However, Mr. President, such a situation does not exist in the case at point. The ICA was created with the approval of Congress; the ICA administers hundreds of millions of dollars of the funds of the taxpayers, in connection with the economic-aid program. As the Senator from Virginia [Mr. ROBERTSON] has pointed out, by means of the original amendment we were not seeking to obtain any necessarily secret information about what happens in connection with the expenditure of the funds appropriated for military purposes by Congress.

It is not my position that we should not do so, although when we try to obtain information about what happens to the funds appropriated for military purposes, we much more frequently encounter legitimate uses of the executive privilege than we do when we seek to obtain information about the expenditure of the funds which have been appropriated for economic aid.

So, although I shall discuss for a few minutes the fact that we are seeking to obtain from the ICA information about what has happened to the funds appropriated for economic aid, under the foreign aid program, I do not want that to be interpreted in the future as seeming to be a concession by me that Congress would be acting beyond its prerogatives if it sought to obtain from the executive branch information in regard to what happens to funds which have been appropriated for military aid.

Not one of us, to my knowledge, ever has asked, or would ask, the administration for information in regard to any matter which would involve top military secrets. In view of the Executive powers of the President, I do not think we should attempt to obtain information from the President which could, by mean of the process of deduction, result in the disclosure of information about a military secret, which would be helpful to a potential enemy. In such cases, all the President would have to do would be to say, "I cannot give you this information, because it relates to matters which, in my opinion, as Commander in Chief, I must keep secret, even from the Congress."

Here, again, history shows that past Presidents have leaned over backwards in trying to cooperate with the Congress in providing all the information which could be given to Congress without having the President violate what he considered to be his duty, under the Constitution not to make public information which, in his opinion, the best interests of the Nation required him to keep secret.

It becomes a matter of judgment and of degree, and also a matter of whether there is an intent and a desire on the part of the Executive at any given time to try to cooperate with the legislative, elected officials of a free people, and to try to carry out what I believe was obviously intended in connection with our Constitution—namely, that the branches of the Government work together, not against each other. When they come to an issue on which there is an honest and sincere difference of opinion, the two bodies involved—the legislative branch and the executive branch—should carry out their constitutional powers under our system of checks and balances—which, in the case of a measure passed by the legislative branch, would mean a Presidential veto of that act of Congress, following which the Congress would have the right to override the veto by means of the necessary two-thirds vote; or, in this case, the right of the President to say, "I exercise the Executive privilege in this case because in my judgment it will not be in the national interest to make this particular information available to you."

But that is quite different from doing what I respectfully submit this administration has attempted to do; and I believe that the memorandum of the Attorney General, to which I shall refer later, makes that clear—namely, that the President issued to the Defense Department a directive in which, in effect, he said to its employees, "You are free to exercise my Executive privilege." Mr. President, to that, I will never agree.

I intend to insert in the RECORD a considerable amount of the material I have prepared in connection with this argument, Mr. President. However, the development of the legislative history in regard to this amendment is so important that we must not permit the amendment to go through the Senate today with only the small amount of discussion which has occurred thus far in regard to the importance of this constitutional issue.

So, Mr. President, I shall take a few moments more to discuss some of the early history; and then I shall insert in the RECORD the remainder of my comments on the specific cases, and thus save a great deal of time.

Mr. President, that account of the Cabinet's conclusion was obtained from Thomas Jefferson's writings; but it was not a full account.

Next I wish to call attention to an account in Freeman's biography of George Washington:

> The copies of St. Clair's reports, covered by this message were sent precisely as received, and when published, they were complete. Not even the ugliest line on the flight of the beaten troops was eliminated. Washington had learned long previously the protective value of candor in dealing with the American people and he knew that one reason for their trust in him was their belief he would tell them the whole truth.

As Mr. Wiggins puts it, in the light of this more complete account of that episode, can it possibly be argued that it sustains the position of the Department of Justice or that it supports Wolkinson's statement that the Executive has always prevailed?

The House demanded the papers. The Cabinet agreed that the House might institute inquiries. It thought it might call for papers. It thought the President should exercise discretion, but in this case decided to make all the papers available. The Cabinet felt the House inquiry should have been directed to the President, and not his department heads, but all the papers were nonetheless produced.

I want to repeat that, Mr. President: The Cabinet, at the very beginning of this Republic, agreed that the House might institute inquiries. It thought it might call for papers. It thought the President should exercise discretion, but in this case decided to make all the papers available. It felt the House inquiry should have been directed to the President, and not his department heads, but all the papers were nonetheless produced.

That is the record which Thomas Jefferson, a member of that first Cabinet, leaves as to its judgment on the nature of executive privilege.

I think that is pretty sound procedure today, too. All we are suggesting, in effect, in the amendment offered by the Senator from Virginia, is a sort of a stopgap for the time being, until, in the next session of Congress, we can go into a fuller consideration of this problem by a bill containing broader language, so that if the ICA refuses the Appropriations Committee information that it seeks as to what is happening to appropriated funds for economic foreign aid, the President shall then make the decision himself on the specific request, and the President shall certify that the information shall not be available to the Congress.

Listen to the language of the Robertson-Ellender-Humphrey amendment:

> None of the funds herein appropriated shall be used to carry out any provision of (this act) or with respect to any project or activity, after the expiration of the 35-day period—

The period of 35 days, instead of 20 days, has been accepted—

> which begins on the date the General Accounting Office or any committee of the Congress, or any duly authorized subcommittee thereof, charged with considering legislation or appropriations for, or expenditures of, the International Cooperation Administration, has delivered to the office of the Director of the International Cooperation Administration a written request that it be furnished any document, paper, communication, audit, review, finding, recommendation, report, or other material relating to the administration of such provision by the International Cooperation Administration in such country or with respect to such project or activity, unless and until there has been furnished to the General Accounting Office, or to such committee or subcommittee, as the case may be, (1) the document, paper, communication, audit, review, finding, recommendation, report, or other material so requested, or (2) a certification by the President that he considers the disclosure of such document, paper, communication, audit, review, finding, recommendation, report, or other material to be contrary to the public interest and has forbidden its being furnished pursuant to such request.

AMENDMENT IN KEEPING WITH HISTORIC INTERPRETATION OF EXECUTIVE PRIVILEGE

How sound in American history this amendment is. How fully in keeping with this historical record that I am putting into the CONGRESSIONAL RECORD this afternoon. Starting back in 1792, when the House sought certain information from a Government department, and the President's Cabinet met, as I just got through pointing out, the Cabinet thought that the request should have been directed to the President himself, instead of to a department of Government, but the Cabinet thought, and the President agreed, that the papers asked for, granting of which was discretionary with the President, under the circumstances of that particular case, should be granted to the House committee.

I say that is 1959 all over. The same problem is with us. What has happened in the meantime? In the meantime it has become a common practice for congressional committees to make their requests for information from executive departments, just as they did in 1792. But until recently, Mr. President, when the Congress sought information from some executive department, the executive department sought a ruling from the White House as to whether or not the information should be made available

This administration is trying to change this matter of personal executive privilege into departmental executive privilege; and I say that is not contemplated by the Constitution; it is not authorized by the Constitution; and, in my judgment, if we can ever get the question before the Supreme Court for a judicial determination, it will not be sanctioned by the Court, on constitutional grounds.

So all the Senator from Virginia is doing at the present time is, if one wants to put it this way, making it perfectly clear that a denial of a request for information from ICA must receive the President's personal attention by this requirement of a Presidential certification that the material is to be denied.

I would go further. I would draw the issue as the Senator from Okahoma [Mr. MONRONEY] suggested that it be drawn; but, if I understood the Senator from Okahoma correctly, it was his position that perhaps for the time being we should go only as far as the Robertson-Ellender-Humphrey amendment goes, with a notice to the administration that by so doing we concede nothing and that by so doing we give notice that come the next session of Congress, we intend to take this matter up again. We should seek to get it clarified further and enact legislation that will then come to grips with the administration with a provision that impounds funds so far as concerns making any more funds available for any particular project about which we seek information being denied to us by the President.

Until Congress enacts that kind of legislation, it is going to be very difficult to get the question at issue before the Supreme Court for a decision. I think this matter has now taken such proportions, Mr. President, and is so threatening our legislative rights here in the Congress, that we need to get the question before the Supreme Court for a final determination.

CONGRESS SHOULD REOPEN MATTER NEXT YEAR

If the Monroney amendment were pressed at this time I think it would accomplish that purpose, but in a spirit of great cooperation, I am not going to press for it. I am going to accept the Robertson amendment although, as I say, I think it is a rather toothless amendment. It is hardly aught but a serving of notice of our insistence that we are not receding from any of our rights, and it has the additional effect of at least putting the President in a position where he is bound to file a certification called for by the act if he wishes to get the money for the project.

As I interpret the amendment, if the President routinely gives certification, there is no language in the amendment which would lay a basis for our doing anything about it. The Senator from Virginia [Mr. ROBERTSON], if I understood him correctly, said we had the power of the purse. We have the power of the purse as to the next appropriation bill, but we would not have any authority over the money already appropriated unless language were put in along the lines of the language proposed by the Senator from Oklahoma [Mr. MONRONEY].

On the other hand, I am never going to take the position with respect to our present President or any other, a man who has been elevated to the greatest office not only in our country but in the world, that once there is laid on his desk the language of the Robertson amendment, which provides for a request for a certification—and that is about the best that can be said for it—that a President is going to take lightly the filing of such certification. I think this or any other President would respect the purpose and the intent of such legislation.

PRESENT CONTROVERSY OVER ICA EVALUATION REPORTS

So I think it is in effect stop-gap legislation which will serve notice on the administration that we do not feel very kindly about the number of times we have been denied, not by the President personally, but by his departments and executive officials, information to which we think we are entitled if we are to carry out our legislative trust to the American people.

In the Foreign Relations Committee this year we spent a great deal of time discussing this problem, because we were concerned about the evidence being submitted to us and the allegations being filed as to corruption, inefficiency and waste in the administration of the Foreign Aid program.

We knew the administration had on file a whole series of so-called evaluation reports, that is, reports on the operation of the foreign aid program, prepared for the administration by competent experts who had been sent out to make a survey, to take a "look-see," to make an analysis of the administration of the foreign aid program and report back to the President through the Department of State. This has become known in this debate as the ICA evaluation report.

Consistently the ICA has denied us those reports. I want the American people to know as a member of the Foreign Relations Committee that those reports would have been of great help to us in evaluating the operation of the foreign aid program in various parts of the country. Making those reports available to us would have saved the taxpayers of this country many, many thousands of dollars.

Let me tell, Senators, what is bound to happen now. The Senator from Virginia referred to it in passing. Let us consider the investigation that the Committee on Foreign Relations has been conducting in connection with charges that there has been great waste in Vietnam. There is an evaluation report on Vietnam, and we would like to have seen it. What is so secret about that? As the Senator from Virginia [Mr. ROBERTSON] has indicated, we are going to have to send out legislative investigatory committees to duplicate what this group of evaluators sent out by the executive branch of the Government have already done.

Does that make sense? It makes nonsense to me, so far as the duplication of expenditure is concerned. But the Senate still has the duty to get the facts as the basis for future legislative action. If the executive branch of the Government will not cooperate with us by giving us the information they have already collected, and which we can judge for ourselves, we may have to conduct independent investigations. It would be much more sensible to make use of their reports. After we had studied their evaluation reports, we oould decide whether we would be justified in conducting a new and independent investigation.

Mr. President, it is just horsesense. I do not want them to turn over to us any top secrets which would injure my country if they should get into the hands of potential enemies. When I had a representative of the State Department on the stand for the Committee on Foreign Relations, I asked him some questions about the reason for their action. Now, let the record speak for itself. In the course of my examination of that State Department official, I asked him how many people had seen these evaluation reports this group of evaluators filed with the Department of State, and through the Department of State with the President. The testimony will show he said some 25 or 30.

I asked him, "Who are they? Of the 25 or 30, how many of them are elected officials?"

If you count the President and the Vice President, there would be two. Of course, we all know the President really sees very few of them. We know they are handled by appointed officers who were not elected. They are handled by people in the ICA and in the Department of State. In fact our discussion in committee showed there was no certainty that the Vice President could see them. It was agreed if he sought to see them, in all probability he would be allowed to do so. But he is not necessarily assured the right to see them. And so we have this information that the congressional committee seeks to look at in order to reach a judgment as to whether foreign aid is being properly administered in Vietnam, Laos, or anywhere else where we are spending so much money.

This information is available to a group of appointed individuals or individuals serving as civil servants under our career system. If they can see them, as we said in our discussion in the committee, what is so wrong with letting members of the Committee on Foreign Relations of the U.S. Senate see those reports? Why may we not see them?

Why may not we see them, in order that we may better determine whether or not we are appropriating too much money, in order that we may better determine whether or not we should modify the foreign aid law in some particular, perhaps in respect to personnel? If the evaluation reports show that there are inefficiencies or wrongdoings, perhaps it is because our standards for selecting personnel are not right.

I have been at a loss to find a single good reason why the Foreign Relations Committee of the Senate and the Foreign Affairs Committee of the House, to which committees come requests from the administration for authorization for the whole mutual security program, cannot be taken into the confidence of the administration. At the very least they should be allowed to take a look at the evaluation reports, which have been filed in the field. After all, some 25 or 30 appointed officers or civil service officers of the State Department or the ICA are allowed to see the reports. If the present arrangement makes sense, I become lost in that kind of logic. It does not make sense. It is not in the interest of the American people.

What do I think the general practice should be? The general practice should be what it has been on the part of past Presidents throughout our history. Starting with the case I just cited, back in 1792, it was thought that the material and papers asked for were papers which the President, at his discretion—and the Cabinet made that very clear—should make available to the House committee, and did. Thus it will be seen that that is the position of President after President, decade after decade, as issues of Executive privilege have arisen between the Congress and the President. No President has ever given up his constitutional right to exercise Executive privilege when he has exercised discretion in making material asked for by the Congress available to the Congress, because he reached the conclusion that his action would not in any way jeopardize the public interest.

We are asking that the traditional practice be followed. But we have run up against a stone wall with this administration. We have run up against a President who has, in effect, given blanket authority to his departments to render the decision for him as to whether or not the material should be made available. They notify the Congress that it is not to be available, and we are stopped there.

What the Senator from Virginia seeks to do by this amendment is to provide that the President shall certify that the material should not be available, and give his reasons.

THE JAY TREATY

The second historical episode I wish to mention this afternoon is that involving the request of the House of Representatives for instructions and papers furnished our ambassadors who negotiated the Jay Treaty. The facts were all brought out by the great journalist who is known, I am sure, to each one of us, in the statement he made to the Congress. I refer, of course, to Mr. Wiggins, of the Washington Post.

I continue to quote from his statement:

> This case no more sustains the claim to sweeping powers of nondisclosure than the first episode. Here, President George Washington refused the papers on the sound and specific constitutional ground that the Senate and not the House was entrusted with authority to advise and consent on the making of treaties. It was because he did not acknowledge that the House was involved in the treatymaking power that he denied the requested papers. This is made plain in the quotations from the President's message by the Department of Justice.
>
> The issue involved appears with greater clarity as a result of a subsequent situation involving diplomatic papers in which President John Adams did respond to a House resolution under conditions that made the House request constitutional.
>
> On Monday, April 2, 1798, the House called up the following resolution:
>
> "*Resolved,* That the President of the United States be requested to communicate to this House, the instructions to, and despatches from the envoys extraordinary of the United States to the French Republic, mentioned in the message of the 19th instant" (which reported the failure of the negotiations with France).
>
> It was then proposed to add the following amendment: "excepting such parts of said papers as any existing negotiation may render improper to be disclosed."
>
> Then Mr. Nicholas said he "did not think it would be right in the present situation of things—when we are told by the President that the negotiation with the French Republic is at an end, and that there is no chance of an accommodation taking place between the two countries—to agree to any exception of this kind. Called upon to act in this desperate state of things, he thought it would not be right for any part of the papers which had led to it to be withheld from Congress. The President having thought fit to declare that all negotiation is

at an end, that he is without hope of an accommodation, it could not be thought proper that the legislature should be called upon to act upon less information than that upon which the President himself had acted. He thought the Constitution must have intended this when it placed the power of declaring war in their hands; to suppose the contrary, would be to suppose an absurdity."

The author of the amendment wished to withdraw it rather than have a vote on it (that seemed likely to be unfavorable) and in so doing stated that he thought the President had the constitutional power to withhold such parts of the papers as he felt it improper to communicate.

Mr. Harper said, "The present call for papers stood upon a very different ground from that made when the British Treaty was under consideration; the objections, of course, against that call would not apply in the present case, as the papers now called for were wanted to throw light upon a subject confessedly within the constitutional powers of the House. He therefore held the call not only to be constitutional but expedient. Nor could he see any ground for the amendment; if the House had a constitutional right to ask for information, they had a right to ask for the whole information, and the President would judge how far he could with propriety comply with the call. But since the House did not know that the communication of any of these papers would be improper, the whole ought to be called for; and, if the President should think it proper to retain a part, he would doubtless give sufficient reasons to the House for doing so. On a former occasion when it was moved to modify the resolution calling for papers in the way now proposed, the motion was rejected, because it went to alter the principle contended for; and he believed the same reason would lead to a rejection of the present motion."

The amendment was then defeated and the resolution itself adopted, by a vote of 65 to 27.

On April 3 the President sent a message to Congress stating: "In compliance with the request of the House of Representatives expressed in their resolution of the 2d of this month, I transmit to both Houses the instructions to and dispatches from the Envoys Extraordinary of the United States to the French Republic, which were mentioned in my message of the 10th of March last, omitting only some names, and a few expressions descriptive of the persons.

