1956

The President's Refusal of Information to Congress

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THE PRESIDENT'S REFUSAL OF INFORMATION TO CONGRESS

by

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A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
Master of Arts

March
1956

AUTHOR'S LIFE

Paul A. Becker, S.J. was born in Jersey City, N.J., on August 2, 1932. He received his elementary education at Saint Raymond's Parochial Grammar School in Lynbrook, Long Island, graduating in June, 1945. For the next four years he attended Xavier High School, New York City. Upon graduating in June, 1949, he entered the Society of Jesus at the novitiate of St. Andrew on Hudson, Poughkeepsie, N.Y.. At the completion of two years in the novitiate and two years of classical studies at St. Andrew's, Mr. Becker began studies in Philosophy at West Baden College, West Baden Springs, Indiana, at the same time transferring from Fordham University to Loyola University of Chicago. From Loyola he received his Bachelor of Arts degree in June, 1954. In September, 1956, he began his three years of regency as an instructor of Latin, English, and American History at St. Peter's Preparatory School, Jersey City, N.J.

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CHAPTER I

INTRODUCTION

In recent years the American people have heard and read a great deal about congressional investigating committees, their powers and their methods. Of the great number of senators and congressmen who have served on these committees at one time or another, perhaps none has enjoyed more publicity than the controversial gentleman from Wisconsin, Senator Joseph R. McCarthy. His name is mentioned here because throughout the numerous probes he directed until his censure by the United States Senate, he was frequently on the receiving end of that power of the President of the United States with which we are here concerned, the power to withhold information from Congress. One recent instance of such a refusal of information occurred in May, 1954, during the Army-McCarthy hearings. In the course of his testimony before the Senate Committee on Government Operations, Army Counselor John Adams told of a meeting which had taken place several months earlier between certain top officials of the Eisenhower Administration. When asked for further details of this conference, Adams refused to answer. His position was supported and

clarified a few days later when the President issued a directive to the Secretary of Defense, forbidding all employees of the Defense Department appearing before the Senate Committee on Government Operations to testify concerning conversations or communications exchanged within the Executive Department on official matters. Deeply chagrined, Senator McCarthy called for a recess to consider "this unbelievable situation."[1]

Unbelievable or not, the case is but one of many cases of a similar nature which have occurred during the Roosevelt, Truman, and Eisenhower administrations. By what right, we could ask, may the President of the United States withhold information from Congress, even when his action seems to be a hindrance to a valuable and worthwhile function of the legislative body? In other words, what is the origin of this power? To answer this question will be the first aim of this thesis.

The problem at hand begins to take on substance when we recall that nowhere in the United States Constitution is there explicit mention or acknowledgment of this presidential power as such. Further, in the one hundred and sixty-four years that have elapsed since the origin of the power, and in the one hundred and sixty since it was first exercised, no statute dealing with such a power has ever been passed. And while there have been a fair number of court cases which dealt with congressional powers

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[1] Time Magazine, May 24, 1954, 26.

of inquiry, the presidential power to withhold information has never been the subject of a Supreme Court decision.

What then is the origin of this power? History tells us that the first president to withhold information from Congress was George Washington. It would be natural to suspect then that Washington played an important part in determining the nature and extent of the power, as well as the conditions required for its invocation. As will be seen later such was the case. Nevertheless, one might still ask by what authority our first president established this power. The answer in Washington's own words is: ". . . 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."[2]

The doctrine of separation of powers which establishes the general independence of the Executive, Legislative, and Judicial Branches of our government, was clearly Washington's justification of his refusal. It is not the purpose of this thesis to consider the doctrine of separation of powers, which is the remote foundation of the President's prerogative in refusing

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[2]Messages and Papers of the Presidents, ed. James D. Richardson, (New York, 1897), I, 188.

information to Congress. Rather its aim will be to determine the proximate origin of this power, and from an examination of the details of Washington's procedure in 1792 and 1796, to learn something of the nature of the power as it existed at the time of its institution.

It was mentioned that the power to withhold information is not explicitly established in the Constitution, nor in an positive statute. What then is the force of this power? When the president exercises his right to withhold information, he acts in accordance with his own interpretation of the Constitution. Thus Washington acted, and such has been the procedure of all later presidents having recourse to the power. However, there is this considerable difference in the actions of later presidents, that they have had behind them the weight of historical precedent. American history abounds in the number of instances in which information has been withheld by the president or by heads of departments. It would, therefore, have been a far easier matter to force President Monroe to back down on his refusal in 1825, either through the threat of impeachment or by weight of public opinion, than it would be today. In a word, the power, although not enjoying the force of law, has come to be regarded as a custom. "A custom is the result of a long series of actions, constantly repeated, which have, by such repetition, and by

uninterrupted acquiescence, acquired the force of a tacit and common consent."[3]

It is true that the general principle established by Washington in 1792, that information might be withheld whenever compliance with a congressional request would prove incompatible with the public interest, admits of numerous interpretations. Moreover, at least in theory, any president has as much right to apply the power according to this norm as Washington did, and would have the right to so interpret the Constitution regardless of historical precedent. Yet, the fact remains that the president today would be much more reluctant to apply the power, were it not for the numerous historical precedents that have intervened since its origin, for there would exist a much greater chance of incurring the wrath of Congress and of the people, without such precedents. The number of these precedents over the years has enormously increased the strength and stability of the power. The many innovations introduced in its application to new situations have considerably broadened the nature and extent of the power, if not in theory, then at least, and much more important, in fact. And the number of precedents issuing from each new innovation has increased the force of the power in each of those distinct and separate types of application. It is for this reason

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[3]Henry Campbell Black, Black's Law Dictionary, 3rd ed., (St. Paul, 1933), 494.

that the second aim of this thesis will be a thorough review and examination of the many historical cases in which the President of the United States has withheld information from Congress. The purpose of this examination will be to determine the historical development of the power, to the end that a greater understanding might be had of its nature and extent as it exists in practice today.

The third question which might be asked, and which certainly can only be answered through a study of this kind, is what are the advantages and disadvantages of the power as it exists today. This of course comes down simply to an inquiry into the advantages and disadvantages which have followed from historical usages of the power. For example, what advantage, if any, can be found in the power when refusal obviously hampers Congress in its work of removing subversive elements from the government? It will also be of value to try to determine whether the power has ever been abused, although this is admittedly the most difficult feature of our investigation.

Other than the brief and scattered accounts of various cases to be found in biographies of presidents, there has been no thorough and connected investigation of this subject. This treatment, therefore, will be unique for the thoroughness of investigation it will give to the subject, as well as for its evaluation of the development and present scope of the power as established by historical precedent.

The best source material was found to be such primary sources as the Annals of Congress, and its successors, the Congressional Globe and Congressional Record. Letters of the various presidents proved to be invaluable also. Secondary source materials, such as biographies of presidents and works dealing with particular periods, were more or less helpful, depending on whether the cases to be considered had other important historical implications. There are a few studies of the congressional investigative power which were moderately helpful.

A word of caution seems in order at this point. This thesis does not attempt any sort of investigation into the legal aspects of the problem. Nor will any theorizing be done on an alternate method of institution which early presidents might have followed, or on how it might now be amended. This is exclusively an historical treatment of the subject, dealing with precedents recorded in history and with the historical background of those precedents. All the conclusions of the thesis will be based solely upon historical evidence.