What now of the allegation that "the Executive has always prevailed"?

Here is a perfect illustration of the limits of Executive privilege, of the difference between a request that was unconstitutional because it exceeded the powers of the House, and one that was constitutional because it was within the powers of the House. There is, as well, an illustration of the readiness of the House to accept the sound reasons of the Executive for withholding the names that went down in history as participants in the XYZ affair.

It is not to be overlooked that the disclosure of the instructions to our ambassadors in the matter of the Jay treaty would have divulged to a hostile House that the Embassy had achieved few of the things it was instructed to obtain. And it is not to be forgotten that Adams dealt the House Republicans a sharp political rebuff by the XYZ disclosures.

So, Mr. President, from the very first administration of this Republic the first President of our Nation recognized that he had the personal constitutional right to exercise executive privilege, but he also appreciated the fact that he had the executive duty to cooperate with the legislature, the Congress, to make available to the Congress all such information that it felt it might need in carrying out its legislative duties. I recommend the record of Washington, Jefferson, Madison, and all the other Presidents up to President Eisenhower, because they have carried out in the main, with certain exceptions which I will include in the RECORD later, the thesis that I am making in the RECORD this afternoon, namely, that this matter of executive privilege is personal to the President. It is not a privilege that he can delegate by way of a blanket Executive order to men in charge of departments or working in departments, men who never were elected by a free people. It is a responsibility that the President must assume personally.

That is what the Robertson amendment as far as it goes—and it does not go nearly far enough—purports to make perfectly clear in the action that the Senate is asked to take.

CONGRESS, TOO, HAS CONSTITUTIONAL PREROGATIVES

I am going to go as far as the Robertson amendment goes, but I hope that come next session Congress will go much farther and will pass legislation which, in my judgment, we have a constitutional right to pass. I am perfectly willing to see Congress pass the legislation and then let the U.S. Supreme Court render a decision as to whether or not we are acting within the framework of the Constitution.

The President undeniably has his prerogative of Executive privilege. But it is also undeniably the prerogative of the Congress to appropriate money and to lay down terms and conditions for its expenditure.

We should pass legislation which makes clear that if we cannot get information from the ICA, for example, on how the foreign aid program is being administered, we will not permit additional funds to be expended on any project until such information is made available to us. When we know that these agencies have reports which have been prepared at the expense of the American taxpayers, when we know that groups of experts have been sent all around the world to make these evaluation reports, and then they take the position under executive privilege that those reports shall be denied to us and force us to spend more taxpayers' money to make congressional investigations of the same subject matter, I am willing to impound their project funds by appropriate legislation.

I am willing that such legislation be passed upon by the U.S. Supreme Court, and I am perfectly willing to say, in my own judgment, if that legislation is properly worded it will be sustained by the Court as a proper exercise under the Constitution of our checking powers upon the executive branch of the Government. When the funds for any project are stopped, as herein suggested, we should then be in a good position to get the matter at issue for Court determination.

Mr. President, from the very beginning of the history of our country this interpretation of the executive privilege which I am making in this speech this afternoon has been followed by our Presidents until this administration took office. Since that time we have had a great increase in refusals on the part of the President to give us information which we need. Worse than that, we get a directive that in effect seeks to delegate this executive privilege to subordinates within the executive branch of the Government, and I believe, Mr. President, and I speak most respectfully but firmly, that the President is guilty of an abuse of the constitutional prerogative in assigning such executive privileges.

Mr. President, just a word or two about Thomas Jefferson's administration. This is the next item discussed in the Wiggins article.

I think Mr. Wiggins did a remarkable job of legal research in collecting and preparing this analysis of the alleged precedents that Professor Wolkinson cited in his Law Review article. His analysis demolishes the Wolkinson article because it points out that although the Presidents alluded to their right of executive privilege time and time again after stating that they had the right to refuse the papers, they in fact made the papers available.

The Wiggins article continues:

PRESIDENT JEFFERSON'S ADMINISTRATION

The House of Representatives' demand upon Thomas Jefferson for the papers in the Burr case is next cited. It is not easy to discover what this episode proves about executive prerogative. In making its request, the House asked for no papers "such as he may deem the public welfare to require not to be disclosed."

Even though the resolution itself exempted papers the President thought should not be disclosed, Jefferson felt obliged to explain the nature of the papers that he did not convey, that is, matter "chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question."

The House invited the President to withhold everything that he thought the public welfare required not to be disclosed. He complied with its request, and exceeded it because he was not content to exercise an outright discretion without full explanation of what he withheld and why he withheld it.

Mr. President, what does the Jefferson case prove in regard to his exercise of executive privilege in regard to the Burr controversy? Mr. Wiggins asks:

Is this another of the situations in which the executive has unvaringly prevailed? When the President does not disclose papers he was not asked to divulge, does this shed much light on his right to the sort of privilege the Justice Department memorandum claims for the Office?

It should be noted at this point that the Burr trial is often cited as an example of executive refusal to comply with a subpena duces tecum. In his remarks during the Burr trial, Chief Justice John Marshall had indicated that he would require the attendance of the President and asserted the power

of the Court to compel his attendance. But when the writ was drawn up, it contained this statement:

"The transmission to the Clerk of this Court of the original letter of General Wilkinson, and of copies duly authenticated of the other papers and documents described in the annexed process, will be admitted as sufficient observance of the process, without the personal attendance of any or either of the persons named.

"Thus Marshall did not issue the challenge to the President which he had indicated in Court that he would issue, and consequently historians have been misled into believing that Jefferson defied the order of the Chief Justice."

The Burr trial did produce, in the oral remarks of the Chief Justice, a sweeping assertion of judicial power and in the statements of Thomas Jefferson, equally sweeping allegations of executive immunity to judicial process, but it was a debate, not a legal collision.

THE JACKSON EPISODE

The Attorney General's memorandum next cites a case in the Jackson administration. The example cited—that of an investigation of a Jackson appointee accused of land frauds—undoubtedly is to the point but it probably is not one that any modern President, in the same circumstances, would follow.

There is a curious twist in this episode. One of Jackson's reasons for refusing the information was that the Senate was investigating the matter in secret sessions under circumstances that would deprive the accused of one of his basic rights—"that of public investigation in the presence of his accusers and of the witnesses against him." Executive secrecy was thus invoked in response to Senate secrecy.

President Jackson's disputes over yielding information to Congress were frequent.

In the light of his refusal to yield land fraud papers noted in the Department of Justice summary, it is remarkable that in his celebrated "protest" of a Senate censure resolution in 1834, he said:

"Cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it should inquire and decide upon the conduct of the President or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Jackson refused to comply with Senate and House requests on many occasions.

On December 12, 1833, he refused a Senate request for copies of a statement he was alleged to have made to the heads of his executive departments.

On January 6, 1835, he rejected a House request for communications over the northeastern boundary dispute, settlement of which was then in progress.

Against these examples of President Jackson's flat refusal to convey requested papers, there also must be set his repeated, if sometimes reluctant, acquiescence to the demands of Congress. These affirmative responses were very numerous.

On January 7, 1834, he sent the House a copy of a contract for the construction of a bridge across the Potomac, together with all the information the Secretary of the Treasury "is now able to communicate" on the subject.

On February 12, 1834, complying with a House resolution, he transmitted to the House a list of presents received from foreign governments by officers of the United States, on deposit in the State Department.

On March 8, 1834, responding to a House resolution, he sent up instructions and other papers in connection with trade with Cuba and Puerto Rico.

On March 20, 1834, in response to a Senate resolution, he sent up copy of instructions given the U.S. Minister to Great Britain and of correspondence between the Minister and the British Government on the condemnation of the ship *Olive Branch*.

On June 13, 1834, Jackson angrily replied to a Senate resolution asking for the first "official communication which was made to Andrew Stevenson of the intention of the President to nominate him as minister plenipotentiary to England and Ireland." He said compliance might be deemed an admission of Senate right to confidential correspondence of this description and that he did not acknowledge such a right. "But," he added, "to avoid misrepresentation I herewith transmit a copy of the paper in question, which was the only communication made to Mr. Stevenson on the subject."

On January 13, 1835, Jackson sent to the House "copies of every circular or letter of instruction emanating from the Treasury or War Department since the 30th day of June last, and addressed to either the receiving or disbursing officers stationed in States wherein land offices are established." This was in response to a House resolution.

On the same day, Jackson angrily reproached the Senate for a resolution demanding a copy of any report made to him by any director of the Bank of the United States with reference to certain notes and bills of exchange. He thought the request improper. However, he said, "for the purpose of preventing misapprehension and injustice, I think it proper to communicate herewith a copy of the only report made to me by any director or directors."

There were further affirmative responses to congressional requests for various information on these 1836 dates: February 9, 10, 15, 18, and 29, April 8, May 14, 27, and 27, and July 1.

It is thus not accurate to say of even the Jackson administration that the President always prevailed.

Mr. President, I summarize my remarks on the Jackson administration by saying that Jackson followed the same policy as that followed by Washington and Jefferson. He recognized that the Constitution gave to the President of the United States the right of executive privilege, but he also recognized that he had no right to exercise it unless he was satisfied that, in fact, the national security and public interest and welfare dictated that he exercise it.

Jackson, like other Presidents, went a long way in explaining the reasons for any refusal to supply Congress with information which it requested. But what are we confronted with under the Eisenhower administration? We are confronted with a blanket refusal to supply us with any information for which we ask, if any underling within the executive branch, presided over by the President, decides that he does not want to make it available to Congress.

I wonder if the President really is at a loss to understand why these criticisms of him are being made, and have been made for the past several years, in Congress? Does he not know that they stem from his taking a blanket refusal approach to the matter of Executive privilege in contrast with the attitude, fair and reasonable, taken by so many of his predecessors in office.

It is President Eisenhower who has drawn this issue. Congress ought to meet it head on. That is why I think that Congress, in the next session, should pass legislation along the lines of the suggestion of the Senator from Oklahoma [Mr. MONRONEY], which will make very clear to the President that Congress is willing to let the matter go to the courts for a constitutional determination in those instances in which we ask for information and the President, through a statement to us personally, fails to give a reason for not supplying the material to us.

It is important that this great historic debate which has been running on over the decades finally be brought for judicial determination, now that President Eisenhower has gone so much further than any other President has gone in respect to this matter. He has done this by handing down what amounts, to all intents and purposes, to an Executive order which seeks to delegate the personal prerogative which the Constitution gives to the President of the United States in the name of what we have come to call, under the separation of powers doctrine, the Executive privilege prerogative.

Now I turn to the administration of President Tyler. The Wiggins article states:

THE TYLER CASE

President Tyler's message to Congress on the Cherokee Indian matter is cited next in the Department of Justice memorandum. And the message should have a place in any collection of comment on Executive prerogative.

The House of Representatives had called upon the President for reports made to the Department of War by Lieutenant Colonel Hitchcock in the investigation of affairs of the Cherokee Indians, together with all information about frauds he was to investigate, and also all the facts in possession of the Executive.

The House was not content with the partial information given it and at its next session renewed its request in more sweeping terms.

The most pertinent paragraph of Tyler's eloquent argument states:

"If by the assertion of this claim of right to call upon the Executive for all the information in its possession relating to any subject of the deliberation of the House, and within the sphere of its legitimate powers, it is intended to assert also that the Executive is bound to comply with such call without the authority to exercise any discretion on its part in reference to the nature of the information required or to the interests of the country or of individuals to be affected by such compliance, then do I feel bound, in the discharge of the high duty imposed upon me 'to preserve, protect, and defend the Constitution of the United States,' to declare in the most respectful manner my dissent from such a proposition."

The able message of President Tyler is not an assertion of an uncontrolled discretion or unlimited right to withhold. With great care it enumerates some of the particular situations in which matters must be kept confidential: pending law-enforcement investigations, incomplete inquiries before their truth or falsity has been ascertained, all papers merely because they concern matters about which the House is deliberating. He challenges this as the sole test of availability (and who wouldn't). He thinks certain communications and papers are privileged and that the general authority to compel testimony must give way in certain cases to the paramount rights of individuals and the Government."

This is a strong and an able argument for executive prerogative in certain cases and an effective presentation of the claim of discretionary power.

However, the Department of Justice memorandum refers not only to the message but to "President Tyler's refusal to communicate to the House of Representatives the reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practiced upon them."

As a matter of fact, while making a statement of principle, President Tyler, nevertheless, did give the House what it asked for. In the very message discussed, he said:

"I have thought proper to direct that the report of Lieutenant Colonel Hitchcock concerning the frauds which he was charged to investigate be transmitted to the House of Representatives, and it accordingly accompanies this message."

Tyler said he did this to "avoid even the appearance of a desire to screen any, and also to prevent the exaggerated estimate of the importance of the information which is likely to be made from the mere fact of its being withheld."

He sent along all the facts about the Cherokees except some correspondence "not supposed to be within the intent of the resolution."

He assured the House that "all the papers in the War Office or its bureaus known or supposed to have any relation to the alleged frauds which Lieutenant Colonel Hitchcock was charged to investigate are herewith transmitted."

How does this comport with Mr. Wolkinson's statement that "in the great conflicts which have arisen, the administrations of Washington, Jackson, Tyler, Cleveland, Theodore Roosevelt, and Herbert Hoover, the Executive has always prevailed?"

In most of Mr. Wolkinson's examples, the Congress prevailed, and got precisely what it sought to get. In the case of Jay Treaty, the President prevailed, but not on the broad ground of executive prerogative but on the solid ground that the House lacked constitutional authority to advise and consent on treaties. The Jackson episode, of all those prior to the Buchanan administration, seems to be the only instance in which it might be said that "the executive prevailed" in an assertion of absolute, unqualified discretionary right to withhold.

Some of the other and later examples ought to be explored under circumstances in which time and space permit. Certainly, the examples prior to the Civil War period, in the Department of Justice's own memorandum, in the light of history, do not support either the conclusion of Mr. Wolkinson, who first compiled this information or the broad assertions of the Justice Department. Historical fact simply is overwhelmingly at war with the law as the Attorney Generals prefer to view it.

Pertinent and interesting as later cases may be, the early cases here examined arose during the years when the Government was taking shape and no subsequent examples could shed more light on the nature of this separation of powers.

Mr. President, for the most part I have used material which was prepared in such scholarly fashion by Mr. Wiggins, of the Washington Post. This material shows that the doctrine of executive privilege has not been exercised on a blanket basis, and in keeping with the pattern which President Eisenhower has come to adopt.

It is quite fair and proper that the Senator from Virginia should have taken the position he took in committee, in which he wanted language which went much further than the language he now proposes in his amendment. But in keeping with his good sense of humor, as he said to us earlier this afternoon in the Senate, he simply did not have the votes in committee; therefore, he brought to the Senate this afternoon language he believed would be helpful to us in solving this problem as a sort of stopgap proposition until the next session of Congress, when we could adopt the type of bill he indicated he would favor, and which the Senator from Oklahoma [Mr. MONRONEY] suggested should be adopted, with which suggestion I am in complete agreement.

Mr. President, I have a substantial body of material on this matter, which I think is pertinent and ought to be placed in the RECORD as a matter of legislative history on this amendment before it is adopted. I shall not take the time now to read it, because there are so many other subjects I have to discuss before we adjourn, anyway. So I would prefer to insert the rest of the material in the RECORD in keeping with my spirit of complete cooperation with the majority leader to expedite, within the rules, the business of the Senate.

Therefore, I now ask unanimous consent that there be printed at this point in the RECORD other material I have on the subject of Executive privilege, including brief quotations from that great historic, landmark case, Marbury against Madison. I should like to have my good friend, the distinguished senior Senator from Georgia [Mr. RUSSELL], know that I have not overlooked Marbury against Madison. I have already discussed it earlier in this discourse.

I should like it understood that my request to have material printed in the RECORD entitles me to include what I consider to be very pertinent excerpts from the great decision of Marbury against Madison, which was handed down by that great Virginian and Chief Justice of the Supreme Court of the United States, John Marshall, in which he delineated, I think rather clearly, the lines of demarcation between the three independent branches of the Government—judicial, legislative, and executive. I think that some of the remarks of Chief Justice Marshall in the famous case of Marbury against Madison are particularly apropos, historically, the issue raised by another great Virginian, the distinguished junior Senator from Virginia [Mr. ROBERTSON], as he has brought to us for consideration this afternoon the old, old, historic, constitutional problem of the separation of powers, as we find them manifested in our discussions on the doctrine of Executive privilege.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Oregon? The Chair hears none, and it is so ordered.

(See exhibit 1.)

Mr. MORSE. Mr. President, with that unanimous-consent request having been granted, I advise the majority leader that I close my remarks in making the legislative history on this amendment and will subside for the time being.

EXHIBIT 1

The U.S. Supreme Court decision of *Marbury* v. *Madison*, 1 Cranch 137 (1803), is the leading case on the subject of separation of powers under our constitutional system of government. The following are pertinent quotations from the Court's opinion:

"This bring us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of Government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

"In the third volume of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' And afterward (p. 109, of the same vol.), he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall, for the present, only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognizance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

"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. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

"It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress.

* * * * *

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

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal

discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

* * * * *

"The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The Government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

"Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

"Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constiture a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such oridnary act, must govern the case to which they both apply."

Also included in the exhibit is a study by the Justice Department 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?"

This study appears to be identical to the Herman Wolkinson articles, which appeared in the Federal Bar Journal in 1949, but I submit them under the first title.

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?