CHAPTER II

THE ORIGIN OF THE POWER

The President's power to withhold information from Congress was clearly established by President George Washington in two cases which arose during his administration. In the first of these cases, concerning the infamous St. Clair expedition, although the conditions for the precedent were methodically set down, no information was actually refused. The first instance of a President exercising the power did not come until four years later at the close of Washington's second term of office. These two cases make up the subject matter of this chapter.

In the latter part of the summer of 1790, Major General Arthur St. Clair, Governor of the Northwest Territory, met with President Washington in New York, to discuss the impending frontier campaign. Aware of St. Clair's lack of experience in the type of warfare carried on in the wilderness, the President was careful to warn the General to be ever on his guard against the possibility of a surprise attack. St. Clair proposed the establishment of a military post at a so-called "Miami Village," near present-day Fort Wayne, Indiana, and he was ordered to proceed to Miami with a force of two thousand men composed of regulars and militia. By

the autumn of 1791, it was assumed that these orders were in process of execution.[1]

On December 9, 1791, word reached the President that St. Clair's expedition had sustained a tragic and ignominious defeat. Attacked by the Indians near the Miami Village, the army had thrown away its weapons and fled in panic, leaving all its cannon and much other equipment behind them. Discipline was not restored to the fleeing remnants until they were many miles from the scene of the disaster, and when inventory was finally taken, the total casualties numbered more than nine hundred. It was, says Freeman, the most ghastly and humiliating experience of the white man in Indian warfare since Braddock's defeat.[2]

Feeling ran high among officials of the Government and the people as well. On December 12, Washington sent to both houses of Congress an official report of the event, promising a further communication of all information necessary for the Legislature to judge what measures should be taken to meet the situation. St. Clair's personal report of the event was sent, complete and exactly as received.[3]

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[1] Douglas Southall Freeman, George Washington, (New York, 1954), VI, 329.

[2] Ibid., 336-339.

[3] Ibid., 339.

Nevertheless, these and other reports sent to Congress during the following months were evidently not sufficient in the eyes of certain legislators. A resolution was brought up in the House of Representatives proposing that the President should be called upon to institute an inquiry. In the debate which followed, this measure met with widespread opposition on the part of many who felt that to phrase the motion in such a way was to imply a certain remissness in the President's performance of his duty, a fact which, to say the least, was by no means certain. On March 27 this first resolution was rejected, and in its place another was passed which stated: "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."[4]

Immediately a request was sent to Secretary of War Knox for all the papers and letters, including Washington's original instructions, connected with the St. Clair expedition, and Knox in turn laid the matter before the President for his approval. On March 31 Washington called a meeting of his cabinet, consisting of Hamilton, Knox, Jefferson, and Randolph. He told them that he did not in any way question the propriety of the House's procedure.

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[4] Annals of Congress, 2nd Congress, 1st Session, (Washington, 1849), III, 490-94.

However, he felt that in as much as this was the first example of such a request for information and would, therefore, serve as a precedent for subsequent cases of a similar nature, he was anxious that it be handled thoughtfully and correctly. On April 2 the Cabinet again met on the same subject. Says Jefferson of the meeting:

> "We were of one mind. (1). that the House was an inquest, and therefore might institute inquiries. (2). that they might call for papers generally. (3). that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosures of which would injure the public. Consequently were to exercise a discretion. (4). that neither the commee nor House had a right to call on the head of a deptmt, who and whose papers were under the Presidt. alone, but that the commee should instruct their chairman to move the house to address the President."[5]

With this matter of principle decided, Washington had no desire to withhold any information from the House, and accordingly he wrote to the Secretary of War on April 4, directing him to forward to the House all papers requested by their resolution.[6]

The only dissenter from this opinion was Hamilton, who agreed on all points except the last, that concerning the House's power to call on heads of departments. He recognized that his own post of Secretary of the Treasury was certainly subject to Congress on some points, as evidenced by the acts which created that office.

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[5]Thomas Jefferson, "The Anas," Writings, ed. P. L. Ford, Federal edition, (New York, 1904), II, 213-14.

[6]George Washington, Writings, ed. John C. Fitzpatrick, (Washington, 1939), XXXII, 15.

Nevertheless, he still did not feel obliged to produce any and every paper Congress might request. Jefferson tells us of this opinion of Hamilton and adds that he thought Hamilton preferred the question to remain vague, so that he might be able to subject himself either to Congress or to the President according to his own pleasure.[7]

The report of the select committee of the House on May 8, 1792 exonerated General St. Clair of all blame. Consideration of this committee's report was then referred to another committee whose report was completed too late for discussion in the 1st Session. When Congress reconvened in the fall of 1792 the matter was taken up anew. A debate took place in which it was moved to demand the attendance of the Secretaries of War and the Treasury on the House. Yet many members of the House opposed this motion, some simply because they could see no point to it; others, because they did not think the House had the power to demand the presence of the officials in question. Consequently, on November 14, an alternate resolution was passed merely calling for information, not demanding the attendance of the department heads. Although Secretary Knox did subsequently appear before the committee, his appearance seems to have been entirely voluntary.[8]

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[7] Jefferson, Writings, II, 214.

[8] Annnals of Congress, 2nd Cong, 2nd Sess, 679-89.

The St. Clair case is an important one in American history. Not only was it the first time a Congressional committee was appointed to investigate a matter involving the Executive branch of the Government, it was also the first Congressional request for information from the Executive. The House based its right to investigate on its control over public expenditures and appropriations.[9]

Thus, although the House received the fullest cooperation from the President in the St. Clair case, and although no information was refused, the certain conditions for future refusals of information were nonetheless clearly established, even pertaining to department heads.

The second Washington case, and the first in which information was refused to Congress, concerned Jay's Treaty of 1794 with Great Britain. War had broken out between Great Britain and France in 1793, promising a profitable trade in wheat for the United States with both belligerent nations. American hopes were of short duration, however, for almost immediately Britain began to seize all neutral vessels trading with the French West Indies. This served to heighten the friction already existing with the English over the refusal of American citizens to pay their debts to English creditors, outstanding since the Revolution, together with British reluctance to surrender their trading posts in the Northwest Territory.

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[9] W. E. Binkley, The Powers of the President, (Garden City 1937), 39-40.

As the United States was not prepared for a war, President Washington, in spite of certain dubious treaty obligations to France, issued a proclamation of neutrality. He then sent Chief Justice John Jay to England to work out a treaty covering the various points disputed by the two nations. America was clearly in no position to bargain, as the treaty clearly demonstrated. To Great Britain went the right of free navigation and trading on the Mississippi, the payment of all outstanding American debts, and the freedom of all American ports to British vessels. Of the key issue, the impressment of United States seamen, nothing was said.

Public opinion was bitter against Washington, Hamilton and Jay. Jefferson, the leader of the Republicans, had already resigned as Secretary of State, and he opposed the treaty when he realized that it would be a good issue on which to unify his party. The treaty was submitted to the Senate, debated in secret for two weeks, and then approved. President Washington signed it on August 12, 1795.[10]

One fact which should be kept in mind is that over this entire episode there hangs the pall of party politics. The Republicans were traditionally pro-French, and called the treaty "the most humiliating contract into which America has ever entered."[11] Ratification had been secured, but it was soon clear

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[10]Carl Brent Swisher, American Constitutional Development, (Cambridge, Mass., 1943), 78-79.