INTRODUCTORY

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

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

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

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

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

SUMMARY

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

SUMMARY OF COURT DECISIONS

A study of court decisions, opinions of the Attorneys General, and authoritative text writers reveals that the issuance of a subpena duces tecum, which calls for testimony

and papers by a court to the head of a department or Cabinet member need not result in the giving of testimony or the production of papers, if they are deemed confidential, in the public interest. The President may intervene and direct the Cabinet officer or department head not to appear; the person subpenaed would then advise the court of the President's order and abstain from appearing altogether. The better practice appears to be, wherever practicable, for the head of the department to appear in court and claim the privilege of keeping in confidence the information requested.

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

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

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

SUMMARY OF THE CONSTITUTION AND THE STATUTES

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

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

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

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

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

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

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

President Washington's administration

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

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

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

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

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

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

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

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

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

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

A fact which writers on this subject generally omit to point out is that in his farewell address, Washington felt called upon to caution against the dangers resulting from the encroachment of one department

[1] Cranch, 137, 143–144.
[2] 135 U.S. 1, 63.
[3] 272 U.S. 132–135.

of the Government upon the others. He wrote:

"It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real deposition. * * * The necessity for reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them" (Richardson's Messages and Papers of the Presidents, vol. 1, p. 219).

Thomas Jefferson's administration

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

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

The resolution was overwhelmingly passed. The Burr conspiracy was then stirring the country. Jefferson had made it the object of a special message to Congress wherein he referred to a military expedition headed by Burr. Jefferson's reply to the resolution was by a message to the Senate and House of Representatives. Jefferson brought the Congress up to date on the news which he had been receiving concerning illegal combination of private individuals against the peace and safety of the Union. He pointed out that he had recently received a mass of data, most of which had been obtained without the sanction of an oath so as to constitute formal and legal evidence. "It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question" (Richardson's Messages and Papers of the Presidents, vol. 1, p. 412, dated Jan. 22, 1807).

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

Andrew Jackson's administration

On December 12, 1833, President Jackson vigorously declined to furnish to the Senate of the United States a copy of a paper which had been published, and which was said to have been read by him to the heads of the executive departments.[4]

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

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

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

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

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

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

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

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

A resolution of the House was adopted on January 17, 1837, to investigate the condition of the executive departments concerning their integrity and efficiency. A committee of the House requested the President and heads of departments to advise it concerning all appointments which were made since 1829 without the advice and consent of the Senate and to report all those who had received salaries without being in office. President Jackson replied:

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

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

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

John Tyler's administration

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

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

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

The foregoing illustrates the principle that all papers and documents relating to applications for office are of confidential nature, and an appeal to a President to make such records public should be refused. Civil Service Commission records, containing con-

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

fidential information furnished by applicants for Government employment, would come within the reasoning of President Tyler's refusal to make such records public.

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

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

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

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

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

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

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

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

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

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

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

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

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

James K. Polk's administration

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

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

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

Polk concluded that the President making an expenditure, deemed by him confidential, may, if he chooses, keep all the information and evidence upon which he acts in his own possession. If, for the information of his successors, he leaves the evidence on which he acts on the confidential files of one of the executive departments, they do not in any proper sense become thereby public records.

Finally, Polk stated that if the President was obliged to answer the present call "he must answer similar calls for every such expenditure of a confidential character, made under every administration, in war and in peace, from the organization of the Government to the present period."

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

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

The administration of James Buchanan

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

President Buchanan said:

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

Ulysses S. Grant's administration

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

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

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

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

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

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

Grover Cleveland's administration

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

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

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

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

[6] Richardson, "Messages and Papers of the Presidents," vol. VII, p. 362.

[7] Ibid., p. 363.

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

[9] CONGRESSIONAL RECORD, vol. 17, pp. 2211–2814. March 9 through March 26, 1886.

[10] Grover Cleveland, Presidential Problems, The Independence of the Executive, pp. 43 ff.

tion." The great debate to which we have referred them took place in the Senate.[11]

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

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

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

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

"The requests and demands which by the score have for nearly 3 months been presented to the different departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not relinquish them, and my duty to the chief magistracy which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands" (ibid., pp. 63–64).

The President analyzed the contents, and the character of the information which had been addressed to him and to the heads of the departments by private citizens concerning the removed officials. He refused to attach official character to papers and documents solely because they are in the executive departments. "There is no mysterious power of transmutation in departmental custody, nor is there magic in the undefined and sacred solemnity of department files." Papers and documents do not derive official character when they are unrelated to a constitutional, statutory, or other requirement making them necessary to the performance of the official duty of the Executive.[13]

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

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

For complete text of President Cleveland's message, see Richardson, Messages and Papers of Presidents, 8, 375–383.

Theodore Roosevelt's administration

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

On January 4, 1909, the Senate passed a resolution directing the Attorney General to inform the Senate whether legal proceedings had been instituted by him against the United States Steel Corp. on account of the absorption by it of the Tennessee Valley Coal & Iron Co.; if no proceedings had been instituted the Attorney General was required to state the reasons for such nonaction. The resolution also asked the Attorney General to state whether an opinion was rendered by him concerning the legality of the absorption, and to attach a copy of the opinion.

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

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

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

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

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

The effort made by the Senate to get the papers took place in January 1909. Theodore Roosevelt's term of office expired at midnight, March 3, 1909. His challenge to the Senate to impeach him, if it wished to get the papers which he felt should not be made public, was fortified by powerful legal argument. Roosevelt had ordered the head of the Bureau of Corporations to get a decision from the Attorney General that the papers should not be made public. The Attorney General followed the provisions of the act of 1903, when he reasoned that the President was to judge what information should be made public. Faced with the Senate committee's insistence that the Commissioner of Corporations violate both the law and the practices of his predecessors or face imprisonment, the Attorney General suggested that the papers be turned over to the President in order that the latter might there-

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

[12] Ibid., p. 62, Grover Cleveland, Presidential Problems.

[13] Richardson, "Messages and Papers of the Presidents," vol. 8, pp. 378–379, 381.

after instruct the Commissioner concerning their disposition (27 Op. Atty. Gen. 150).

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

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

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

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

"* * * What I want to know is, where Congress gets authority either out of the Constitution or the laws of the United States to order an executive department about like a servant" (43 CONGRESSIONAL RECORD 3732 (1909)).

Senator Rayner answered the foregoing queries by asserting that each House of Congress had the power to order anyone that had information or documents coming within its jurisdiction and control. He cited the Kilbourn and the Chapman cases [18] in support. Senator Dolliver replied that those cases involved private citizens who had refused to appear and give testimony before committees of the Senate [17] and not officials of the executive departments.

The debate developed two striking points of agreement between proponents and opponents of the resolution: (1) That there was no law which compelled heads of departments to give information and papers to Congress; (2) that if the head of a department refused to obey a subpena of either of the Houses of Congress, there was no effective punishment which Congress could mete out. Senator Bacon, who had introduced the resolution, was asked the pointed question: Whether Congress could by law compel the production of papers by heads of departments? He replied that the matter of enforcement presented difficulty, and that the same question had been raised in the famous 1886 debate, in Cleveland's administration, and it was conceded "that there was no present or immediate remedy in case the head of a department or the President should refuse." (43 CONGRESSIONAL RECORD 849 (1909)). Of what use, therefore, was the resolution, urged its opponents, when there was no way to enforce it? The President and heads of departments might, in a proper case, decide, to pay no attention to a request for documents; passing the resolution, therefore, would be a futile gesture.[19]

The resolution did not come to a final vote.

Professor Willoughby, in his well-known treatise, discusses the resolution and refers to the debates in Cleveland's and Roosevelt's administrations. He concludes that the constitutionality of the positions taken by Presidents Cleveland and Roosevelt would seem to be clear. Referring to the contests between Congress and the Presidents as to the right of the former to compel the furnishing to it of information, Willoughby states that it has been established that the President may exercise full discretion as to what information he will furnish, and what he will withhold.[20]

PRESIDENT COOLIDGE'S ADMINISTRATION

On March 12, 1924, the Senate passed a resolution which provided for the appointment of a committee to investigate the Bureau of Internal Revenue, with authority to hold hearings and subpena witnesses. In a letter dated April 10, 1924, to President Coolidge, Andrew Mellon, Secretary of the Treasury, pointed out that although the purpose of the committee was to obtain information upon which to recommend to the Senate reforms in law and in administration of the Bureau, it now appeared that the committee intended to vent a personal grievance of Senator Couzens, the author of the resolution in the Senate, against Mr. Mellon. The committee sought out all companies in which Mr. Mellon was interested, and directed its investigation activities solely against those companies.

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

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

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

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

PRESIDENT HOOVER'S ADMINISTRATION

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

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

The bitterness of the debate in the Senate culminated in a message from President Hoover to the Senate dated July 11, 1930, wherein he pointed out that there were a great many informal statements and reports which were given to our Government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize all the negotiations and statements which went into the making of the treaty. The Executive must not be guilty of a breach of trust, nor violate the invariable practice of nations. He concluded as follows:

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

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

It appears that the Senate was not satisfied by President Hoover's reply. It avoided, however, further wrangling. Senatorial face was saved by adopting a resolution of Senator Norris, which stated that in ratifying the treaty the Senate did so with the distinct and explicit understanding that there were no secret files or documents which in any

[14] Ibid., pp. 839, 1762 (1909).
[15] 43 CONGRESSIONAL RECORD, 849.
[16] 43 CONGRESSIONAL RECORD, 842.
[17] 43 CONGRESSIONAL RECORD 3732 (1909).
[18] *Kilbourn* v. *Thompson,* 103 U.S. 168; *In re Chapman,* 166 U.S. 661.
[19] 43 CONGRESSIONAL RECORD 3730 (1909).
[20] W. W. Willoughby, "The Constitutional Law of the United States," 2d ed. (1929), pp. 1488–1491.
[21] 72 CONGRESSIONAL RECORD, p. 12029 (1930).

way, directly or indirectly, modified or changed the stipulations and agreements in the treaty (73 CONGRESSIONAL RECORD 378 (1930); The Developments of Congressional Investigative Power, McGeary, p. 103, footnote 20).

On May 14, 1932, a resolution was presented in the House of Representatives requesting the Secretary of the Treasury to submit to the House the testimony, documents, and records which had been presented in the investigation conducted by the Secretary of the Treasury concerning the importation of ammonium sulphate. The resolution was vigorously attacked on the ground that the Government in obtaining the information, had not disclosed a purpose of intended publicity, and that no business interest would disclose its costs of production and other confidential data, even for the use of the Federal Government, if that information was to be disclosed to the world.[22] The resolution appears to have been amended so as to contain the phrase: "if not incompatible with the public interest." The Secretary of the Treasury wrote the Speaker of the House on May 26, 1932, that the information had been furnished to the Treasury with the understanding that it would be treated confidentially. He added:

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

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

Franklin D. Roosevelt's Administration

House Resolution 212 called upon President Roosevelt, "if agreeable to him and available," to transmit to the Speaker of the House of Representatives the full transcript of his press conference of May 3, 1935, on the resolutions of the U.S. Chamber of Commerce concerning the President's legislative program. The object of the resolution was to afford the President an opportunity to send up for the record his comments on the resolution adopted by the chamber of commerce at Washington "which constituted the first major offensive by the representatives of big business on his program as a whole."[23]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

[22] 75 CONGRESSIONAL RECORD, 72d Cong., 1st sess., p. 10207 (1932).

[23] 79 CONGRESSIONAL RECORD, 7002 (1935).

[24] Ibid., 7186.

[25] 40 Opinions Attorney General No. 8, Apr. 30, 1941.

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

he had put to Mr. Hoover dealt with internal security or national security.

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

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

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

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

On July 9, 1943, Mr. Smith appeared before the committee. He had previously, by letter, advised the chairman of the committee that the matters which the committee sought to obtain from him affected the national defense, and that the President had issued instructions that the files and correspondence of the Bureau of the Budget should not be made public because of their confidential nature and because disclosure would not comport with the public interest (committee hearings, vol. 1, p. 34).

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

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

Congressman Hart asked Mr. Smith:

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

"Mr. SMITH. That is right."[28]

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

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

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

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

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

Acting Secretary of War Robert P. Patterson received an invitation by letter to appear before the committee and to produce certain documents. Several Army officers were also requested to appear. The reply of Mr. Patterson, in part, was as follows:

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

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

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

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

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

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

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

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

To summarize

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

1. Federal Bureau of Investigation records and reports were refused to congressional committees, in the public interest.

2. The Director of the Federal Bureau of Investigation refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interests of national security, to refrain from testifying or from disclosing the contents of the Bureau's reports and activities.

3. Communications between the President and the heads of departments are confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress.

4. The Director of the Bureau of the Budget refused to testify and to produce the Bureau's files, pursuant to subpena which had been served upon him, because the President had instructed him not to make public the records of the Bureau due to their confidential nature. Public interest was again invoked to prevent disclosure.

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

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

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

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

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

President Truman's administration

By concurrent resolution a joint congressional committee on the investigation of the Pearl Harbor attack was established on September 11, 1945. The committee was au-

[27] Vol. 40, Opinions, Atty. Gen., No. 8.

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

[29] Ibid., 39.

[30] Vol. 40, Opinions, Atty Gen., No. 8, Apr. 30, 1941.

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

[32] 90th CONGRESSIONAL RECORD, p. 2111.

[33] 90th CONGRESSIONAL RECORD, Appendix, 1034, 1066 (1944).

thorized to require by subpena, or otherwise, the attendance of witnesses and the production of books and papers. There had been seven prior investigations concerning the Pearl Harbor attack.[34] The committee's investigation extended to the files of all pertinent branches of the Government, and President Truman issued instructions to various departments of the Government. We will examine those instructions.[35]

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

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

On November 7, 1945, the President addressed a memorandum to the chief executives of all departments, agencies, commissions and bureaus. The memorandum stated that in order to assist the committee to make a complete investigation, heads of departments were requested by the President to authorize every person in their respective departments or agencies, if interrogated by the committee, to give any information of which they may have knowledge bearing on the subject of the investigation. The President also requested the heads of the departments to authorize their respective employees to come forward voluntarily and to disclose to the committee "any information they may have on the subject of the inquiry which they may have any reason to think may not already have been disclosed to the committee." [36]

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

There was one additional memorandum issued by the President for the chief executives of all executive departments, agencies, commissions and bureaus. It referred to the President's memorandum of November 7, 1945, and requested the heads of the departments to further authorize every person in those departments or agencies, whether or not they were interrogated by the committee, "to come forward and disclose orally to any of the members" of the committee "any information which they may have on the subject of the inquiry which they may have any reason to think has not already been disclosed to the committee." [37] The memorandum closed with the words: "This does not include any files or written material."

The joint committee's investigation was obviously intended to make full and complete disclosure to the American people, in order that the lessons of the Pearl Harbor disaster might "avoid pitfalls in the future," and "to evolve constructive suggestions for the protection of our national security." [38]

The executive branch was obviously in full agreement with the intent of Congress. The committee's report makes it clear, as already indicated, that the files of the pertinent Government branches were made available to the committee, following instruction from the President.[39]

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

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

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

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

The minority report was also critical of the phrase in the October 23, 1945, memorandum of the President: "any information in their possession material to the investigation." [42] The minority stated that those words provided a cloak for those reluctant to yield information requested by the members of the committee. Finally, the minority pointed out that the subsequent memorandums of the President never wholly removed the restrictions on the Government departments, and that in the order of November 7, 1945, the President relaxed restraints on executives of the Government in order that they might speak freely to "individual members of the committee," but the order did not include the release to such individual members of files or written material. [42]

The foregoing criticism of the minority, that "the joint committee was hedged about with troublesome qualifications and restraints" [42] by the Chief Executive does not find support in the report which was signed by the other eight members of the joint committee. However, there is a tacit understanding by the majority of the propriety of the President's instructions to the heads of departments as outlined above, and the minority did not anywhere in its report question the right of President Truman to issue the instructions which he did to the heads of departments. Apparently, their chief complaint was that the Truman committee, during the 4 years of its operations, did allow individual members of the committee to search for any information deemed relevant by them, whereas, in the joint committee investigation the majority of the committee refused to extend permission for individual members to search files and other records.

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

Résumé and conclusions

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

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

[35] Appendix C, Communications From the President of the United States Relating to the Pearl Harbor Investigation, pp. 283–287 of the report, ibid., footnote 1, supra.

[36] Ibid., Joint Committee Report, p. 286.

[37] Ibid., Joint Committee Report, p. 287.

[38] P. xi. Foreword, Joint Committee Report, supra.

[39] Ibid., xiv. Introductory Statement of the Joint Committee Report.

[40] Ibid., p. xv, Introductory statement of the joint committee report.

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

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

[43] For the Senate debate which accompanied the President's directions to the Cabinet officers and heads of departments, see 91 CONGRESSIONAL RECORD 10583–19504 (1945).

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

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

The framers of the Constitution had taken pains to insure the independence of the executive branch.[45] Historical precedents detailed by us, covering more than 150 years of presidential action, demonstrates that our Presidents have vigorously asserted that independence.

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

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

The next part of my exhibit is the letter of the President to the Secretary of Defense, dated May 17, 1954, and accompanied by a memorandum from the Attorney General.

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

[Immediate release, May 17, 1954. James C. Hagerty, press secretary to the President]

The President today sent the following letter to the Secretary of Defense:

"THE WHITE HOUSE.

"The Honorable the SECETARY OF DEFENSE,
"Washington, D.C.