[11]Albert J. Beveridge, The Life of John Marshall, (Boston, 1919), II, 114.

that the Republicans had not yet begun to fight. The effectiveness of the treaty depended upon the appropriation of government funds, an appropriation which could be voted only by the Republican dominated House of Representatives. The controversy finally boiled over in the form of a resolution proposed in the House on March 2, 1796, by Edward Livingston of New York. The measure stated: "Resolved. That the President of the United States be requested to lay before this House a copy of the instructions to the Minister of the United States who negotiated the treaty with Great Britain, communicated by his message of the first of March, together with the correspondence and other documents relative to the said treaty."[12]

In the debate which followed, Livingston was asked whether the purpose of securing these papers was to contest the constitutionality of the treaty or to bring about the impeachment of Washington or Jay. He answered that this remained to be seen and that the main reason for the call was that the House might be able to decide whether it would sanction the treaty or not. The Federalists replied that the treaty was conducted in perfect accord with the Constitution, and they pointedly observed that according to that same Constitution the House had absolutely no share in the treaty-making power.[13]

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[12] Annals of Congress, 4th Congress, 1st Session, 426.

[13] Ibid., 426-29.

This sanctioning of the treaty to which Livingston referred was simply the voting of the appropriations necessary for carrying the treaty into effect. The Republicans claimed that the House could hardly be expected to vote intelligently on the matter without access to the requested papers and information. They were willing to admit the President's constitutional right to refuse this information, and on March 7, an amendment was inserted into the resolution so as to except "such of the said papers as any existing negotiations may render improper to be disclosed."[14]

At this point the issue of the debate underwent a change from the original question of whether information should be requested of the President, to whether the House enjoyed a share in the treaty-making power at all. For three weeks the debate rambled on. James Madison and Albert Gallatin were the principal spokesmen for the Republicans, and Madison's arguments were particularly cogent and to the point. The gist of his rather lengthy speech was that since treaties have the force of law, the House could not be a part of the law-making power of the government and yet be excluded from the treaty-making power, for such an exclusion would be to reduce it to a purely ministerial agency, an instrumental arm of the Executive and the Senate. Then too, he said that the House could not be expected to appropriate funds without deliberation on the subject. The treaty was utterly dependent for

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[14] Ibid., 429-38.

its efficacy, at least in this case, on the appropriation of funds by the House, and this was an argument both for the House's right to the desired papers, as well as for the contention that it shared in the treaty-making power.[15]

It was March 24 before the House finally returned to the original question of the request for information. Livingston's amended resolution requesting the papers was put to a vote and passed, sixty-two to thirty-seven.[16]

The Federalists argued the matter during the following week, suggesting that the desired papers had already been given to the Senate and were at that moment on file in the same building in which they all sat. Therefore, they pleaded, why debate for eighteen days over papers which could have been obtained in as many hours?[17]

On March 25 the President replied to the House that "he would take the request of the House into consideration."[18] He then wrote to his cabinet members as follows:

> Sir: The Resolution moved in the House of Representatives, for the papers relative to the negotiation of the Treaty with G. Britain having passed in the affirmative, I request your opinion,

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[15] Ibid., 487-95.

[16] Ibid., 759.

[17] Ibid., 791.

[18] Washington, Writings, XXXIV, 505.

> Whether that branch of Congress hath, or hath not a right, by the Constitution, to call for those papers?
>
> Whether, if it does not possess the right, it would be expedient under the circumstances of this particular case, to furnish them?
>
> And, in either case, in what terms would it be most proper to comply with, or to refuse the request of the House?
>
> These opinions in writing, and your attendance, will be expected at ten o'clock tomorrow.[19]

The cabinet was unanimously opposed to compliance with the resolution of the House. On March 30, Washington, following these opinions, and especially that of Hamilton,[20] replied to the House in a tone at once courteous but unyielding:

> 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.[21]

He pointed out further that the "nature of foreign negotiations requires caution, and their success must often depend on secrecy; . . . To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to

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[19] Ibid.

[20] John S. Bassett, The Federalist System, (New York, 1907), II, 134.

[21] Messages and Papers of the Presidents, ed. James D. Richardson, (New York, 1897), I, 186-88.

establish a dangerous precedent." He reminded the House that careful examination of the Constitution, the journals and proceedings of the Federal Convention, and of the state ratifying conventions, proved conclusively that the House was definitely not intended to share in the treaty-making power of the government. As for the Senate, which does share in this power, Washington again stressed the point that no information whatsoever had been refused to that body at the time of its deliberation on the treaty. Furthermore, he said that since the House had no share in the treaty-making power, the only other purpose which it seemed it could have had in its request was impeachment, and that had not been specified in the resolution. He concluded:

> 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; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, 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.

Needless to say, the House Republicans were indignant at this blunt refusal. Wrote Madison to Monroe: "I have no doubt that the advice, and even the message itself, were contrived in New York, where it was seen that if the rising force of the Republicans was not crushed, it must speedily crush the British party, and that the only hope of success lay in favoring an open

rupture with the President."[22] On April 6 Representative Thomas Blount proposed a resolution stating that even though the House had no share in the treaty-making power, in a case such as this in which the treaty concerned a matter subject to House control, the House had not only a right, but even an obligation to deliberate on carrying the treaty into effect. The resolution was passed on the following day by a vote of fifty-seven to thirty-five.[23] Another resolution was also passed on April 7, the same day, in which the House denied the necessity of stating the purpose of its call for information, when such information was needed for the constitutional operations of the House.[24]

The situation was indeed serious by this time. From Senator Rufus King of New York came the blunt announcement that unless the House made the necessary appropriations, the Senate would consider all legislation at an end and the Union dissolved.[25] Similarly, the Federalist Press threatened that they would see the dissolution of the Union before allowing the rejection of Jay's Treaty to precipitate a war with England. Secretary of the Treasury Hamilton secured counter-resolutions from many of the

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[22] Letters and Other Writings of James Madison, Fourth President of the United States, (New York, 1884), II, 97.

[23] Annals of Congress, 4th Congress, 1st Session, 772-73.

[24] Ibid., 782-83.