"DEAR MR. SECERTARY: It has long been recognized that to assist the Congress in achieving its legislative purposes every executive department or agency must, upon the request of a congressional committee, expeditiously furnish information relating to any matter within the jurisdiction of the committee, with certain historical exceptions—some of which are pointed out in the attached memorandum from the Attorney General. This administration has been and will continue to be diligent in following this principle. However, it is essential to the successful working of our system that the persons entrusted with power in any 1 of the 3 great branches of Government shall not encroach upon the authority confided to the others. The utlimate responsibility for the conduct of the executive branch rests with the President.

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

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

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

"By this action I am not in any way restricting the testimony of such witnesses as to what occurred regarding any matters where the communication was directly between any of the principals in the controversy within the executive branch, on the one hand, and a member of the subcommittee or its staff, on the other.

"Sincerely,

"DWIGHT D. EISENHOWER."

Memorandum for: The President.
From: The Attorney General.

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

This fundamental principle was fully recognized by our first President, George Washington, as early as 1796 when he said: "* * * it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved * * *." In his Farewell Address, President Washington again cautioned strongly against the danger of encroachment by one department into the domain of another as leading to despotism. This principle has received steadfast adherence throughout the many years of our history and growth. More than ever, it is our duty today to heed these words if our country is to retain its place as a leader among the free nations of the world.

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

to withhold information and papers for the public good.

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

President Washington's administration

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

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

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

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

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

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

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

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

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

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

President Jefferson's administration

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

"*Resolved,* That the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same" (16 Annals of Congress (1806–1807), p. 336).

The resolution was overwhelmingly passed. The Burr conspiracy was then stirring the country. Jefferson had made it the object of a special message to Congress wherein he referred to a military expedition headed by Burr. Jefferson's reply to the resolution was a message to the Senate and House of Representatives. Jefferson brought the Congress up to date on the news which he had been receiving concerning the illegal combination of private individuals against the peace and safety of the Union. He pointed out that he had recently received a mass of data, most of which had been obtained without the sanction of an oath so as to constitute formal and legal evidence. "It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal factor, whose guilt is placed beyond question" (Richardson's Message and Papers of the Presidents, vol. 1, p. 412, dated January 22, 1807).

Similar actions by Presidents Jackson, Tyler, Buchanan, and Grant

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

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

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

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

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

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

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

One of the best reasoned precedents of a President's refusal to permit the head of a Department to disclose confidential information to the House of Representatives is President Tyler's refusal to communicate to the House of Representatives the reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practiced upon them. A resolution of the House of Representatives had called upon the Secretary of War to communicate to the House the reports made to the Department of War by Lieutenant Colonel Hitchcock relative to the affairs of the Cherokee Indians together with all information communicated by him concerning the frauds he was charged

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

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

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

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

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

President Cleveland's administration

In 1886, during President Cleveland's administration, there was an extended discussion in the Senate with reference to its relations to the Executive caused by the refusal of the Attornel General to transmit to the Senate certain documents concerning the administration of the office of the district attorney for the southern district of south Alabama, and suspension of George W. Durkin, the late incumbent. The majority of the Senate Committee on the Judiciary concluded it was entitled to know all that officially exists or takes place in any of the departments of Government and that neither the President nor the head of a department could withhold official facts and information as distinguished from private and unofficial papers.

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

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

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

President Theodore Roosevelt's administration

In 1909, during the administration of President Theodore Roosevelt, the question of the right of the President to exercise complete direction and control over heads of executive departments was raised again. At that time the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against the United States Steel Corp., and if not, the reasons for its nonaction. Request was also made for any opinion of the Attorney General, if one was written. President Theodore Roosevelt replied refusing to honor this request upon the ground that "Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever" (CONGESSIONAL RECORD vol. 43, pt. 1, 60th Cong., 2d sess., pp. 527–528).

When the Senate was unable to get the documents from the Attorney General, it summoned Herbert K. Smith, the head of the Bureau of Corporations, and requested the papers and documents on penalty of imprisonment for contempt. Mr. Smith reported the request to the President, who directed him to turn over to the President all the papers in the case "so that I could assist the Senate in the prosecution of its investigation." President Roosevelt then informed Senator CLARK of the Judiciary Committee what had been done, that he had the papers and the only way the Senate could get them was through his impeachment. President Roosevelt also explained that some of the facts were given to the Government under the seal of secrecy and cannot be divulged, "and I will see to it that the word of this Government to the individual is kept sacred" (Corwin, "The President—Office and Powers," pp. 281, 428; Abbott, "The Letters of Archie Butt, Personal Aide to President Roosevelt," pp. 305–306).

President Coolidge's administration

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

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

President Hoover's administration

A similar question arose in 1930 during the administration of President Hoover, Secretary of State Stimson refused to disclose to the chairman of the Senate Foreign Relations Committee certain confidential telegrams and letters leading up to the London Conference and the London Treaty. The committee asserted its right to have full and free access to all records touching the negotiations of the treaty, basing its right on the constitutional prerogative of the Senate in the treatymaking process. In his message to the Senate, President Hoover pointed out that there were a great many informal statements and reports which were given to the Government in confidence. The Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize all the negotiations and statements which went into the making of the treaty. He further declared that the Executive must not be guilty of a breach of trust nor violate the invariable practice of nations. "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest" (S. Doc. 216, 71st Cong., special sess., p. 2).

President Franklin D. Roosevelt's administration

The position was followed during the administration of President Franklin D. Roosevelt. There were many instances in which the President and his executive heads refused to make aavilable certain information to Congress the disclosure of which was deemed to be confidential or contrary to the public interest. Merely a few need be cited.

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

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

3. Communications between the President and the heads of departments were held to be confidential and privileged and not subject to inquiry by a committee of one of the Houses of Congress (letter dated Jan. 23, 1944, signed Francis Biddle, Attorney General, to Select Committee, etc.).

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

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

PRESIDENT TRUMAN'S ADMINISTRATION

During the Truman administration also the President adhered to the traditional Executive view that the President's discretion must govern the surrender of executive files. Some of the major incidents during the administration of President Truman in which information, records, and files were denied to congressional committees were as follows:

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

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

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

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

Finally, my exhibit concludes with an article by Philip R. Collins from the Georgetown Law Journal, volume 39, page 563.

THE POWER OF CONGRESSIONAL COMMITTEES OF INVESTIGATION TO OBTAIN INFORMATION FROM THE EXECUTIVE BRANCH: THE ARGUMENT FOR THE LEGISLATIVE BRANCH*

(By Philip R. Collins **)

Congressional committees of investigation have, in recent decades, become a part of our national scene. These committees, their members and tactics make good copy for column 1, page 1 of our large metropolitan newspapers. More than one Member of Congress has won favorable notice and political advancement by reason of his activities on such committees.[1]

A participation in the ever-current debate as to whether a congressional committee is a force for good or for evil in our democratic form of Government is not the purpose of this article.[2] Nor are we concerned with the right of a witness or an accused, as he may be popularly called, to representation by counsel and to cross-examination of witnesses. This question has been properly and fully examined by other writers.[3] Nor need there be a discussion of a question fully covered by both the courts and writers in legal periodicals through the years—the right of congressional committees of investigation to punish for contempt.[4] In this article, the writer merely proposes to discuss the power of these committees to obtain information and documentation from the executive branch of our Government.

INTRODUCTION

The problem, then, which confronts us, may be restated in one question: Should Congress, through the medium of its investigating committees, be allowed to require the executive branch of our Government to furnish them with information which is deemed necessary by the legislative branch, in order to legislate wisely and in the public interest? This problem, which has seemingly remained unresolved through the years, and which usually lies dormant in times of war or national emergency, was resurrected during the 80th Congress.

Over the years, the executive branch has developed a stock answer or argument to such requests when it has not desired to furnish the requested information or documents. This stock response of the executive branch will be referred to herein as the "precedent" argument, because, prior to a citation of examples which supposedly buttress his position, the head of an executive department will respond substantially as follows to the committee requesting the information: To conclude that the public interest does not permit general access to these reports, I am following the conclusions reached by a long line of distinguished predecessors in the executive branch of the Government who have taken the same view.[5]

The writer will then cite and, if the matter is of major importance, will elaborate on a series of incidents in which the executive branch refused to submit information to congressional investigating committees. According to the usual method, these examples will begin with the refusal of President Washington's Secretary of War to furnish certain original letters and documents on Washington's advice, to a congressional committee investigating the failure of the campaign of General St. Clair and could continue down to the refusal of the Department of Commerce, during the 80th Congress, to furnish information to the committees concerning the FBI loyalty report on Dr. Edward U. Condon, Director of the Bureau of Standards.[6] The executive branch

* A more elaborate treatment of this subject and related problems is contained in a doctoral dissertation submitted to the department of political science, the graduate school, Georgetown University. See Collins; "A Problem in American Constitutional Law: The Power of Congressional Investigating Committees To Require Information from the Executive" (Georgetown University, June 1950).

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[1] Senators MUNDT, of South Dakota, and NIXON, of California, are examples of Congressmen who have risen to the upper Chamber because of the publicity received from their service on congressional investigating committees.

[2] Boudin, "Congressional and Agency Investigations: Their Uses and Abuses" (35 Va. L. Rev. 143 (1949)).

[3] E.g., Lord, "The Lawyer and the Congressional Investigation" (21 So. Calif L. Rev. 242 (1948)); Wyzanski, "Standards for Congressional Investigations" (3 The Record, N.Y.C. Bar Association 93 (1948)).

[4] E.g., *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *In re Chapman*, 166 U.S. 661 (1897); Dimock, "Congressional Investigating Committees" (Johns Hopkins Press, 1938); Eberling, "Congressional Investigations" (Columbia Press, 1927); Landis, "Congressional Power of Investigation" (40 Harv. L. Rev. 153 (1926).

[5] E.g., the statement of Vincent C. Burke, Acting Postmaster General, delivered before a subcommittee of the Senate Post Office and Civil Service Committee, 80th Cong., 2d sess., Thursday, May 20, 1948 (unpublished).

[6] Random examples usually cited by the executive branch include: (1) President Washington's refusal to give the House copies of his instructions to Minister John Jay concerning the negotiation of a treaty with Great Britain in 1796; (2) the refusal of President Jefferson to turn over information on the Aaron Burr incident to the House; (3) President Jackson's refusal to send to the Senate copies of the charges made against Gideon Fitz, the Surveyor-General; (4) President Tyler's refusal to disclose to the House the names of applicants and their mode of application for office; (5) the refusal of President Tyler to communicate information concerning Colonel Hitchcock negotiations with the Cherokee Indians; (President Polk's refusal to forward an accounting to the House of all payments for contingent expenses of foreign intercourse; (7) President Buchanan's protest against a resolution creating a committee to investigate his attempts to influence Congress; (8) President Grant's reply to the House when it demanded to know whether he performed executive functions while away from the seat of the Government; (9) the message of President Theodore Roosevelt informing the Senate of his instructions to the Attorney-General not to reply to a resolution directed at the latter inquiring as to his inaction in not prosecuting the U.S. Steel Corp. because

argues further that no Congress has dared to endeavor to force the head of an executive department to submit information, once there has been a formal refusal by the executive department to do so.

The second argument advanced by the executive branch is that the courts have repeatedly held that the executive cannot be required to produce such papers when their production is, in the executive's opinion, contrary to the public interest. This argument states further that whether or not the production of such papers is in the public interest is a question for the executive and not for the courts to determine. Citations of Federal and State court decisions are used to buttress this statement. The genesis of this legal argument is to be found in a formal opinion of Attorney General Robert H. Jackson, a member of the Roosevelt Cabinet in 1941, in response to a request for information from a congressional investigating committee.[7]

The tendency of the American press and public has been to uncritically accept these arguments of the executive branch. The fact is that the concept of the inquisitorial tribunal, does not fit comfortably into the minds of Americans raised in a tradition of Jeffersonian or Lincolnian liberalism. Nor was the popular view rendered more cordial toward investigating committees by the Kleig light and Hollywood ballyhoo technique which, with dubious judgment, was employed by congressional investigating committees of recent memory.

The arguments of the executive branch, under the microscope of careful examination, are not unimpeachable. The precedent argument can be countered, as the following paragraphs will attempt to show, by strong arguments on the part of the legislative branch. And the legal argument is equally questionable.

THE REPLY OF THE LEGISLATIVE BRANCH TO THE PRECEDENT ARGUMENT OF THE EXECUTIVE BRANCH

The answer of the legislative branch of our Government to the claim of the executive branch is to be found in the debates and proceedings of the two Houses of Congress. There are two series of debates to be considered—one of the Senate during the 49th Congress, first session, in March, 1886,[8] and the other in the House of Representatives during the 80th Congress, second session, in May, 1948.[9]

The discussion in the CONGRESSIONAL RECORD for the 49th Congress, first session, on the proposed resolutions to censure the Attorney General for refusing to give the Senate certain information furnishes interesting data pertinent to the position of the legislative branch on the issue which is the topic of this study. In the 80th Congress, second session, there was introduced House Joint Resolution 342:

"Directing all executive departments and agencies of the Federal Government to make available to any and all standing, special, or select committees of the House of Representatives and the Senate, information which may be deemed necessary to enable them to properly perform the duties delegated to them by the Congress." [10]

The legislative history of this resolution,[11] and allied documents,[12] furnishes the material for the second part of the response to the "precedent" argument of the executive branch.

During President Cleveland's first term, in March 1886, the Senate censured the Attorney General, Mr. Garland, a former Senator from Arkansas, for his failure to furnish the Senate Judiciary Committee with information and papers relating to the suspension of George N. Duskin, a Republican, as United States Attorney in an Alabama District. The Truman Administration, in its recent struggle with the Congress, cited the debates in 1886 on this subject as a victory for their position, since Cleveland's Department of Justice was not forced in any way to submit the requested information. It is to be noted, however, that the action of the Attorney General was condemned by the Senate in four separate resolutions, the most important of which probably was the second, in which the Senate stated expressly:

"In condemnation of the refusal of the Attorney General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the 25th of January, and set forth in the report of the Committee on the Judiciary, as in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof." [13]

An attempt by Senator Morgan, of Alabama, after the passage of the four resolutions, to amend the same by a tricky procedural move, failed. The attempted amendment, submitted in the form of a resolution, read as follows:

"Resolved, That nothing in these resolutions contained is to be construed as declaring that the conduct of the Attorney General renders him liable to impeachment, and the Senate disclaims the right or power to punish him by imprisonment or otherwise than by impeachment for the offense charged against him in the second resolution, which the Senate has just adopted." [14]

This resolution was defeated by a sly maneuver of the majority leader, Senator Hoar, of Massachusetts. When Hoar's point of order that the amendment was not timely, failed, and the President pro tempore ruled that Senator Morgan clearly had the right to offer the amendment, Hoar then asked that this be allowed by unanimous consent, rather than by order, for he felt that "it would embarrass the Senate * * * very much to establish such a precedent." [15]

Then, hastily, Senator Hoar moved to lay the resolution on the table. His motion carried by a vote of 33 yeas to 26 nays with 16 Members absent. The effect of this motion was to reject the resolution to amend.[16] By such a rejection, the majority in the Senate made it clear that they were in no way excusing the Attorney General from possible impeachment and that they were not renouncing what they considered to be their legal right to punish him by imprisonment, or otherwise than by impeachment for his refusal to submit to the committee the desired information.[17]

This hardly seems, therefore, to be a case which could or should be cited by the Executive in support of that branch's precedent argument. In this situation, the Senate, in effect, said: We censure you, Mr. Garland, because you have not given us the information we requested; we do not force you to give us the information, but this does not mean that we do not think we have the power to do so. Nor, by these resolutions, are we waiving such power.

These debates of 1886, consuming some 17 days, present additional information in support of the legislative branch's position and in rebuttal of the argument, based on precedent, advanced by the executive branch.

The novel arguments, supporting the position of the legislative branch, were mainly

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of its absorption of the Tenn. Valley Coal and Iron Corp.; (10) the refusal of J. Edgar Hoover to testify as to certain matters, relating to the internal security and the activities at Pearl Harbor, at the direction of the Attorney General's executive assistant, during an investigation of the FCC. See also the Burke statement, supra note 5; Wolkinson, *Demands of Congressional Committees for Executive Papers,* 10 Fed. B.J. 107 (1949).

[7] 40 Op. Atty. Gen. 45 (1941).

[8] 17 CONGRESSIONAL RECORD 2211–2815 (1886).

[9] 94 CONGRESSIONAL RECORD 5704 (1948).

[10] H.J. Res. 342, 80th Cong., 2d sess. (1948).

[11] H.R. Rept. No. 1595, pts. 1 and II, 80th Cong., 2d sess. (1948); 94 CONGRESSIONAL RECORD 5704 (1948).

[12] See memorandums of Mar. 10, 1948, and Dec. 30, 1947, from the Federal Law Section, Library of Congress, to Congressman HOFFMAN reprinted in the appendix to H.R. Rept. No. 1595, pt. I, 80th Cong., 2d sess. 14 (1948); H.R. Rept. No. 1753, 80th Cong., 2d sess. (1948), directing the Secretary of Commerce to transmit to the House a letter concerning Dr. Edward U. Condon; see also message of President Truman vetoing S. 1004 which concerned the grant of specific authority to Senate members of the Joint Committee on Atomic Energy to require investigations by the FBI of persons nominated for appointment under the Atomic Energy Act of 1946, reprinted in 94 CONGRESSIONAL RECORD 6196 (1948).

[13] 17 CONGRESSIONAL RECORD 2211 (1886).

[14] Id. at 2814.