[25] Claude Bowers, Jefferson and Hamilton, (Boston, 1925), 298-99.

merchants in his home state of New York who stood to suffer from a rejection of the treaty. Finally, a plan was devised by the Federalists to have the Senate attach Jay's Treaty as a rider to three other treaties with Spain, Algiers, and the Indians, all of which were up for consideration at that time. It was hoped that the House would then be forced to yield in order to secure the Senate's ratification of these three other treaties. However, this maneuver failed when the House Republicans managed to outvote the Federalists on the first three treaties before the treaty with Great Britain came up. It is interesting to note, says Schachner, that the Federalists did not attempt to defend the treaty, but concentrated their attack on the fact that the House had no right to examine the treaty at all.[26]

The next few weeks were crucial. John Adams writing on April 19 speaks of the dangers of war or dissolution of the Union if the House should refuse to make the necessary appropriations. "I cannot deny," he said, "the right of the House to ask for papers, nor to express their opinions upon the merits of a treaty. My ideas are very high of the rights and powers of the House of Representatives. These powers may be abused, and in this instance there is great danger that they will be. . . . But the faith and honor of the nation are pledged, and though the House cannot

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[26]Nathan Schachner, The Founding Fathers, (New York, 1954), 391-93.

approve, they ought to feel themselves bound. Some persons still think the House will comply."[27]

On April 15 debate on the treaty began once more in the committee of the whole. The turning point came on April 28 with the famous "Tomahawk Speech" of Representative Fisher Ames. Although only thirty-eight years old, Ames was in very poor health, and his speech on this occasion almost cost him his life. His eloquence in stressing the vital necessity of avoiding war and preserving the nation at any honorable cost turned the tide of opposition.[28] A vote of fifty to forty-nine sent the matter from the committee of the whole to the House, and on April 30, by a vote of fifty-one to forty-eight, legislation making the necessary appropriations in support of the treaty was enacted by the House, "exercising its recognized constitutional freedom of judgement."[29]

Although the question of the House's power with regard to treaties has continued through the years to be a favorite subject of debate, there was not much that could be said on the President's refusal of information. This second case, unlike the one of four years previous, was not just a simple statement of

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[27] Letters of John Adams Addressed to His Wife, ed. Charles Francis Adams, (Boston, 1841), II, 222-24.

[28] Great Debates in American History, ed. Marion M. Miller, (New York, 1913), II, Part I, 51-56.

[29] Annals of Congress, 4th Congress, 1st Session, 1291

principle, but an abrupt refusal, and it could not be expected to sit well with the congressional house in question. Moreover, there was clearly present an element of party politics, and this rendered the controversy even more bitter. The argument advanced by the House Republicans that they were entitled to information concerning any appropriation they were expected to make, was a good one in those early days, and remains so even today. Nevertheless, Washington's defense of his action in withholding the papers called for by the House definitely carried the day. Whether the House should have a share in the treaty-making power is an interesting question, worthy of much consideration and perhaps even of a constitutional amendment. Yet as Washington pointed out in his letter of refusal, the plain fact is that the Constitution did not at that time (nor does it today) include the House in that power. Inasmuch as it was the contention of those Republicans demanding the information that the House did possess such power over treaties, surrender of the information would have been tantamount to admitting they were correct about the treaty power. With this fact in mind it is easy to understand those words of the President: ". . . it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments be preserved."[30]

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[30]Richardson, Messages and Papers of the Presidents, I, 188.

protection of the constitutional separation of powers demanded a refusal of the information.

This was not the only reason for the President's refusal. Even had the House not put forth such a bold interpretation of the extent of its powers, but merely requested the information, the President would have refused anyway, in order to preserve the secrecy so essential to the negotiation of a treaty with a foreign power. The House itself recognized this in the amendment which was passed to Livingston's resolution, excluding "such of the said papers as any existing negotiations may render improper to be disclosed."[31]

Thus did the House itself recognize the constitutional right of the President to refuse the information should he choose to do so; thus did the President make the public interest his norm of action, for it must be in the public interest to protect the powers of the Executive from encroachment by another branch of the government, and to protect the principle of treaty-secrecy; and thus was the precedent, outlined four years before, firmly established.[32]

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[31] Annals of Congress, 4th Congress, 1st Session, 438.

[32] (The best treatment of Washington's second case is McMaster, History of the People of the United States, II, 267-281; Swisher, American Constitutional Development, 78-83; and Schachner, The Founding Fathers, 389-393.)

CHAPTER III

THE DEVELOPMENT OF THE POWER - I

Having considered the origin of the power, we turn now to its subsequent development. This chapter will be devoted exclusively to cases in which the President's refusal was based upon the obligation imposed by the Constitution on every Chief Executive, of protecting his powers against Congressional encroachment, while the chapter to follow will deal with other cases in which the reason given for the refusal was of a more specialized nature. Since there are two cases which particularly stand out over the years as the most vigorous and contested refusals of information to Congress, both designed to protect the President's prerogative, both of them will be treated in this chapter.

The first of these cases took place in the administration of President Andrew Jackson. A really thorough treatment of Jackson's war on the United States Bank would require more space than could possibly be allowed here. Nevertheless, certain details will be mentioned, as they contribute to a fuller understanding of this case. It is not perfectly clear just why Jackson opposed the Bank. Was he really convinced that the institution was a menace to the lower classes? Or was it merely a political

issue, on which he meant to capitalize to increase his following? As a matter of fact, the real reason was probably a very complex combination of these and other reasons. At any rate, when in July, 1832, the bill for rechartering the Bank came before the President, Jackson vetoed it. When later that same year he was re-elected to the Presidency after so much public discussion of his veto, he considered his action gloriously vindicated. And so the administration set out once and for all to destroy the "Nobility System" and its head, the United States Bank.[1]

Although the Bank charter was not due to expire for another three years, Jackson was determined to kill the institution as soon as possible. The charter made the Bank the depository of federal funds, unless the Secretary of the Treasury should order otherwise. Accordingly, the President decided to remove these funds from the Bank. Because Secretary of the Treasury McLane would have nothing to do with the move, he was promoted to the State Department, and his position in the Treasury Department was filled by William J. Duane, a Philadelphia lawyer who had signed the anti-Bank report in 1829. This was the plan proposed by Attorney-General Taney, who believed that while Congress itself could not control federal funds, the Secretary could.[2]

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[1]Arthur M. Schlesinger, Jr., The Age of Jackson, (Boston, 1945), 89-97.

[2]Binkley, The Powers of the President, 77.

But the Secretary would not. Duane certainly must have known what was expected of him when he took the position, yet he managed to evade the issue, neither accepting nor opposing the President's point of view. On September 14, 1933, Jackson finally suggested to Duane that he resign, but to everyone's surprise, he refused. When on the eighteenth Jackson read a paper to his cabinet, a fiery denunciation of the Bank, and Duane continued in his refusal to remove either the funds or himself, the exasperated President simply fired him, and on September 25 appointed Taney Secretary of the Treasury.[3]

The Senate was more irritated over this action than over the original veto. Due to the close relationship that had always prevailed between Congress and the Treasury Department, they felt that their prerogative was being threatened. The duties of the Secretary, they argued, were assigned by Congress, and it was to Congress that he was directed to report. In other words, Jackson thought the Secretary was subject to the President's orders, whereas the Senate did not.[4]

When Congress assembled in December, 1833, Henry Clay proposed that an inquiry be made of the President, whether a certain paper reported to have been read at a cabinet meeting and later

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[3]Schlesinger, The Age of Jackson, 100-1.