[15] The following colloquy, contained in 17 CONGRESSIONAL RECORD 2814 (1886), is pertinent:

"Mr. HOAR. I desire to raise a question of order. All the resolutions have been passed, the whole four. There is no mode of amending the series now. It is simply like dividing the vote on the passage of a bill into four parts, and when they are all passed upon you cannot move to amend the bill after it has been passed.

"The PRESIDENT pro tempore. The Chair is of opinion that in view of the notice given by the Senator from Alabama that he would offer an amendment, and the amendment having been sent to the desk, the question being raised as to whether he could or could not offer it, the resolution should be received.

"Mr. HOAR. To what is it an amendment? An amendment implies a pending question to be amended. The question is, Shall the bill pass? The question, shall it pass with a certain amendment, must be acted on before it is passed. But when a series of resolutions which are four distinct propositions are before the Senate and there is a demand that the question be divided, according to the usual parliamentary procedure the question is put on the passage of each separately, and when each separately has passed the matter is as much beyond the reach of amendment as a bill after it has passed. Giving a notice beforehand does not change the parliamentary law. The Senator should have made his motion as an amendment to the last resolution.

"The PRESIDENT pro tempore. In ordinary cases clearly the Senator from Massachusetts is right; but the Senator from Alabama sent an amendment that was then in order to the Chair, and the Chair was about to put the question upon it as an amendment when the Senator from Alabama gave notice to the Senate that he would offer it as an additional resolution. The Chair thinks under the circumstances that it is clearly his right to offer the amendment."

[16] The following definition of a "motion to lay on the table" is to be found in Cannon, Procedure in the House of Representatives (U.S. Government Printing Office, 1948) p. 415 and is equally applicable in regard to the Senate:

"The motion to lay on the table is used for final and summary disposition without debate, and to protect the House against business which it does not wish to consider, and while it is not a technical rejection, it is in effect an adverse disposition equivalent to rejection."

[17] 17 CONGRESSIONAL RECORD 2814 (1886).

advanced by Senator Edmunds of Vermont, a member of the Republican Party and the chairman of the Senate Judiciary Committee during the 49th Congress, in the debate on the general subject of the relations between the Senate and executive departments.[18] The Senator's first argument was based on article II, section 3 of the Constitution of the United States. Article II, of course, deals with the powers of the Executive and section 3 specifically provides that the Chief Executive "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.[19]

The Senator gave a broad definition to the term, "state of the Union", and argued that the Constitution commands the President in affirmative terms to give such information to the two Houses of Congress and that when the Constitution so refers to "state of the Union", it has reference to the "universal power of knowledge and information of the two Houses of Congress in respect to every operation of the Government of the United States and every one of its officers, foreign and domestic." [20]

The Senator continued in the following words:

"That is the state of the Union. The state of the Union is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law, either within its borders or out of it. There is no one mass, no one cue, or quantity, or subject that makes up the state of the Union, as every gentleman—and there are a good many here who have been Members of the House of Representatives, when they go into the Committee of the Whole on the State of the Union—knows. It is the condition of the Government and every part of it, not only its legislative part about which the President of the United States could communicate no information without impertinence, for the Constitution has declared that the two Houses are to regulate themselves, but he is to give to Congress, as a positive command, from time to time, information on the state of the Union; and that is because they are entitled to have it, and they are entitled to have it every time they call for it, and he violates a positive command of the Constitution when on a constitutional call and in a regular way by either House he omits to do it." [21]

For this reason, Edmunds continued, from our earliest Congresses, the Chief Executive has been given much leeway by the legislative branch in determining whether the public interest would be preserved or injured by forwarding certain information to the Congress or to a committee of the Congress. This was particularly true where undue and premature disclosures of confidential fact would be involved in forwarding the information to a committee, even though the committee was entitled to have such information. Following the line of reasoning above outlined, however, this Republican leader reached the conclusion that either House of Congress had a "right to know everything that is in the executive departments of the Government." [22]

From his research, the Senator stated that this was the first instance in 40 years in which either House had failed "on its call to get information that it has asked for from the public departments of the Government." [23] In all the history of our country, up to his era, declared the Senator, there had been few instances in which there was evinced the slightest reluctance on the part of either the executive or the departments to respond to calls of either House or of their committees for papers in the possession of the former.

"Sometimes in a case of political fever, as it might be called, they have evinced, wide years apart, a reluctance and a hesitation on the part of the executive or of the heads of departments to do this thing; and then, that storm being over, the orderly administration of constitutional Government went on as before, and either House of Congress on its request or demand, as the case might be, and the committees of either House of Congress acting without a direct and positive authority to send for persons and papers, have always obtained from the departments on their mere request everything that either House or its committees thought necessary for the proper discharge of their duties.[24]

The Senator from Vermont continued his attack on the position of the minority of the committee, who had cited a few incidents in which the executive department refused to furnish papers or information to one of the Houses of Congress. He pointed to the numerous occasions on which Presidents actually furnished such information to congressional committees even on subjects which were, indeed, more confidential than the subject then under consideration, and some of which were as confidential as the information which Washington refused to furnish concerning Jay's treaty.[25] His argument, supported by these numerous citations, is that the Presidents realize their responsibility to submit information to the Congress, whether based on the "state of the Union" requirement or otherwise; and that when Presidents refuse to furnish such information, they do so not on constitutional but on purely political grounds.

The willingness displayed by the executive branch in furnishing information to the various committees and to the respective Houses of Congress, in the period prior to Cleveland's first administration, is best observed by a perusal of some of the examples cited by Senator Edmunds in his argument on the opening day of this debate in the Senate on March 8, 1886. The wide range of subjects involved in the submissions of information through the years is also worthy of notice.[26]

In executive session on March 3, 1806, the President was requested to report all documents and papers relative to the interference of the American Minister at Paris in the case of the ship *New Jersey*. The President furnished this information although there was no question then pending in the Senate regarding either the ship *New Jersey* or the American Minister at Paris.[27]

The President was requested by the Senate on June 2, 1813, to inform the Senate, and the Senate was so informed by the Chief Executive, whether any communications had been received from one Russell, an agent of the United States, admitting or denying the declaration of the Duke of Bassano, as to the repeal of the Berlin and Milan decrees. With respect to this Senator Edmunds said:

"It has been stated that an agent of the United States had got (sic) that information and had given it away in an improper manner; but the detail it is quite unnecessary now to go into; * * * in order, I repeat, to keep itself acquainted with the state of the Union and the executive affairs of this Government and the conduct of all its agents, proceeded to call for this information, and got it as a matter of course. It was not exercising a jurisdiction to confirm or reject Russell for anything, or to ratify or reject a treaty. It was getting information in a general way for its general purposes in the exercise of its general duty." [28]

The Senate Committee on the Judiciary was instructed on March 13, 1822, to procure from the Secretary of State a letter written by a Mr. Jennings of the State of Indiana, recommending one Dewey for appointment as U.S. Attorney for Indiana. The Senator indicated that the resolution instructing the committee to obtain this paper implied that the power to secure the same extended to a private paper, so far as such a paper can be a private paper, and described the document in question as being a letter that the Senate had reason to believe was in the files of our Department of State. The paper was turned over to the committee without objection.[29]

The Secretary of War was directed by the Senate on October 30, 1828, to furnish copies of the reports of the Inspector General of the Army of the United States, confidential as well as others, including the details of all statements and instructions. This order, the Senator informs us, was adopted in executive session and was complied with by the Secretary of War as a matter of course.[30]

The Senator similarly cited numerous other occasions on which the executive had without argument surrendered information to Congress.[31] But of all the cases amassed by the Senator from Vermont in this discussion, his last probably had the most telling effect. In March and April 1879 the Senate Judiciary Committee, controlled by a Democratic majority, had sought and received from the Attorney General, the same type of information which Cleveland and his Attorney General, Mr. Garland, were refusing to submit to the Republican controlled Senate Judiciary Committee in 1886. The information requested in 1879 concerned nominations for certain vacancies and also dealt with the propriety of the removal of one Michael Schaeffer, Chief Justice of the Supreme Court of the Territory of Utah and the appointment of David Corbin to that office. To cap the climax, Senator Edmunds gleefully noted that in 1879 some of the most famous Democrats of the era were on that Judiciary Committee, three of whom were presently members of Cleveland's Cabinet, and one of whom was the present Attorney General, Mr. Garland. The Democratic Senatorial Committee had asked for information and the Republican Executive had acceded to the request. Edmunds concluded his recitation of this incident with the following biting peroration:

"Alas, for the Democracy of those days. Think sir, of the infinite idiocy, unpatriotism, usurpation of that number of five Senators of the United States of the Democratic Party assailing a Republican Attorney General and a Republican President with the insulting and impertinent inquiry as to papers and information touching a man, to be removed whose successor was nominated to accomplish his removal. And yet those men were in their day and in those times among the headlights of the Democratic locomotives. There was Thurman—his light is put out—the greatest Democrat in the United States (applause in the galleries) and the best one, and the noblest one, and the bravest one, for he had the courage not long ago in your State, sir, to denounce the Democratic frauds on the ballot. There was Thur-

[18] Id. at 2211.
[19] U.S. Constitution, art. II, sec. 3.
[20] 17 CONGRESSIONAL RECORD 2215 (1886).
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Some of the occasions cited by Senator Edmunds are listed, supra note 6.
[26] 17 CONGRESSIONAL RECORD 2216 (1886).
[27] Ibid.
[28] 17 Cong. Rec. 2217 (1886).
[29] Ibid.
[30] Ibid.
[31] 17 CONGRESSIONAL RECORD 2219–2220 (1886); Josephson, The Politicos (Harcourt Brace & Co., 1938) p. 100 et seq.

man, and there was Joe McDonald, a name familiar in the West as well as in the East as the embodiment of upright Democatic pluck and constitutional law; and there was Garland, whom we all knew here, the leader on the Democratic side of the Senate, and running over with constitutional and statute and reported law, knowing his rights as a Senator and as a member of the committee and knowing his duties; and Lamar, and then all the rest of us on this side, joining in what the present President of the United States calls an impertinent invasion of his rights in asking for information from him. Sir, if I was going to be rhetorical, I should say just here:

"O shame! Where is thy blush?" [32]

It is submitted that Mr. Edmunds presented well the answer of his era to the "precedent" argument of the executive branch. His answer is that there is no precedent for the statement that the executive branch may withhold information from the Congress and their committees of investigation, when the former branch feels that the submission of such information is for the public interest. He contends that, because of its responsibility to present to Congress information on the state of the Union and otherwise, the executive branch must comply with requests for information and documents from the legislative branch and its committees. He supports this proposition by examples of the continued adherence of the executive branch to this norm and he shows that refusals are usually based solely on political and party arguments.

The Republican House majority in the 80th Congress carried this argument one step further. They passed a resolution requiring the executive branch to furnish them with whatever information they requested. To understand the position of the Republican House of Representatives in the 80th Congress, it is necessary to examine the piece of legislation they introduced, House Joint Resolution 342 of the 80th Congress, 2d session.[33]

The intent and purpose of this joint resolution of the House of Representatives, is best revealed by a study of its legislative history,[34] brief though it be, in comparison with that of many bills considered by Congress.[35] As is true with much controversial legislation, the emotional attitude of the House of Representatives, when considering this resolution, was not especially calm and tranquil.

Before proceeding any further, it should be emphasized that House Joint Resolution 342 was never enacted into law. The history of this resolution, in fact, may be stated in a very few words.

The resolution was introduced into the House of Representatives on March 5, 1948, was referred to the Committee on Expenditures in the Executive Departments on that same date, and was favorably reported out of committee, without hearings, on March 22, 1948. Though accompanied by a majority report, included also was a stinging retort by the minority, and an answer to the minority report by the majority of the committee.[36] By special resolution,[37] House Joint Resolution 342 was taken up quickly on the floor of the House by the Committee of the Whole on the State of the Union,[38] was debated for 2 days, after which it was reported favorably by the Committee of the Whole to the House of Representatives and finally was passed by the House of Representatives on May 13, 1948. Referred to the Senate Committee on Expenditures in the Executive Departments on May 14, 1948, the resolution died there. The reason for the demise of the resolution in the Senate committee is quite apparent when one recalls that convention summer of 1948—the deliberate inactivity of a Republican Congress, endeavoring to obstruct the plans and hopes of the President, and his so-called must legislation—which the Senate refused even to consider.

As introduced, House Joint Resolution 342 was comparatively mild, its real teeth being inserted while it was in committee—though of course, the three section resolution, as originally introduced, was still highly unacceptable to the executive branch. It was provided that all executive departments and agencies of the Federal Government, the secretaries of the respective departments and agencies, and all persons acting under authority granted these agencies were authorized and directed to furnish the congressional committees any information, books, records, and memorandums in the Agency's possession that the respective committee might deem necessary for its investigation, provided that the request was made upon a majority vote of the members of the committee and provided that the request had the approval of the Speaker or the President pro tempore, depending whether it was committee of the House of Representatives or of the Senate. Under the resolution, the committee request would be accompanied by a certificate of the committee, signed by the committee clerk, attesting to the majority vote; and the approval of the Speaker or the President pro tempore was to be indicated by a letter over his signature. These provisions were found in section 1 of House Joint Resolution 342, the real core of the resolution as it was introduced.[39]

Under section 2 of this resolution, which was added in committee, when information, books, records, or memoranda were received from a governmental department or agency or from any administrative officer of such an agency, as a result of a request previously made under the first section of the resolution, the committee would immediately meet and determine, by majority vote, what, if any, part of such information should be made public and what part should be deemed to be confidential. If any part of that portion of such records declared confidential were divulged by a member of the committee or by any employee of the committee or any other individual obtaining knowledge of such information because of the disclosure of such information to the committee, any such offender would be liable to prosecution for having committed a misdemeanor and could be punished by a fine not exceeding $1,000 or by imprisonment not exceeding 1 year, or both, at the discretion of the court. In addition, if the offender was an employee of the United States, he would be dismissed from office or discharged from his employment.[40]

The chairman and the majority of the committee explained their position very fully and very well in the committee report,[41]

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[32] 17 CONGRESSIONAL RECORD, 2221 (1886).

[33] H.J. Res. 342, 80th Cong., 2d sess. (1948).

[34] Cf. the following statements concerning a "joint resolution" to be found in Cannon, Procedure in the House of Representatives (U.S. Government Printing Office, 1948) p. 228:

"A joint resolution is a bill within the meaning of the rules and must be signed by the President, with the exception of proposed amendments to the Constitution.

"A joint resolution is the proper vehicle for authorization of invitations to foreign governments, correction of errors in bills which have gone to the President, enlargement of scope of inquiries provided by law, authorization of deviation from form prescribed by bills."

[35] See, for example, the two bound volumes, published by the National Labor Relations Board, which comprise the "Legislative History of the Labor-Management Relations Act of 1947," popularly called the Taft-Hartley law.

[36] H. Rept. 1595, pts. I and II, 80th Cong., 2d sess. (1948).

[37] H. Res. 575, 80th Cong., 2d sess. (1948).

[38] For information on the Committee of the Whole on the State of the Union, see Clarence Cannon, op. cit. supra note 16, at 95 et seq.

[39] H.J. Res. 342, 80th Cong., 2d sess., § 1 (1948), reads as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That all executive departments and agencies of the Federal Government created by the Congress, and the Secretaries thereof, and all individuals acting under or by virtue of authority granted said departments and agencies, are, and each of them hereby is, authorized and directed to make available and to furnish to any and all of the standing, special, or select committees of the House of Representatives and the Senate, acting under the authority of any Federal statute, Senate or House resolution, joint or concurrent resolution, such information, books, records, and memorandums in the possession of or under the control of any of said departments, agencies, Secretaries, or individuals as may, by any of said committees, be deemed to be necessary to enable it to carry on the investigations, perform the duties, falling within its jurisdiction, when requested to do so: *Provided,* That said request shall be made only by a majority vote of all the members of the committee voting therefor at a formal meeting of the committee: *And provided further,* That if the committee be a committee created by the Senate, upon approval of the President or the President pro tempore of the Senate: *And provided further,* That if the committee making such request be a committee created by or acting under the authority of the House of Representatives, upon approval of the Speaker or Acting Speaker of the House of Representatives, such majority vote of the committee to be shown by a certificate of the chairman of the committee, countersigned by the clerk; the approval of the President or President pro tempore of the Senate or the Speaker or Acting Speaker of the House of Representatives to be shown by letter over his signature. Any officer or employee in any such executive department or agency who fails or refuses to comply with a request of any committee of the Congress made in accordance with the foregoing provisions of this section shall, upon conviction thereof, be punished by a fine not exceeding $1,000 or by imprisonment for not exceeding one year, or both, at the discretion of the court."

[40] H.J. Res. 342, 80th Cong., 2d sess., par. 2 (1948), reads as follows:

"When, by virtue of section 1, any committee of the Congress shall have received information, books, records, or memoranda from any of the departments, agencies, Secretaries, or individuals in pursuance of a request made under the authority of said section, it shall forthwith, by majority vote of the membership of said committee, determine what, if any, part of such information shall be made public and what part shall be deemed to be confidential, and it shall thereafter be unlawful for any member of said committee or any employee thereof to divulge or to make known in any manner whatever not provided by law to any person any part of the information so disclosed to said committee and which has by said committee been declared to be confidential; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and, if the offender be an employee of the United States, he shall be dismissed from office or discharged from employment."

[41] H. Rept. No. 1595, pt. I, 80th Cong., 2d sess. 1948).

which accompanied the resolution, as reported to the Congress. The report stated that an executive branch had never denied information to Congress when the information would aid in the passage of legislation which the executive branch deemed beneficial or helpful to itself. In such instances, in fact, "the various departments of the Government, when favoring legislation proposed by the administration in power, have been quick to assert the right to have their representatives appear and testify before congressional committees." [42] It was only when opposing some action, thought to be contemplated by the Congress, that the President or his subordinates have challenged this right of Congress.

The majority indicated, however, that the policy of the Executive of denying information to congressional committees seemed to be widening in scope continually. Committees of both Houses of Congress were finding that their efforts to ascertain how money appropriated by Congress was being spent, how the laws were being interpreted and administered, or whether certain legislation was effective or ineffective, were being hindered or delayed by the refusal of various officials and departments of the executive branch to make available information sought by congressional committees. The report then proceeded to indicate instances where the various congressional committees were denied their requests for documents and testimony by agents of the executive branch. For instance, the Department of Justice had denied information concerning the parole of four members of the underworld, reputed to be remnants of the Capone gang; Dr. John Steelman, the assistant to the President, had, on the advice of the President, refused to testify before a subcommittee of the House Committee on Education and Labor on the manner in which the Taft-Hartley Act was being administered; the Civil Service Commission had refused to furnish a congressional committee with a so-called key loyalty list of governmental employees and this was followed some months later by the President's "loyalty order," by which the label of "confidential" was placed on all loyalty records; and finally—and perhaps most important of all—the Secretary of Commerce had refused to submit to the House Un-American Activities Committee the Federal Bureau of Investigation letter concerning Dr. Edward U. Condon.[43]

The majority of the committee presented the issue before the Congress and then proposed the remedy. They did not claim, they insisted, that the Congress had the right to challenge the actions of the executive or of the judiciary while the latter branches were acting within the scope of the authority given by the Constitution; those departments, they admitted, were created by the Constitution, and congressional power over them was limited to Congress power of removal from office through constitutional procedure. The majority contended, however, that, inasmuch as the Congress was charged with the authority to create, and it had created, various executive departments and agencies, and that since it was charged with the duty of appropriating funds and enacting legislation for the proper and effective activities of these agencies, it not only had the right but the duty to seek and obtain from every agency created by it and dependent upon congressional appropriations, all relevant information necessary to the enactment of proper legislation. Summing up, the majority stated the issue to be as follows:

"Shall the Congress insist that departments created by it, dependent upon its will for existence, give to its committees the information necessary to enable it to act intelligently and wisely, or shall it permit its creatures to arbitrarily determine what information the Congress shall or shall not have?" [44]

The majority concluded their report by submitting that the proper remedy seemed to be not special legislation enacted to meet a particular situation, but overall legislation by the Congress, which, subject to court decision, would settle the question as to the authority of the Congress to demand information from the executive departments. It was expressly denied that the Members of Congress were any less discreet or loyal than the heads of, or the subordinates in, the various executive departments. But the committee made it clear that they were placing the best possible safeguards around the receipt of confidential information from executive departments.

The minority report,[45] which was signed by six members of the minority on the committee, including the minority leader, Mr. McCormack of Massachusetts, as was to be expected, called for the defeat of this resolution. This report presented the usual arguments of the executive branch, which this writer has chosen to label as the "precedent" and "legal" arguments, and while not specifically citing the opinion of former Attorney General Jackson, paralleled its substance almost exactly.[46] Unlike their predecessors in the Senate during the first Cleveland administration, however, the members of the minority did not admit, though discussing the same basic issue, that they were involved in a purely political argument, but rather, kept their discussion on the lofty level of a pressing problem of constitutional law.[47]

The minority of the committee denied the assertion in the majority report that the refusal of information to congressional investigating committees had hindered these committees in carrying out their function. Returning to the "precedent" argument of the executive branch, the minority proposed that "the short answer to this assertion is contained in the history * * * of repeated Executive refusal to comply with such congressional demands ever since the time of President Washington." [48] In conclusion, the minority examined the instances cited in the majority report and in regard to each instance declared that the President or the particular executive department was justified in refusing to submit the information requested by the congressional committee.

Eight days after the minority report was submitted, the chairman of the House Committee on Expenditures in the Executive Departments, Mr. Clare Hoffman, submitted an "Answer to the Minority Report." [49] This document pointed out some prominent loopholes in the argument of the minority. It chided the minority report for its lack of judicial authority in support of the proposition denying the right of the Congress to subpena witnesses who might be employed in the executive branch of the Government and from whom Congress, through its committees, desired to elicit testimony deemed necessary for the proper exercise of Congress legislative function. It was pointed out by the chairman, in his answer, for no other member joined with him in signing this document, that opinions of Presidents and presidential advisers would not bear much weight, since such authorities would, as a matter of course, deny the right of the legislative branch to infringe upon what the President considered his exclusive function. Opinions of the Attorney General merit most respectful consideration, Hoffman said, but they are not law. He denied that the President of the Senate, the Speaker of the House, a congressional committee, or a majority of a congressional committee had less discretion or patriotism than had the Executive or his advisers, particularly since, in his opinion, the State Department and the Department of Commerce had "their full quota of indiscreet individuals, as well as some who seem to be unaware we have potential enemies." [50]

The answer denied that it was the purpose of the resolution to lock these two branches of the Government in internecine warfare—only a distorted view of the resolution would give rise to such a statement. The present situation was deplorable if these two branches of the Government could not submit a difference of opinion to the third branch of the Government, the judiciary, in a constitutional manner for a constitutional decision. The argument that 79 Congresses have not seen fit to attempt such enforcement, so this Congress should not dare to do so was answered by the chairman in the following manner:

"The very fact—if it be a fact—that we are still or, if you prefer, again confronted by a great national crisis or emergency, upon the correct solution of which our future existence depends (and we might begin to inquire when one emergency ends, another begins, or whether emergencies are not now continuous), is a cogent reason why, before we proceed further along the unusual and uncharted and variable course mapped out by the Executive, we should obtain a final, judicial decision road-marking the proper course.

"The fact that 79 Congresses which have gone before us have not seen fit to attempt such enforcement is no reason for further delay. None of the preceding 79 Congresses ever was asked to burden the American taxpayer with the obligation of policing, educating, rehabilitating the whole world.

"If the executive departments and administrative agencies have authority to with-

[42] Id. at 2.

[43] Id. at 3–4; see also minority report at 12.

[44] H. Rept. No. 1595, pt. I, 80th Cong., 2d sess. 4 (1948).

[45] Id. at 7.

[46] 40 Op. Atty. Gen. 45 (1941).

[47] Minority Leader McCormack particularly echoed this view which may be found in H. Rept. 1595, pt. I, 80th Cong., 2d sess. 10 (1948):

"The development of our constitutional history from the beginnings of this country, and the relative ease with which we as a nation have found ourselves able to work and run the Government within the concept of separation of powers which is embodied in our Constitution is a tribute not only to the Founding Fathers who wrote our Constitution but also to the statesmanship and good sense of the Presidents of the United States and the 79 Congresses which have gone before us whose duty it has been to work under that Constitution. We should respect and follow the statesmanlike and constitutional precedents which have become part of our heritage.

"Clearly this is not the time for the two branches of our Government to become locked in internecine warfare. Our Constitution is a great and mighty document. Its strength and vitality depends upon the statesmanship and good sense of those whose duty it is to operate under it. By ill-considered action, departing from the precedents of a century and a half, we may weaken our Constitution for all time. Passage of House Joint Resolution 342 would certainly be a step in this direction. There are too many other nations at this point in the world's history whose constitutional systems have been shaken and shattered. Let us not join them by taking such ill-considered action."

[48] Id. at 11.

[49] H. Rept. 1595, pt. II, 80th Cong., 2d sess. (1948).

[50] Id. at 3.

hold some information from the Congress, do they not, by the same token, have power to withhold all information from Congress? If, when they cause bills to be introduced and insist they be heard in support thereof, should they not give to the Congress the information it seeks and needs? Should the departments be permitted to hide their errors and maladministration behind a cloak labeled 'confidential' and thus defeat a needed remedy?" [51]

Mr. HOFFMAN pointed out in detail the New Deal trend of issuing rules and regulations, in great numbers, by the executive departments. It reminded the dissenters of the minority that these agencies only possess this rule-making power under some act of Congress, conferring such authority on these rule-making agencies. Remembering this fact and guided by numerous decisions of the several Federal courts the answer reiterated that Congress had the power to require the Executive to submit the information it deemed necessary.[52]

The argument that congressional committees would abuse this power, if it were granted by the passage of this resolution, found its reply in the decision of the United States Supreme Court in the case of *McGrain* v. *Daugherty*,[53] wherein the Court made the following declaration:

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither House will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses." [54]

It should be remembered, however, in evaluating this case, that the Court was not speaking of a direct demand by the legislative on the Executive. Its authority as a precedent concerning any phase of the legislative power of inquiry over the Executive is consequently weakened.

In concluding, the answer to the minority report differentiated between the Executive Office and the executive departments. The Congress, it was admitted, had no jurisdiction over the Executive himself, when he acted within the limits of his constitutional power. The executive departments, however, were in an entirely different category, for they were created by an act of Congress and depend upon the Congress for their continued existence; "It is axiomatic that that which the Congress creates, it may destroy or regulate." [55] The conclusion of this "Answer to the Minority Report" was that judicial decisions, logic, and reason upheld the right of the Congress to the authority expressed in House Joint Resolution 342.[56]

Debate on the resolution, after the House had resolved itself into the Committee of the Whole House on the State of the Union, was both diverse and interesting.

Congressman HOFFMAN of Michigan, who was in charge of the legislation on the floor of the House, took pains to make clear to the House what the resolution did not do. He showed that the resolution in no way sought information from any individual holding an office created by the Constitution, that is from the President or from any member of the judiciary.[57]

Congressman MCCORMACK, of Massachusetts, the minority leader, chided his colleagues of the majority, stating that this was the first time in the history of Congress that this endeavor to obtain information from the executive branch had ever been reported out by a committee and considered by either House in the form of a bill or resolution. But the majority was ready for Mr. MCCORMACK's proposition, and they replied in the following fashion through their chairman:

"The opponents of this resolution argued that, inasmuch as 79 previous Congresses had not found this legislation to be necessary, this Congress should not adopt it. Seventy-nine Congresses never found the Marshall plan to be necessary. Seventy-nine Congresses never found it necessary to give to other nations more than $80 billion. The statement that 79 Congresses never found legislation of this type necessary is no argument against the present need, for 79 Congresses never found executive departments so insistent in their refusal to deny to the Congress information which it needed and requested.

"Never, during the existence of 79 previous Congresses, has the Nation been confronted by a bureaucracy which was so egotistical, so arrogant, so defiant of the power of the Congress as that which challenged the authority of the 80th Congress." [58]

Mr. Graham, speaking for the majority, told his colleagues that they were considering "one of the most grave, one of the most serious, and one of the most far-reaching steps that any Congress of the United States will ever take," [59] in this problem of the relations between the Congress and the executive branch. He exhorted the Members to pass this resolution, by all means since "this great sprawling bureaucracy with these tremendous grants of powers and the subordination which past executives have sought to bring about in lowering the dignity, honor, and position of the Congress, can no longer be tolerated".[60] He argued that the President should be told that he had gone so far and could go no further; then, the Supreme Court could pass on the whole matter and determine what the policy of the Government should be.[61] Congressman Graham was undoubtedly overflowing with zeal and fervor for the cause he was espousing, but the writer questions whether the Congressman actually meant that the Supreme Court should determine governmental policy.

Congressman MacKinnon, on the other hand, believed that too much emphasis was being placed on the question of confidential, secret or restricted information in the course of this debate. It was his feeling that too many of the governmental departments, save the Army, Navy, and Atomic Energy Commission, overclassified their documents and information. He claimed that the entire objective of these executive departments in so doing was to stop producing evidence on matters involving public business primarily because it would embarrass the administration. He continued:

"I have examined these claims of secrecy while I have been a Member of Congress. I ran into similar claims when I served in the legislature of my own State for a number of years. I have never yet seen the claim of secrecy made that when the information was dragged out and given to the public there was any real merit to the claim. I have never yet seen one. There may be some that exist, but I will have to be shown. I have never seen a good excuse for secrecy and I will say further that the reasons I get down here from the Federal departments I consider far inferior to those I get back home. They are equally ingenious." [62]

Following these and other expressions of opinion, pro and con, as to the merits of this resolution, a group of amendments were introduced, in an endeavor to settle differences as to the contents thereof and in order to perfect the resolution.[63]

After sundry amendments had been accepted, the chairman of the Committee of the Whole House on the State of the Union reported the joint resolution back to the House of Representatives. The resolution was then ordered by the Speaker to be engrossed and read a third time.[64]

Congressman MCCORMACK, then, made use of a procedural stratagem and offered a motion to recommit the resolution to the Committee on Expenditures in the Executive Departments. The motion to recommit was rejected by a vote of 217 nays to 145 yeas, with 69 Members not voting. The next and final action in the House on the joint resolution was "on the passage of the bill." The question was taken and there were recorded 219 votes in favor of the resolution, with 142 against and 70 Members not voting. In the end, then, the joint resolution was passed by the House by a substantial majority.[65]

One could, in fact, say that the majority is overwhelming, when the list of the Members "not voting" is examined. It is to be noted that, of the 70 Members not voting, 23 were Republicans and 25 were Dixiecrats. In a word, then, had this resolution passed the Senate and been vetoed by the President, an action certain to take place, there would have been a distinct possibility of overriding the veto. A party line vote, adding the 48 votes of the Dixiecrat-Republican abstainers to the admixture of 219 Members voting "yea," would result in 267 votes, which is very close to the number required to override a veto in the House of Representatives.

The resolution, as amended by the House of Representatives and as passed by that body on May 13, 1948, was referred to the Senate, read twice in that body, according to the normal procedure, and referred to the Senate Committee on Expenditures in the Executive Departments. There, with all the activities of the presidential election summer and with the special session of the Congress, which, by its inactivity, lived up to the presidential appellation of a "do-nothing" Congress, the joint resolution died. In fact, there was little probability of its being enacted, once it reached the House of Representatives as late as the middle of May in a presidential year. For, even though it passed the House of Representatives, there would have been a fair amount of debate in the upper body before passage, and following that, most assuredly, there would have been a presidential veto. Then, both Houses of the Congress would have been faced with the additional and time-consuming problem of marshalling forces to override the veto.

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[51] Ibid.

[52] The report cites: *United States v. Josephson*, 165 F. 2d 82 (2d Cir 1947), certiorari denied, 333 U.S. 838 (1948); *Fields* v. *United States*, 164 F. 2d 97 (U.S. App. D.C. 1947), certiorari denied, 332 U.S. 851 (1948); *United States* v. *Dennis*, 72 F. Supp 417 (D.D.C. 1947); *United States* v. *Bryan*, 72 F. Supp. 58, 61 (D.D.C. 1947); *Townsend* v. *United States*, 95 F. 2d 352 (U.S. App. D.C. (1938) *McGrain* v. *Daugherty*, 273 U.S. 135 (1927).

[53] 273 U.S. 135 (1927).

[54] Id. at 175.

[55] H. Rept. 1595, pt. II, 80th Cong., 2d sess, 6 (1948).

[56] Id. at 7.

[57] 94 CONGRESSIONAL RECORD 5704 (1948).

[58] Id. at 5708.

[59] Id. at 5721.

[60] Id. at 5722.

[61] Ibid.

[62] Id. at 5728.

[63] These amendments are not discussed in the body of this article, since they are relatively unimportant and have little bearing to the main subject under discussion.

[64] CONGRESSIONAL RECORD 5820 (1948).

[65] Ibid.

In this struggle between the executive and legislative branches of our Government, the legislative history of the proposed joint resolution is quite important. In answer to the precedent argument of the executive branch, there has been presented in this article, thus far, the two-part reply of the legislative branch, the answer of the Senate during Cleveland's first term and the answer to the House of Representatives by this joint resolution during the 2d session of the 80th Congress. The joint resolution takes the legislative branch's answer a step further. The Senate, during Cleveland's first term, said that the precedent argument of the executive branch was not valid, since there was no actual precedent, the executive departments furnishing information to congressional committees willingly and without hesitation in a majority of instances. Refusal was made only where conflict existed between the two branches, more often based on political than on constitutional grounds. Going further, the argument of this Senate stated that, not only is there no precedent to prevent them from obtaining information from the executive branch, on the refusal of the latter branch, but that, in carrying out their function, they have the right to know anything and everything about the executive departments. This they considered particularly true, under the constitutional provision, requiring the President to submit information on the state of the Union.

The House of Representatives, in the 2d session of the 80th Congress, takes the further step of proposing that they have the right to pass legislation compelling submission of information and documents, as they require, under this right which allegedly has always belonged to the legislative branch.

One merely hazards a guess, under the makeup of our present Supreme Court, in submitting whether or not House Joint Resolution 342 would have been declared constitutional, if enacted into law and if brought up to our high court on a test case. When weighing the basic arguments of the executive branch, i.e., that there cannot and must not be an encroachment by one branch of the Government on another branch under our doctrine of separation of powers—and of the legislative, that the Congress must know of the operations of the executive branch in order to legislate properly and that there should be a spirit of cooperation between all branches of our Government—it is well to consider the language of the U.S. Supreme Court in the case of *O'Donoghue* v. *United States*.[66] This case was decided by a Supreme Court, which was probably closer to the present day Truman Court than to the Roosevelt Court. The Court there stated:

"If it be important thus to separate the several departments of Government and restrict them to the exercise of their appointed powers, it follows, as logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution." [67]

It is suggested that this language, which was quoted favorably by the court in *Humphrey's Executor* v. *United States*,[68] probably the latest decision on the removal of governmental officials by the President, is important to the argument of the legislative branch. It brings out the fact that, while it is true the governmental branches must maintain their separate entity, all branches are working for a common goal—the making of a better Government and the preservation of that Government. However, neither case directly involves the exercise of the power of compulsion by the legislative.