[4]Binkley, Powers of the President, 78.

published was genuine, ". . . and if genuine that he be also requested to lay a copy of said paper before the Senate." Some objections were made by the Jacksonians, Benton and Forsyth, but the measure was swiftly passed.[5]

The paper in question was of course the one Jackson read to his cabinet on September 18, containing his decision to remove government funds from the United States Bank, and listing his reasons for this action. The President claimed that the law gave full authority to the Secretary, and that Congress' right to knowledge was only supposed to be an aid to further legislation. This power of the Secretary had been defended in 1817, he said, and even though the charter had not yet expired, he felt that the removal should be gradual and over a period of time. Various reasons were then advanced why the President thought the Bank was against the public interest.[6]

It is interesting to conjecture what might have been the motives of Henry Clay. Why, for instance, did he insist on Jackson's handing over to the Senate a paper which had been published in thousands of newspapers all over the United States and Europe? This question also occurred to Senators Benton and Forsyth, and the latter bluntly asked Clay from the Senate floor what the object of the motion was, whether it was not for purposes

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[5]Congressional Globe, 23rd Congress, 1st Session (Washington, 1835), 20-21.

[6]Messages and Papers of the Presidents, III, 1224-38.

of impeaching the President? It was one of the rare occasions that found the great orator without an answer. Binkley suggests that Clay was simply trying to play up the President's part in the removal as much as possible.[7] This would square with the assertion of Marquis James that throughout the whole affair Clay was really more concerned with his chances in the election of 1836 than with the fate of the Bank.[8]

On December 12, the President addressed a forceful reply to the Senate's resolution. The letter read in part:

> The executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of Departments acting as a Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.
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> * * *
>
> Knowing the constitutional rights of the Senate, I shall be the last man under any circumstances to interfere with them. Knowing those of the Executive, I shall at all times endeavor to maintain them agreeably to the provisions of the Constitution and the solemn oath I have taken to support and defend it.[9]

The point at issue then took a false shift. "It is a struggle," said Calhoun, "between the executive and legislative

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[7]Binkley, Powers of the President, 80.

[8]Marquis James, The Life of Andrew Jackson, (New York, 1938), 655.

[9]Messages and Papers of the Presidents, III, 1255.

departments of the Government; a struggle, not in relation to the existence of the Bank, but which, Congress or the President, should have the power to create a bank, and the consequent control over the currency of the country. This is the real question."[10] Of course this was not the real issue at all, but it was an issue on which all of Jackson's enemies could unite, the Bank supporters as well as proponents of nullification. The Senate floor and galleries were packed when, on December 26, Clay sounded the keynote. "We are," he said, "in the midst of a revolution rapidly tending toward a total change of the pure republican character of our government, and to the concentration of all power in the hands of one man. The powers of Congress are paralyzed, except when exerted in conformity with his will, by frequent and extraordinary exercise of the executive veto, not anticipated by the founders of our Constitution and not practiced by any predecessors of the present chief magistrate." The speech, which lasted from the twenty-sixth to the thirtieth of December, ranged from such subjects as the undermining of the currency and the tariff to the grave dangers to liberty and the Constitution embodied in the person of Andrew Jackson. Clay concluded: "The premonitory symptoms of despotism are upon us; and if Congress do not apply an instantaneous and effective

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[10] Register of Debates in the United States Congress, 23rd Congress, 1st Session, (Washington, 1834), X, 217-18.

remedy, the fatal collapse will soon come on, and we shall die - -ignobly die- - base, mean, and abject slaves, the scorn and contempt of mankind; unpitied, unwept, and unmourned!"[11]

December 26, the day on which he began his speech, also saw Clay propose two resolutions, which after debate, were passed early the following year. The first one stated: "Resolved that the reasons assigned by the Secretary for the removal are unsatisfactory and insufficient." It was passed on February 5 by a vote of twenty-eight to eighteen. The second was a resolution censuring the President which stated: "Resolved, that the President in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and the laws, but in derogation of both."[12] This resolution was passed on March 28, by a vote of twenty-six to twenty.

On April 15 President Jackson countered with a lengthy protest addressed to the Senate. "The President of the United States, therefore, has been by a majority of his constitutional triers accused and found guilty of an impeachable offense," said Jackson, "but in no part of this proceeding have the directions of the Constitution been observed." Of course, it was no secret

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[11] Ibid., 59-94.

[12] John S. Bassett, The Life of Andrew Jackson, (New York, 1931), 649.

that the House was Jackson's and would never impeach him. The Senate's action in censuring the President was second best to impeachment, and the only alternative open to the Senate which had not the right to impeach the President, for it remains to the House to institute proceedings against the Chief Executive, and Jackson's retaliation was merely to point out to the Senate the unconstitutionality of its action.[13]

The Senate refused to receive this reprimand of the President, and the censure resolution alone remained on the record. This enabled the friends of the President to claim he had been condemned without a hearing, and that his protest had been treated with contempt.[14]

Of course, the President never handed over the requested paper. With the House solidly behind him, there was not a chance in the world he would be impeached, and so the worst the Senate could do was to refuse to place his protest in the record. On April 4, four resolutions proposed by Representative James K. Polk were passed in the House, killing the Bank. But the affair was far from being closed. Senator Thomas Benton pledged that he would not rest until the censure resolution was expunged from the record, and he began a campaign to secure that end. Pressure was exerted

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[13]Messages and Papers of the Presidents, III, 1288-1312.

[14]Bassett, Andrew Jackson, 650.

by the President and his huge following upon state legislatures, which then began to demand the resignation of senators who had voted for the censure. At last in 1837, with Jackson no longer in office, the expunging resolution was passed. Not even the opposition of Henry Clay, making one of the great speeches of his career, could stop it.[15]

Was Taney justified in removing the deposits? He himself certainly thought so, since section sixteen of the Bank charter gave him full discretion to do as he saw fit, and it would seem that he was right. He pointed out that the congressional power to order restoration of the funds was invalid without the President's consent. Then too, when the Secretary was given power to withdraw deposits by Congress, that body was well aware that the President had the power to remove the Secretary.[16]

But even if Jackson and Taney were not justified in removing the funds from the Bank, the President was undoubtedly justified in refusing his cabinet paper of September 18 to the Senate. Such an inquiry on the part of a Congressman today would be absurd says Binkley. The reason it did not strike them as such in those days was because people had been accustomed to nearly twenty-five years of subordination of the Executive to Congress.[17] Jackson's

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[15]Binkley, Powers of the President, 85-88.

[16]Bassett, Andrew Jackson, 646-9.

[17]Binkley, Powers of the President, 80.

victory is important precisely because it was the first time a president's refusal had been founded merely on the protection of the Executive's prerogative. As such, there can be no doubt that it was for the public welfare, since protection of the principles of the Constitution is always for the public welfare. Consequently, Jackson was fully within the conditions laid down by Washington for the exercise of the power.

Yet, this case was even more significant because it came at a time when the power of Congress was at a peak, and because it was, to a certain extent, a partisan conflict won by the President. With one exception, the situation which surrounded President Andrew Jackson in 1833 is unique in American history, as far as the refusal of information is concerned. That one exception provides the background for our second case.