In brief, it is submitted that a study of the debates during the Cleveland administration, of the legislative history of this resolution passed by the House of Representatives during the 80th Congress and of cases decided by the U.S. Supreme Court during the last 20 years show that the precedent argument of the executive branch is not as ironclad as one might be led to believe. While it is not the writer's function at this juncture to present the argument on the merits of the respective positions, it is submitted that a future Congress, facing a President who is a member of the opposing political party, may well make use of these two series of debates—one by a Republican Senate during Cleveland's administration and the other by a Republican Congress during Truman's first term—and may well find the means of forcing their will upon the executive branch, by the passage of legislation, similar to House Joint Resolution 342, 80th Congress, 2d session, 1948.

A CRITIQUE OF THE LEGAL ARGUMENT OF THE EXECUTIVE BRANCH

In order to ascertain just what is meant by the legal argument of the executive branch, it is necessary to examine two specific answers of executive departments to requests for information from committees of Congress.

In April of 1941, Robert H. Jackson, presently an Associate Justice of the Supreme Court, was Attorney General of the United States, a member of the Cabinet of the late President Roosevelt. On April 23, 1941, he had been requested by the Honorable CARL VINSON, chairman of the House Committee on Naval Affairs to furnish the committee with all Federal Bureau of Investigation reports since June 1939, together with all future reports, memorandums, and correspondence of the Federal Bureau of Investigation, or the Department of Justice, in connection with investigations made by that Department arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which had naval contracts, either as prime contractors or subcontractors. Since the Attorney General and the Justice Department in general had received several requests for similar types of information, Jackson framed his answer to the committee in the manner of a governmental statement of policy, or in other words as a formal "Opinion of the Attorney General." [69]

The Attorney General restated the position of the Department of Justice that all investigative reports are confidential documents of the executive department of the Government, intended to aid the President in his duty of seeing that the laws of the land are faithfully executed, and that congressional or public access to them would not be in the public interest.[70] He further stated that disclosure of these reports could not do otherwise than prejudice law enforcement; that disclosure of the reports at that time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which the Congress wished to protect the country; that disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation; and that disclosure of information contained in the reports might also result in the grossest kind of injustice to innocent individuals.[71]

The lawyer of the Cabinet then restated that in refusing to submit the requested documents to the committee he was following the "eminent examples" of a long line of predecessors, citing from letters of various Attorneys General of the United States to the various Houses of Congress; [72] in addition, he cited the usual examples of Presidential refusals and refusals of the executive branch.[73]

The important citation from this opinion of the Attorney General, in which we are most interested, is the statement made that "this discretion in the executive branch has been upheld and respected by the judiciary." [74] Continuing with this line of reasoning, Jackson further states:

"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 interests. 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."[75]

In support of this statement, cases decided by the U.S. Supreme Court, the several Federal courts and certain State courts are cited. It is doubtful whether these cases are correctly cited and whether they would stand scrutiny when applied to the situation where Congress is requesting information from the Executive to aid in legislation and whether the courts would so hold, if a congressional committee attempted to force the production of such information and the case reached the courts, as the result of such forceful action.

Another Executive reply meriting consideration involved the Post Office Department. The answer of this Department differs in

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[66] 289 U.S. 516 (1933).
[67] Id at 530.
[68] 295 U.S. 602 (1935).
[69] 40 Op. Atty. Gen. 45 (1941).
[70] Id at 46.
[71] Id. at 47.
[72] Attorney General Jackson cited the following opinions of his predecessors at 40 Op. Atty. Gen. 45, 47 (1941):

"Letter of Attorney General Knox to the Speaker of the House, dated April 27, 1904, declining to comply with a resolution of the House requesting the Attorney General to furnish the House with all papers and documents and other information concerning the investigation of the Northern Securities case.

"Letter of Attorney General Bonaparte to the Speaker of the House, dated April 13, 1908, declining to comply with a resolution of the House requesting the Attorney General to furnish to the House information concerning the investigation of certain corporations engaged in the manufacture of wood pulp and print paper.

"Letter of Attorney General Wickersham to the Speaker of the House, dated March 18, 1912, declining to comply with a resolution of the House directing the Attorney General to furnish to the House information concerning an investigation of the Smelter Trust.

"Letter of Attorney General McReynolds to the Secretary to the President, dated August 28, 1914, stating that it would be incompatible with the public interest to send to the Senate, in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Co.

"Letter of Attorney General Gregory to the President of the Senate, dated February 23, 1915, declining to comply with a resolution of the Senate requesting the Attorney General to report to the Senate his findings and conclusions in the investigation of the smelting industry.

"Letter of Attorney General Sargent to the chairman of the House Judiciary Committee, dated June 8, 1926, declining to comply with his request to turn over to the committee all papers in the files of the Department relating to the merger of certain oil companies."

[73] Id. at 48–49.
[74] Id. at 49.
[75] Ibid.

form from the letter of the Attorney General, in that it was read to a committee of the 80th Congress as a statement of the Honorable Vincent C. Burke, the Acting Postmaster General. The form of this answer was, most naturally, different from Jackson's because the request for information did not come in the courteous form of a letter, as Jackson had received, but as a subpena, commanding Burke to appear before a special subcommittee of the Senate Post Office and Civil Service Committee and to present investigative reports prepared for the Postmaster General by certain Post Office inspectors.

The committee took this action, based on a tip from a disgruntled former area inspector concerning the activities of the postmaster of the city of Detroit, Mich. Newspaper clippings, of some 11 years previous, were brought forth. The dissatisfied retired postal inspector testified at the hearing, that there were several investigations made of this particular post office, all indicating malfeasance and nonfeasance in office and that the Post Office Department in Washington had taken no action in this matter. He hinted that the reason for the inaction on the part of the Washington officials was because the postmaster had previously been chairman of the Democratic central committee in the greater Detroit area.[76]

In his statement, Burke discussed the functions of post office inspectors, showing that they are the special representatives of the Postmaster General and are charged with the investigations of post offices and all matters connected with the postal service. He indicated that inspection reports received from these officials are regarded as confidential documents and that the disclosure of their contents is forbidden, except as the Postmaster General, in his discretion, should otherwise direct. He then relied almost exclusively on the opinion of Attorney General Jackson for the remainder of his statement. In addition he pointed out that the disclosure of such information would hamper the inspection service, since it would be a breaking of faith with many people, who had made confidential statements to these inspectors, and would also cast aspersions on many innocent people, since statements received in investigations are often wrong and inspired by malicious or misinformed people. The Acting Postmaster General, then, cited the executive precedent, as appears in the Jackson opinion, and also the statement, with case citations, to which reference has been previously made.[77]

Numerous cases are cited in both of these answers of executive departments.[78]

Before discussing these cases, it is well to recall the proposition which the Attorney General and the Acting Postmaster General support in their respective documents, i.e., that the courts have held that they will not require the executive to produce such papers when the production of the same is contrary to the public interest, and that the executive shall determine whether or not the production of the papers would be or would not be in the public interest. Since both of the documents were addressed to Congress, we must naturally presume that the words of the Attorney General as to the production of the papers must mean the production of such papers to or for the use of congressional committees of investigation. It is submitted that an analysis of these cases fails to show that they so hold.

The two reports cite *Marbury* v. *Madison*,[79] a landmark case in the field of American constitutional law. For the purposes of the present topic, it is necessary to discuss only the facts of the case plus the quotation from the holding of the Court, cited in the opinion of Attorney General Jackson.

President Adams had appointed one William Marbury as a justice of the peace, prior to the assumption of the Presidency of Thomas Jefferson. However, the commission evidencing the appointment had not been issued to Marbury by John Marshall, the Secretary of State under President Adams. James Madison, who succeeded Marshall as Secretary of State, refused to issue the commission to Marbury. In the meantime, John Marshall had been appointed Chief Justice of the United States by President Adams and was called upon to decide this issue.

The Attorney General, Levi Lincoln, was summoned to appear before the Court, since certain facts relating to the commission had to be ascertained. Lincoln objected to answering the questions, since, as he pointed out, he found himself delicately situated between his duty to the Court and his duty to the executive department, having been Acting Secretary of State at the time when the transaction in question had taken place. It was Lincoln's feeling that he was not bound to answer concerning any facts which came officially to his knowledge while acting as Secretary of State.

The Court gave Lincoln time to consider what he should answer, but stressed that they had no doubt he ought to answer, since there was nothing confidential to be disclosed. Anything which was confidential or which had been communicated to him in confidence, he was not bound to disclose. After some thought, Lincoln agreed to answer all questions, with the exception of one, the inquiry as to what had been done with the commissions. He had no way of knowing that they had ever come to the possession of James Madison, nor could he shed any light on the question of whether they were in the Office of the Secretary of State, when Mr. Madison took over that Office.

The Court agreed that Lincoln did not have to say what had become of the commissions. The Court pointed out that:

"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 those 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 manned in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: They respect the Nation, not individual rights, and being entrusted to the Executive, the decision of the Executive is conclusive".[80]

Marshall showed that there existed an intimate political relation between the President and the heads of departments. Because of this relationship, any legal investigation of the acts of any of these officers was rendered peculiarly irksome, as well as delicate, and this aroused some hesitation about entering into such an investigation. He concluded that it was the province of his Court solely, "to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive," [81] could never be made in his Court.

The author would not dream of deprecating the decision of this first Chief Justice of our High Court. It should be noted, however, that this citation, considered so apt by Attorney General Jackson in his opinion, referred to an action brought before the Court by an individual citizen and concerned not in the least a situation where information is desired not in the interests of a private person but for the benefit of the Congress of the United States, which, though a different branch than the executive, is still a branch of our Government.

The case of *Totten, Administrator* v. *U.S.*[82] stands for the proposition that an action cannot be maintained against the Government in the Court of Claims for secret services rendered during most of the Civil War by a northern spy, based on a contract made between the spy and President Lincoln in 1861. Mr. Justice Field stating, as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which, it will not allow the confidence to be violated. But this case is far removed from a refusal by the executive branch to a request of a congressional committee. The Totten case involved a civil suit for damage and the so-called confidential information was refused when requested by the Court in this action.

The Court held in In re Quarles & Butler[83] that it is the right of every private citizen to inform a U.S. marshal or his deputy of a violation of the Internal Revenue laws, that this right is secured to a citizen by the Constitution and, accord-

[76] Hearings, Special Subcommittee of Senate Post Office and Civil Service Committee, May 20, 1948. Subcommittee composed of Senator Langer, of North Dakota, Senator Buck, of Delaware and Senator Chavez, of New Mexico.

[77] Statement of Vincent C. Burke, Acting Postmaster General, delivered before the Special Subcommittee of the Senate Post Office and Civil Service Committee on Thursday, May 20, 1948, pp. 3 ff.

[78] *Boske* v. *Comingore*, 177 U.S. 459 (1900); *In re Quarles & Butler*, 158 U.S. 532 (1895); *Vogel* v. *Gruaz*, 110 U.S. 311 (1884); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Totten* v. *United States*, 93 U.S. 105 (1875); *Aaron Burr* v. *United States*, 4 Cranch 455 (U.S. 1807); *Marbury* v. *Madison*, 1 Cranch 137 (U.S. 1803); *Arnstein* v. *United States*, 296 Fed. 946 (D.C. Cir. 1924); *Elrod* v. *Moss*, 278 Fed. 123 (4th Cir. 1921); *In re Valecia Condensed Milk Co.*, 240 Fed. 310 (7th Cir. 1917); *In re Lamberton*, 124 Fed. 446 (W.D. Ark. 1903); *In re Huttman*, 70 Fed. 699 (D. Kan. 1895); *Appeal of Hartranft*, 85 Pa. 433 (1877); *Worthington* v. *Scribner*, 109 Mass. 487 (1872); *Gray* v. *Pentland*, 2 S. & R. 23 (Pa. 1815); *Thompson* v. *German Valley R.R.*, 22 N.J. Eq. 111 (1871).

[79] 1 Cranch 137 (U. S. 1803).

[80] Id. at 165.

[81] Id. at 170. Rufus Choate, the famous American lawyer, stated as follows concerning Marshall's opinion:

"I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the legislature contrary to the Constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamantine demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it—this is an achievement of statesmanship of which a thousand years may not exhaust or reveal all the good."

As quoted in John F. Dillon, "John Marshall Complete Constitutional Decisions" (Callaghan & Co., 1903) p. 38.

[82] 92 U.S. 105 (1875).

[83] 158 U.S. 532 (1895).

ingly, that a conspiracy to injure, oppress, threaten, or intimidate the citizen in the free exercise or enjoyment of his right, or because of his having exercised it, is punishable under section 5508 of the Revised Statutes [84] *Vogel* v. *Gruaz* [85] was a "privileged statement" case. The U.S. Supreme Court found that a communication made to a State's attorney in Illinois by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot, in a suit against such a person to recover damages, be testified to by the State's attorney, even though there be evidence of the speaking of the same words to other persons than the attorney. Neither of these cases bear on our present problem. Nor does *Boske* v. *Comingore* [86] support the broad statement made in Attorney General Jackson's opinion, since an opinion of a court holding that certain records of a Government department are privileged, has little or no bearing on the scope of congressional investigatory authority.

Huttman [87] and Lamberton [88] concern matters which Internal Revenue officials are not compelled to relate in a court of law. Information of this nature is confidential and privileged and such officials cannot be compelled to reveal it. But, these cases arose where the information was demanded of the executive department in criminal proceedings in a court of law. These cases had nothing to do with demands made by congressional investigating committees and the courts said nothing in support of the refusal of executive agencies to submit information to such legislative committees. These cases, then, hardly seem germane to the question.

In another cited case the U.S. Court of Appeals for the Fourth Circuit found, inter alia, that a local sheriff, who testified that he communicated to the defendant prohibition officer that the plaintiff was transporting liquor, did not have to reveal the source of his information.[89] This scarcely is on all fours with the problem at hand.

In *Worthington* v. *Scribner*,[90] the Massachusetts high court held that, in an action for maliciously and falsely representing to the Treasury Department of the United States that the plaintiff in bringing books into the United States was intending to defraud the Revenue Bureau, the defendants could not be compelled to answer interrogatories filed by the plaintiff. This was another privileged communication case and the court held that the communications in question could not be disclosed, since the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by interrogatories or by a bill in equity.

Neither the Worthington case, supra, nor the Valecia,[91] Arnstein,[92] Gray,[93] and Thompson [94] cases support the proposition asserted by the Attorney General in his opinion. They stand for the proposition that certain matters, which are classified as privileged communications of one sort or another, need not be disclosed in a court of law. While these cases place limitations on the judiciary, since the requests or demands on the executive were made as a result of civil or criminal litigation—they have no bearing on the question under discussion.

In the appeal of Hartranft [95] a grand jury had requested the court to hold the Governor of Pennsylvania in contempt because he refused to appear, though under subpena, to testify concerning deaths in a Pennsylvania railroad strike. The court held that the Governor was the absolute judge of what official communications, to himself, or his department, might or might not be revealed, and he was the sole judge not only of what his official duties were, but also of the time when they should be performed. The nature of the request is similar to requests ordinarily made by the legislative upon the executive. But it must be noted that the request originally came from the grand jury on the theory that it would be an aid to a criminal prosecution. This is the proposition to which the decision of the court was necessarily addressed. The court's broad statement, as to the Governor's right to refuse disclosure of information, must be read in that context.

The Attorney General also cites the Aaron Burr treason trial [96] as supporting authority. Burr had applied, as will be recalled, for the issuance of a subpena duces tecum upon President Jefferson. Marshall, the presiding judge, allowed the subpena to issue. It directed the President to produce a letter which one General Wilkinson had sent to him. Burr filed an affidavit with the court, in which he alleged that this letter contained information, which would prove helpful to his defense. Marshall, in his opinion, stated that, under the Constitution and laws of the United States, the President was not exempt from the process of the court in a criminal trial, nevertheless, he also ruled that the President was free to keep from view those portions of the letter which the President deemed confidential in the public interest. To this end, the President alone was the judge of what was confidential.[97] This is perhaps the nearest thing to authority contained in the citations of the Attorney General. Its weaknesses are too apparent to merit discusison.

The Court, through Marshall, seems to state that it would not force official records and papers into public view by subpena. What probably let the Court to its decision was the fact that the letter in question was not in the files of the War Department, or in any other department of the Government. The Court appears to have been largely influenced by Colonel Burr's argument that the President, who had publicly accused Burr of traitorous conduct, in a special message to the Congress, and had been primarily responsible for bringing him to trial, and for bringing the weight of the Government behind the prosecution, ought not, in fairness to an accused person on trial for his life, keep from him a private communication which the accused thought would help prove his innocence.[98]

A brief reading of these cases shows clearly that they do not stand for the proposition stated in the opinion of the Attorney General. Some of the cases give a general statement as to the theory of separation of powers, but the leading case [99] which does so has been overruled by a group of more recent cases beginning over 20 years ago.[1]

The bulk of the cases cited by the Attorney General not only do not support his broad assertion, but instead are based on the point that the papers or testimony sought were privileged communications within the meaning of the law and hence inadmisisble as evidence. In addition, the requests or demands on the Executive were a result of civil or criminal litigation. Whatever limits may be imposed on the judiciary in the conduct of civil and criminal litigation can have little bearing on the scope of congressional investigatory authroity.