A large amount of the credit for the success of Andrew Jackson's two administrations must be attributed to his use of the spoils system. The Senate realized this fact, and during Jackson's own time sought to share with the President the power he enjoyed. But the old general was a bit too crafty as well as stronger and more popular, and at length the Senate was forced to desist. For one reason or another the presidents following Jackson were weaker, and senatorial encroachment once again continued along the path it had been pursuing when he entered the White House. The climax came with the Tenure of Office Act of 1867, by

which the Senate assumed control of all appointments to and removals from public office. Public opinion and protests by the President brought about a revision in the act two years later, which took most of the sting out of the law. Nevertheless, the amendment failed to restore the President's full freedom of removal, for it provided that the Executive within thirty days after the commencement of each session nominate persons to fill the vacancies. Then if the Senate rejected any of these appointments, the President had to make others, and so on, until an agreement was reached. These limitations were the subject of numerous protests by Presidents Grant, Hayes, and Garfield, and the law was generally considered unconstitutional by most lawyers both in and out of the Senate. Yet nothing was done to remove it from the books.[18]

When Grover Cleveland took the oath of office on March 4, 1885, his inaugural address left no doubt as to the new President's "appreciation of those functions which by the Constitution and laws have been especially assigned to the executive branch of the Government."[19] In the interval between his inauguration and the opening of the first session of Congress in December, Cleveland suspended 643 Republican officials and appointed the same

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[18]Robert McElroy, Grover Cleveland, The Man and the Statesman, (New York, 1923), I, 169-172.

[19]Messages and Papers of the Presidents, X, 4886.

number of loyal Democrats to fill those vacancies. By far the greater number of officials suspended, said the President, were ousted because of "gross and indecent partisan conduct on the part of the incumbents." He had in mind the use of government post offices as local party headquarters, and other scheming which went on during the election.[20]

When Congress convened in December, Cleveland, in accordance with the Tenure of Office Act of 1869, submitted the names of his 643 Democratic appointees, well within the required thirty day limit. Immediately, congressional committees began bombarding the President and executive departments with requests for reasons, as well as papers and information on file in the executive departments relating to the suspensions. Said Cleveland in retrospect: "These requests foreshadowed what the Senatorial construction of the law of 1869 might be, and indicated that the Senate, notwithstanding constitutional limitations, and even in the face of the repeal of statutory provisions giving it the right to pass upon suspensions by the President, was still inclined to insist, directly or indirectly, upon that right."[21] The Republican Senate was clearly making an attempt to preserve the power it had held for years, despite the fall of the Presidency and the House to the Democrats.[22]

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[20]Grover Cleveland, Presidential Problems, (New York, 1904), 39-42.

[21]Ibid., 46.

[22]Binkley, Powers of the President. 176.

Realizing that the doctrine of separation of powers was at stake, the President directed all department heads to refuse any requests for information concerning the suspensions with the stereotyped reply that "the public interest would not thereby be promoted," or that "the reasons related to purely administrative acts." With regard to the 643 Cleveland appointees to office, the President later said that "all information of any description in the possession of the Executive or in any of the departments, which would aid in determining the character and fitness of those nominated in place of suspended officials, was cheerfully and promptly furnished to the Senate or its committees when requested." However, he felt that if he complied with senatorial requests for information concerning the suspensions, he would be failing in his duty to defend and protect the Constitution and the office of President.[23]

The reaction of the Senate was to delay. It was intimated that the Senate would confirm Cleveland's nominations if he would merely withdraw his accusations against the suspended officials. Such a course would have been politically unwise in the long run, as well as dishonest, and realizing this, the President refused even to consider it. And so after a lapse of three months, only seventeen of the 643 nominations had been considered, and only fifteen confirmed. Cleveland himself was by this time convinced

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[23]Cleveland, Presidential Problems, 46-8.

that the Senate was attempting to lay a foundation for the contention that it had a right to control the heads of executive departments even against the President in matters of executive duty.[24]

When it became clear that the strategy of holding up appointments would not force the President into acknowledging their right to control removals, the senatorial majority chose another approach. On July 17, 1885, Cleveland had removed George M. Duskin from the post of District Attorney for Southern Alabama, and had replaced him with a Democrat, John D. Burnett. On December 20, the Senate Judiciary Committee requested all papers and information relating to the nomination of Burnett and to the removal of Duskin. The Attorney-General replied by granting the first request which pertained to the appointment of Burnett, for there was no doubt that the Senate had a share in that power. However, concerning the Duskin papers, he replied that he had not as yet received any orders from the President directing their transmission.[25] Within a few hours of this refusal, the Judiciary Committee held a discussion of the question. Senator Vest wrote to the President of this meeting:

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[24] Ibid., 49-50

[25] Binkley, Powers of the President, 177.

> Mr. Edmunds replied that he did not claim the right to know the President's reasons for suspension, but that committees of Congress had never been refused such courtesy by the President, etc. No one of the Republican senators present dissented from this position. Mr. Edmunds clearly conceded the point, that the President had the exclusive Constitutional power to make removals and suspensions, for reasons satisfactory to him, without consulting the Senate.[26]

Despite this opinion the Republican majority was as determined as ever to force the President to yield to their demand. On January 25, 1886, contrary to the best legal opinion, a resolution was passed which stated: "Resolved that the Attorney General be, and he hereby is directed to transmit to the Senate copies of all documents and papers that have been filed in the department of justice since the first day of January, A.D. 1885, in relation to the conduct of the Office of District Attorney of the United States for the Southern District of Alabama."[27] With the resolution went a defiant ultimatum that the Senate would never confirm persons nominated to succeed suspended officials unless the reasons for the suspensions were furnished. Replied the Attorney General: "I am directed by the President to refuse your demand."[28]

At this point the clash broke wide open. The Senate passed another resolution, this time condemning "the refusal of the Attorney General under whatever influence, to send to the Senate

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[26]McElroy, Grover Cleveland, 176.

[27]Cleveland, Presidential Problems, 52.

[28]McElroy, Grover Cleveland, I, 177.

copies of the papers called for in its resolution of the twenty-fifth of January . . . as in violation of his official duty and subversive of the principles of Government and good administration thereof." They declared it was the duty of the Senate to "refuse its advice and consent to the proposed removals of officers when such papers are denied."[29]

Cleveland then drafted a message which he sent to the Senate on March 1, and in which he assumed full responsibility for the Attorney General's refusal. "I do not suppose," he said, denying that Congress had any control over executive departments, "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.'" As for the papers, to which the Senate claimed it had a right because they were of an official nature, the President said:

> They consist of letters and representations addressed to the Executive or intended for his inspection; they are voluntarily written and presented by private citizens who are not in the least instigated thereto by any official invitation or at all subject to official control. While some of them are entitled to Executive consideration, many of them are so irrelevant, or in the light of other facts so worthless, that they have not been given the least weight in determining the question to which they are supposed to relate.

Cleveland continued, asking whether these papers were to be considered public and official simply because they were kept in the

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[29]Cleveland, Presidential Problems, 57.

Executive Mansion or deposited in the Departments. "If the presence of these papers in the public offices is a stumbling-block," said the President coyly, "in the way of the performance of Senatorial duty, it can easily be remedied." He then went on to discuss the Tenure of Office Act, and accused the Senate of trying to handcuff him as it had Andrew Johnson twenty years earlier, and he bluntly declared both the repealed and unrepealed parts of that act to be unconstitutional.[30]

Upon receiving the President's message, the chairman of the Judiciary Committee said he thought it was the first time in the nation's history that a President had interfered with the deliberations of either house of Congress. Debate on the two reports of the committee and on the President's message continued for two weeks. At last the Senate passed a resolution censuring the Attorney General, and by implication the President, by a vote of thirty-two to twenty-five.[31]

The climax of the whole affair was reached when Cleveland delivered a death blow, revealing that Duskin's term had expired on December 20, 1885, prior to the demand for papers relating to his office, and prior to the resolutions and reports of the Judiciary Committee and to the debate defending this supposedly

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[30]Messages and Papers of the Presidents, X, 4960-68.

[31]Cleveland, Presidential Problems, 66-7.

suspended official. This took all the sting out of the Senate's "professed anxiety . . . to guard the interests of an official who was suspended from office in July, 1885, and who was still claimed to be in a state of suspension."[32] The only question remaining was the confirmation of Burnett's appointment, and as there was no reason for displacing him, it was quickly made. "Once again," says Binkley, "just as in the impeachment of Johnson, there had been selected an impossible case on which to test their powers over dismissal. Their experience with the Tenure of Office Acts was altogether unlucky."[33]

Of course, the big victory came when in December, 1886, Senator Hoar, one of the Republicans who had opposed Cleveland, introduced in the Senate a measure repealing the Tenure of Office Act. The bill was passed with only one Republican dissenting.[34] Undoubtedly, one of the reasons for the Republican about-face was their realization of what the Whigs in Jackson's time had never been able to grasp, that the American people seemed to regard the President more or less as a tribune, and tended to identify themselves with the President in his fight against the Legislative Branch of the Government.[35] Indicative of this mood of the people

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[32] Ibid., 68

[33] Binkley, Powers of the President, 181.

[34] George F. Hoar, Autobiography, (New York, 1903), II, 143-4.

[35] Binkley, Powers of the President, 182.

was the March 11, 1886 editorial in the Nation which read: "There is not the smallest reason for believing that, if the Senate won, it would use its victory in any way for the maintenance or promotion of reform. In truth, in the very midst of the controversy, it confirmed the nomination of one of Baltimore's political scamps."[36] In addition to public opinion there were certain other factors which influenced the Senate's capitulation. The President's strong and irrefutable message, the revelation about Duskin, the fact that many Republicans sincerely felt the President was right, all these contributed to the change in the position of the Senatorial majority. Then too, many Republicans had approached the President with requests to depose members of their own party from office, and they now feared that the President might make this public, as well as the evidence supplied by them.[37]

This was one of Grover Cleveland's greatest constitutional victories. Rarely since the days of Andrew Jackson had a president stood up to the Senate so fearlessly and successfully. Indeed, there are a number of similarities between this case and Jackson's war against the Bank in 1833-34. Both involved conflicts between a Democratic President and an opposition Senate; both occurred after a long period of Senatorial dominance in the

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[36]Henry J. Ford, The Cleveland Era, (New Haven, 1921), 74.

[37]Allan Nevins, Grover Cleveland, A Study in Courage, (New York, 1932), 263.

government; both resulted in victories for the Chief Executive, and in the restoration of a certain measure of Presidential power.

Was Cleveland justified in withholding the information relating to the suspensions? There seems to be no doubt whatever on this score. In the first place, as the minority report mentioned, all the precedents cited by the majority of the Judiciary Committee, in which the President had handed over information to Congress, involved business over which Congress had some power according to the Constitution, for example, treaty-making and appointment. Yet in this case, the Tenure of Office revision of 1869 clearly and completely reserved all power over removals and suspensions to the discretion of the President alone. Thus Cleveland could hardly have surrendered the requested information and files without effectually admitting that the Senate had a share in the removal power, which they most definitely did not have. Refusal of the information was essential to protect the powers of the President against Senatorial encroachment.[38]

In the second place, a pledge of secrecy had been given to the numerous advisors who had donated information. Failure to keep such a pledge would eventually have caused the desertion of all the President's advisors, and greatly handicapped him in the administration of the government.[39] As both these motives for

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[38]Ernest J. Eberling, Congressional Investigations, (New York, 1928), 258.

[39]Nevins, Grover Cleveland, 260.

refusal were very much for the public welfare, and as compliance would have been contrary to the public welfare, Cleveland was fully justified in his use of the power, for he followed strictly the precedent set down by President George Washington.

The two cases just considered were undoubtedly the most important instances of a presidential refusal of information for the purpose of protecting the prerogative of the Chief Executive. There were, however, three other cases of lesser importance, in which the same reason for withholding information was advanced, but in which the President's right was less vehemently contested.

President Andrew Jackson, who so successfully asserted the constitutional power of the Executive in the conflict with the Senate already considered, later found two more opportunities to assert this power, one in 1835, and the other in 1837. His victory in 1834 must have thrown a pall over the other cases, at least so far as Congress was concerned, for in comparison with that earlier case the later ones were quite tame. The second Jackson case was precipitated when an official by the name of Gideon Fitz, who held the office of Surveyor-General South of the state of Tennessee, was removed from his post by the President. On February 2, 1935, the Senate passed a resolution in which it requested the President to hand over copies of the charges which were communicated to Jackson against Fitz, and which were responsible for Fitz's removal from office. The reasons given for the request were that this information was necessary in order that

the Senate might know how to act concerning the appointment of a successor to Fitz, and as an aid to the investigation it was then conducting into certain alleged frauds in the sale of public lands.[40]

The President replied on February 10, explaining that although in the past he had frequently handed over information, in this case he felt compelled to refuse. He considered that he would be failing in his duty of resisting encroachment on the rights of the Executive, since the information in question was not of a more general type, but related exclusively to subjects falling under the jurisdiction of the Executive alone. Jackson also pointed out that compliance with the resolution would very likely result in a Senate review of his removal of Fitz, a right possessed by that body only when sitting as judges in a case of impeachment. And even if such a consequence did not result in this case, Jackson still felt that compliance with this request might later be cited as a precedent for later applications of a similar nature. The President concluded:

> 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; but as the Senate may lawfully call upon the President for information properly appertaining to nominations submitted to them, I have the honor, in this respect, to reply that I have none to give them in the case of the person nominated

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[40] Messages and Papers of the Presidents, III, 1351.

> as successor to Mr. Fitz, except that I believe him, from sources entitled to the highest credit, to be well qualified in abilities and character to discharge the duties of the office in question.[41]

An appropriate close to the administration of Andrew Jackson came with one of the most successful attempts of a President to resist a Congressional inquiry. On January 17, 1837, a special committee of the House was appointed to conduct an examination into the condition of certain executive departments. To aid the committee a series of resolutions was adopted on January 23, calling on the President and heads of departments for certain information. Especially outstanding was the following:

> Resolved that the President of the United States be requested and the heads of the several departments be directed to furnish this committee with a list, or lists, of all officers or agents or deputies, who have been appointed or employed and paid since 4th of March 1829, to the first of December last (if any without authority of law) or whose names are not contained in the last printed register of public offices commonly called the Blue Book by the President or either of the said Heads of Depts. respectively; and without nomination to, or the advice and consent of the Senate of the United States showing the names of such officers or agents or deputies; the sums paid each, the services rendered and by what authority appointed and paid; and what reasons for such appointments.[42]

A copy of these resolutions was sent to President Jackson by the committee. On Januery 27 Jackson's reply was delivered by his secretary to Mr. Henry Wise of Virginia, Chairman of the

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[41] Ibid., III, 1351-53.