The fact that the opinion of the court in *Kilbourn* v. *Thompson*,[2] is outmoded is perceivable from the opinion of the Court of Appeals for the District of Columbia in *Townsend* v. *United States*,[3] where, concerning the scope of a congressional investigation, the court pointed out that a legislative purpose may be presumed and that the "power to conduct a hearing for legislative purposes is not to be measured by recommendations for legislation or heir absence." [4] Again, in *United States* v. *Bryan*,[5] the District Court of the United States for the District of Columbia indicated that the collection of facts by a congressional investigating committee may cover a wide field and need not be limited to "securing information precisely and directly bearing on some proposed measure, the enactment of which is contemplated or considered".[6] The court found that the Congress could very well find it necessary and desirable, in order to act in an enlightened manner, to become acquainted not only with the precise topic "involved in prospective legislation, but also with all matters that may have an indirect bearing on the subject".[7]

In a decision rendered in 1946, the U.S. Supreme Court gave indication that it recognized that the limitations imposed upon the legislative power of inquiry by *Kilbourn* v. *Thompson*,[8] were not realistic. In that case, *Oklahoma Press Publishing Co.* v. *Walling*,[9] the Administrator of the Wage and Hour Division of the Department of Labor had issued and served on the Oklahoma company a subpena directing the production by the company of certain of its records, including records which would indicate whether or not the company had a sufficient relationship to interstate commerce to bring it within the jurisdiction and coverage of the Fair Labor Standards Act. The company, in opposing the subpena, contended inter alia, that at least probable cause for jurisdiction over it must be shown before it could be lawfully required by subpena to produce its records. The Court rejected this contention of the appellant company, holding that probable cause for jurisdiction did not have to be shown in order to validate the subpena—that the Administrator had jurisdiction to compel the production of documents in order that he might determine whether the facts showed that a case existed within the jurisdictiton of the Fair Labor Standards Act.

The Court, then, proceeded to liken the powers of the Administrator, which were granted to him by the Congress, to the inquisitorial power of a grand jury or the discovery powers of a court of equity. In a foot-

[84] Rev. Stat. sec. 5508 (1875).
[85] 110 U.S. 311 (1884).
[86] 177 U.S. 459 (1900).
[87] 70 Fed. 699 (D. Kan. 1895).
[88] 124 Fed. 446 (W.D. Ark. 1903).
[89] 158 U.S. 532 (1895).
[90] 109 Mass. 487 (1872).
[91] 240 Fed. 310 (7th Cir. 1917).
[92] 296 Fed. 946 (D.C. Cir. 1927).
[93] 2 S. & R. 23 (Pa. 1815).
[94] 22 N.J. Eq. 111 (1871).
[95] 85 Pa. 433 (1877).
[96] 2 Robertson, Reports of the Trials of Colonel Aaron Burr (Hopkins and Earle, 1808) pp. 533–536.
[97] 1 Robertson, Reports of the Trials of Colonel Aaron Burr (Hopkins and Earle, 1808) pp. 177, 180, 187–188.
[98] Brown, "Executive Papers, the President and the Congress" (20 New York State Bar Association Bulletin 1948) p. 166, 171.
[99] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880).

[1] *McGrain* v. *Daugherty*, 273 U.S. 135 (1927).
[2] Supra note 99.
[3] 95 F. 2d 352 (D.C. Cir. 1938).
[4] Id. at 355.
[5] 72 F. Supp. 59 (D.D.C. 1947).
[6] Id. at 61.
[7] Ibid.
[8] Supra note 99.
[9] 327 U.S. 186 (1946).

note to its opinion the Court stated that the investigating power of Congress, itself, was of the same character.[10] It seems reasonable to conclude that if Congress can vest in the Administrator of the Wage and Hour Division such a power of investigations (limited only by the broad grant of authority in section 11(a) of the Fair Labor Standards Act[11]) Congress itself may do the same in conducting its own investigations in aid of its own powers. From this, it seems reasonable to conclude further that the inquisitorial power of Congress extends to adducing facts which it can use as a basis for determining whether or not it has any power to legislate.

From the above, it can be seen that the Supreme Court is cognizant of the unrealistic qualities of the decision in the Kilbourn case and that this is not an appropriate case to cite in support of any point in the general subject matter of congressional investigations.

The distinction should be drawn, therefore, between information which an individual is demanding for his benefit in a civil or criminal trial and information which an investigating committee of the Congress should have in order to carry out the legislative intent of a statute or in order to aid it in its function of enacting appropriate and necessary legislation. There should, of course, be a spirit of cooperation between the executive and legislative branches when the information is to be given for a purpose good for the country as a whole. Furthermore, it seems reasonable to suppose that the framers of the Constitution wished to make that same spirit of cooperation a constitutional obligation incumbent upon the executive branch.

It is the feeling of the writer that should a case, perhaps through a contempt proceeding involving the head of an executive department or agency, reach the courts, credence would be given to the requirements of the legislative branch and that the cases cited in the opinion of Attorney General Jackson would not be deemed binding. Stated in another way, it is submitted that the aforementioned statement of the Attorney General falls and with it falls the second or legal argument of the executive branch.

CONCLUSION

In summary, the foregoing discussion holds that the "precedent" argument of the executive can be countered by precedents favorable to the legislative, about as numerous and strong as those of the executive branch. Even if the reader feels that the argument from precedent does not favor the legislative as much as it favors the executive branch, the claim of Congress that it has the constitutional power to create a precedent in its favor by enactment of appropriate legislation, has not been successfully countered by the executive. It is further submitted that the second or legal argument of the executive branch, generally accepted as true by the public and the press, is not supported by the authorities cited.

INTERNATIONAL DEVELOPMENT ADVISORY BOARD

Mr. WILEY. Mr. President, will the Senator yield so that I may ask a question of the chairman of the Appropriations Committee?

Mr. MORSE. I yield.

Mr. WILEY. I observe that the Appropriations Committee has restored $200,000 of the funds asked for by the executive branch for expenses for the Department of State in connection with the mutual security program. As the Senator knows, a small part of these expenses was justified by the executive branch as intended to cover the expenses of the International Development Advisory Board. This Board is provided for by the authorizing legislation and I believe many Senators look at it as I do as a valuable means by which the people responsible for administering this program may get the advice of highly qualified members of the public representing industry, labor, agriculture, education, science, and other major groups in our Nation. In addition, this is a valuable means by which private citizens and groups may present their views as to the administration of this program to the officials in charge. I simply want to be sure that there is no limitation on the use by the Department of State of these funds to provide the necessary small expenses for this highly competent and important Advisory Board.

Mr. HAYDEN. There is nothing in the bill which imposes such a limitation. The funds in question may be used for the expenses of this Board.

Mr. WILEY. I thank the Senator very much. The head of this Committee is Mr. Bullis, of Minneapolis.

Mr. JOHNSON of Texas. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. JOHNSON of Texas. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MUSKIE in the Chair). Without objection, it is so ordered.

Mr. JOHNSON of Texas. Mr. President, I am informed that the very able junior Senator from New York [Mr. KEATING] wishes to make a statement at this time.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Bartlett, one of its reading clerks, announced that the House had passed, without amendment, the following bills and joint resolution of the Senate:

S. 2230. An act to amend the National Cultural Center Act;

S. 2445. An act authorizing the conferring of the degree of master of arts in education on certain students who enrolled in the District of Columbia Teachers College prior to July 1, 1958, and who, prior to July 1, 1961, are certified by the president and faculty of such college as having met all requirements for the granting of such degree;

S. 2517. An act to amend section 7 of the Federal Home Loan Bank Act, as amended; and

S.J. Res. 103. Joint resolution authorizing the National Geographic Society to erect a memorial on public grounds in the State of Virginia to honor Rear Admiral Richard E. Byrd.

The message also announced that the House had agreed to the 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. 6904) to establish an Advisory Commission on Intergovernmental Relations.

The message further announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 9035) to permit the issuance of series E and H U.S. savings bonds at interest rates above the existing maximum, to permit the Secretary of the Treasury to designate certain exchanges of Government securities to be made without recognition of gain or loss, and for other purposes.

The message also announced that the House had severally agreed to the amendment of the Senate to the following bills of the House:

H.R. 2302. An act for the relief of Agnes Lorraine Pank;

H.R. 8582. An act to authorize the San Benito International Bridge Co. to construct, maintain, and operate a toll bridge across the Rio Grande near Los Indios, Tex.; and

H.R. 8694. An act to authorize the Starr-Camargo Bridge Co. to construct, maintain, and operate a toll bridge across the Rio Grande, at or near Rio Grande City, Tex.

The message further announced that the House had severally agreed to the amendments of the Senate to the following bills and joint resolutions of the House:

H.R. 2449. An act to authorize the Secretary of the Army to lease a portion of Twin Cities Arsenal, Minn., to Independent School District No. 16, Minn.;

H.R. 3030. An act to amend the act entitled "An act to authorize the establishment of a band in the Metropolitan Police force" so as to provide retirement compensation for the present director of said band after 10 or more years of service, and for other purposes;

H.R. 3735. An act to make the Policemen's and Firemen's Retirement and Disability Act Amendments of 1957 applicable to retired former members of the Metropolitan Police force, the Fire Department of the District of Columbia, the U.S. Park Police force, the White House Police force, and the U.S. Secret Service; and to their widows, widowers, and children;

H.R. 6190. An act to direct the Secretary of the Army to convey the Army and Navy General Hospital, Hot Springs, National Park, Ark., to the State of Arkansas, and for other purposes;

H.R. 7244. An act to promote and preserve local management of savings and loan associations by protecting them against encroachment by holding companies;

H.J. Res. 478. Joint resolution relating to permanent residence and deportation of certain aliens; and

H.J. Res. 479. Joint resolution relating to the entry of certain aliens.

The message also announced that the House had agreed to the following concurrent resolutions, in which it requested the concurrence of the Senate:

H. Con. Res. 439. Concurrent resolution authorizing the Speaker of the House of Representatives and the President of the Senate to sign enrolled bills; and

H. Con. Res. 440. Concurrent resolution establishing that when the two Houses shall adjourn on Monday, September 14, 1959, they stand adjourned sine die.

The message further announced that the House had passed a joint resolution (H.J. Res. 531) establishing that the second regular session of the 86th Congress convene at noon on Wednesday, January 6, 1960, in which it requested the concurrence of the Senate.

[10] Id. at 216.

[11] 52 Stat. 1066 (1938), 29 U.S.C. § 211 (1946 ed.).

ENROLLED BILLS AND JOINT RESOLUTION SIGNED

The message also announced that the Speaker had affixed his signature to the following enrolled bills and joint resolution, and they were signed by the Vice President:

H.R. 1435. An act conferring U.S. citizenship posthumously upon Gerardo Rafael Dobarganes y Torres;

H.R. 1701. An act for the relief of Mrs. Ellen Leschner;

H.R. 2077. An act for the relief of Bernard Barrett;

H.R. 3096. An act for the relief of Peony Park, Inc., and others;

H.R. 3180. An act to extend for an additional 3 years the time within which the State of Michigan may commence and complete the construction of certain projects heretofore authorized by the Congress;

H.R. 3410. An act for the relief of Mrs. Leonard O. Erickson;

H.R. 4821. An act to amend the act of August 12, 1955, Public Law 378, 84th Congress (69 Stat. 707), so as to provide additional relief for losses sustained in the Texas City disaster;

H.R. 4839. An act for the relief of Peter F. de Ullman;

H.R. 4894. An act for the relief of the Georgia Kaolin Co.;

H.R. 6405. An act for the relief of Vukasin Krtolica;

H.R. 6508. An act to grant minerals, including oil and gas, on certain lands in the Crow Indian Reservation, Mont., to certain Indians, and for other purposes;

H.R. 7518. An act for the relief of Rudloph Rozman;

H.R. 7550. An act for the relief of Vartaonuche Kalfayan;

H.R. 7683. An act to provide that the tax exemption hertofore accorded the Veterans of Foreign Wars with respect to certain property in the District of Columbia, formerly owned by such organization but never used for its intended purpose, shall apply instead to other property subsequently acquired and used for that purpose;

H.R. 7870. An act to amend the Revised Organic Act of the Virgin Islands, as amended; and

H.J. Res. 477. Joint resolution relating to the exclusion of certain aliens.

TRANSIT OF THE SUEZ CANAL AND LOANS TO THE UNITED ARAB REPUBLIC

Mr. KEATING. Mr. President, on July 3, 25 Members of the Senate sent to the President a telegram in which they explained their concern over the recent detention by the United Arab Republic of cargoes bound from Israel through the Suez Canal. They referred to previous correspondence on the subject. I was proud to be a signer of that letter.

On August 28 my distinguished colleague from New York [Mr. JAVITS], the distinguished Senator from Pennsylvania [Mr. SCOTT], and I joined in sending to the Secretary of State a letter in which we called attention to the fact that there was pending a loan by the International Bank for Reconstruction and Development; and we expressed the view that funds should not be advanced by the Bank to the United Arab Republic, for Suez Canal work without first having a guarantee of free transit through the canal.

We have just received from William B. Macomber, Jr., the Assistant Secretary of State, a most reassuring reply to our letter of August 28. I shall not read the entire letter into the RECORD; but the letter contains the following statement, among others:

You may be assured that we shall continue to avail ourselves of opportunities for setting forth our views in this regard in various apppropriate international agencies, including the International Bank for Reconstruction and Development. With respect to the UAR aplication for a loan for canal development, you will no doubt have noted the bank's August 27 statement that, *inter alia*, "Neither the Bank nor the Board of Directors has made any decision on the loan.

The full text of this message from the Department of State is most gratifying. I am glad to note that we will continue to seek means for alleviating Egypt's unwarranted blockade which is in contravention of international law and which unfairly discriminates against the noble State of Israel.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD a copy of the letter sent to the Secretary of State, and joined in by me with my distinguished colleagues, the senior Senator from New York [Mr. JAVITS] and the Senator from Pennsylvania [Mr. SCOTT]; and the reply received from Assistant Secretary of State Macomber.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

AUGUST 28, 1959.

Hon. CHRISTIAN A. HERTER,
Secretary of State,
Department of State,
Washington, D.C.

DEAR MR. SECRETARY: Reference is made to the letter of July 3 from Assistant Secretary Macomber in response to the telegram sent by 25 Members of the Senate to the President on June 24, explaining concern over the recent detention by the United Arab Republic of their cargo bound from Israel through the Suez Canal. Mr. Macomber expressed the concern of the State Department regarding the Suez Canal situation and stressing the importance of resolving the problem satisfactorily. He added that the U.S. Executive Director of the International Bank for Reconstruction and Development is aware of developments in this matter and is also conversant with our longstanding policy in support of the principle of freedom of transit through the canal.

In the light of the above and the fact that the International Bank for Reconstruction and Development presently has under active consideration a loan to the Government of the United Arab Republic, we would appreciate your advice as to what is being done to obtain from the UAR firm assurances and guarantees of free transit through the canal. Needless to say we do not feel that money should be advanced by the IBED to the UAR for the canal without at least these assurances in hand.

Respectfully,

JACOB K. JAVITS.
KENNETH B. KEATING.
HUGH SCOTT.

DEPARTMENT OF STATE,
Washington, September 11, 1959.

The Honorable KENNETH B. KEATING,
U.S. Senate.

DEAR SENATOR KEATING: I have for reply your letter to Secretary Herter of August 28, 1959, signed also by Senators JAVITS and SCOTT, in which you note that the International Bank for Reconstruction and Development has under consideration a loan to the United Arab Republic for improvement of the Suez Canal, and inquiring as to what is being done to obtain from the UAR assurances of free transit through the canal.

The Government of the United States firmly supports the principle of freedom of transit through the Suez Canal as an international waterway, and has made this position known repeatedly both in international forums and to the Government of the United Arab Republic. You may be assured that we shall continue to avail ourselves of opportunities for setting forth our views in this regard in various appropriate international agencies, including the International Bank for Reconstruction and Development. With respect to the UAR application for a loan for canal development, you will no doubt have noted the bank's August 27 statement that, inter alia, "Neither the bank nor the board of directors has made any decision on the loan."

We continue to support United Nations Secretary General Hammarskjold in his current efforts to achieve a solution to the question of free transit of the canal, and we hope that, aided by the counsel of the United Nations and of other friendly countries, including the United States, progress toward a solution of the current problem of restrictions on such transit can be attained.

Thank you for your interest in this matter. If I can be of any additional assistance to you, please do not hesitate to communicate with me.

Sincerely yours,

WILLIAM B. MACOMBER, Jr.
Assistant Secretary.

WE MUST TEACH ABOUT COMMUNISM

Mr. KEATING. Mr. President, on a previous occasion I addressed the Senate on the need for a coordinated program of courses about communism in our schools and colleges. Today, in light of the announced exchange of visits by President Eisenhower and Mr. Khrushchev, I should like to reiterate that plea and to offer further commentary upon a situation which I believe merits our careful attention.

The Soviet offensive against our way of life has taken many forms; but, far from weakening our political and economic fabric, it has given us new strength and vigor. It has provided us with an opposing system which we can contrast with, and compare to our own. Through its maneuverings, we have come to value more highly our heritage of freedom, and have gained a desire to defend it in whatever ways may be necessary.

It is my conviction that we who represent the democratic ideology can be twice armed if we understand the tenets of communism, as well as those of democracy. Ignorance of our opponents could be the most fatal mistake of our time. Lack of comprehension about democracy could be equally disastrous. Unquestionably, then, our schools must teach about communism, while at the same time they strive to develop a fuller understanding of democracy.

During the past few years there have been ever-increasing opportunities for contacts between the people of Russia and the people of the United States.