[42] Register of Debates in the United States Congress, 24th Congress, 2nd Session, (Washington, 1837), XIII, Appendix, 199.

committee. The message pointed out that the resolutions adopted by the House implied that there was reason to doubt the statement in his annual message that the executive departments were in good condition. The letter is such an excellent and forceful defense of Presidential prerogative that it merits quotation at least in part. Said Jackson:

> . . . according to the established rules of law, you re-request my self and the heads of departments to become our own accusers, and to furnish the evidence to convict ourselves; and this call purports to be founded on the authority of that body, in which alone by the Constitution, the power of impeachment is vested. The heads of departments may answer such requests as they please, provided they do not withdraw their own time and that of the officers under their direction, from the public business to the injury thereof . . . For myself, I shall repel all such attempts as an invasion of the principles of justice, as well as of the Constitution; and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition.[43]

Chairman Wise was quite overwrought at this reply, and on January 30, he rose to offer a series of resolutions to the committee. The President's letter, he said, was "an official attack on the proceedings of the House and of the committee." He then suggested that the committee listen to a report by himself on the correspondence exchanged with the President, and that measures be considered for the defense of the House's proceedings and powers as well as those of its committees. However, the vote of the committee was negative, defeating Wise's resolutions six to three.[44]

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[43] Ibid., XIII, Appendix, 202.

[44] Eberling, Congressional Investigations, 136.

It was the view of the majority of the committee members that the House did not have the power to call upon a party, much less upon the President of the United States, to incriminate itself. There were two reasons which justified an investigation, impeachment or legislation. Legislation they argued had to be ruled out as a motive, since the only defect that had been found in the laws was in their execution. Consequently, they had no other choice but to consider this request as a preliminary inquiry for the purpose of determining whether impeachment proceedings should be instituted or not. In such a case they felt that they could by no means construe their right to information as an unlimited power to call for persons or papers at their own arbitrary will. Such action would be a violation of that provision of the Constitution which states that the people have a right to security as to their persons, houses, papers, and effects, against unreasonable search or seizure. The committee, therefore, decided that they did not have the right to demand all personal and private papers of public officials, and they concluded that so far as this particular investigation was concerned there was no evidence that the executive departments had not been conducted with ability and integrity.[45]

And so the matter was settled. Mr. Wise was quite dissatisfied with the committee's verdict, and claimed that there

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[45] Ibid., 137-8.

was a difference between an inquisition, which was what Jackson termed the House's request, and an inquiry, which he thought the committee had a right and a duty to make.[46] This distinction may or may not have been valid. Nevertheless, Wise did overlook one very important fact which in subsequent cases was brought out explicitly, and that is that the right of the House or the Senate to make inquiries, which no one would dispute, does not presuppose a corresponding duty on the part of the President to comply with such inquiries. This was the first time the principle established by Washington in 1792, that complete discretion rests with the President, was attacked. Jackson's victory on the point was final and conclusive.

A factor which should not be passed over, although it is of minor importance, is that, as Wise pointed out, Jackson controlled the House, and, therefore, the committee too. This was indicated by the hasty and superficial vindication they gave the President. Possibly the administration had a few skeletons to hide. There can be no doubt that Jackson would have had a much harder fight against a House dominated by the opposition, and if there had been anything to hide, and were it serious enough, the President might have been hard pressed to avoid impeachment proceedings. This illustrates the influence that party politics can have on the use and development of a power such as this. Of

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[46] Ibid., 140.

course, as the case stands today, whether there were any skeletons or not, we do not know, nor was it ever proved. And Jackson's assertion of his right not to testify against himself certainly was valid, and very much in conformity with the public interest.

A rather amusing case occurred in 1876 when on April 3, the House requested President Ulysses S. Grant to inform it whether any executive offices, acts, or duties were within a certain period performed away from the capital. It would seem that the aim of this inquiry could only have been to cause the President some embarrassment for his lengthy summer sojourns at the Jersey Shore. Replied the President: "I fail . . . to find in the Constitution of the United States the authority given to the House of Representatives to require of the Executive, an independent branch of the Government, coordinate with the Senate and House of Representatives, an account of his discharge of his appropriate and purely executive offices, acts, and duties, either as to when, where, or how performed."[47]

Grant also went on to say that as the information requested could have little to do with legislation, the only other purpose could be in view of the House's power of impeachment. However, he reminded the House that no one can be forced to testify against himself, not even the President. The act upon which the request

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[47] Messages and Papers of the Presidents, IX, 4316.

was based, he said, related only to the establishment of the seat of government, and the provision of buildings and offices. Grant concluded by enclosing a long list of precedents justifying his behavior. The precedents included numerous cases from the administrations of nearly all of his predecessors in which the President had carried on executive business away from the seat of government.[48] His letter left little doubt either of the correctness of his refusal or of his long-established practice of maintaining a "summer White House."

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[48] Ibid., IX, 4317-18.

CHAPTER IV

THE DEVELOPMENT OF THE POWER - II

Besides the cases already mentioned in which the President's refusal of information was prompted by the necessity of defending the prerogative of the Executive against encroachment, there were also many cases in which certain more specific issues were at stake. For instance, one of the reasons most frequently resorted to in recent times has been the President's feeling of obligation toward the individual, or toward the private citizen, or toward persons whose constitutional right of a public trial of jury seemed in danger of violation. In this connection, the following four cases provide excellent precedents for the actions of modern Chief Executives.

Late in 1806, the nation was deeply concerned over the Burr Conspiracy, and Jefferson's seeming laxity in handling the affair. The President mentioned the subject in his annual message to Congress in December, 1806, but his failure to mention any names caused Congressman John Randolph to introduce the following resolution into the House of Representatives on January 16:

> 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 propposes to take for suppressing or defeating the same.[1]

The resolution was overwhelmingly passed.

Accordingly, on January 22, the President replied in a message to the Senate and the House, summarizing the details of the conspiracy as related to him by dispatches from General Wilkinson and other sources. However, he refused to give any names other than that of Aaron Burr. Said the President:

> The mass of what I have received in the course of these transactions is voluminous, but little has been given under the sanction of an oath so as to constitute formal and legal evidence. It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question.[2]

Of Jefferson's refusal to give names, Schachner blandly states: "His delicacy was doubtless motivated by the consideration that had he yielded all the names, they would have included such men as Senators Breckinridge and Smith, General Andrew

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[1] Annals of Congress, 9th Congress, 2nd Session, 336.

[2] Messages and Papers of the Presidents, I, 400.

Jackson and Governor William Henry Harrison, as well as Wilkinson himself, with explosive personal and political connotations."[3] It is not too difficult to understand how such notable personages as these might have been involved, for Jefferson mentions,[4] and Schachner admits,[5] that Burr managed to seduce many well meaning citizens into believing he had the support of the Government in his mysterious enterprise. Nor would it be too surprising if Jefferson wished to keep this information secret. Yet, Schachner seems to imply that this was his only reason for withholding the names. Such a charge, the truth of which is by no means self-evident, seems to call for more proof than Schachner gives, and until such proof is forthcoming, it seems reasonable to accept Jefferson's own explanation of his refusal at its face value.

A similar case occurred during the administration of President James Monroe, although the issue did not concern the value of the evidence involved. On January 4, 1825, the House of Representatives passed a resolution requesting President Monroe to hand over a number of documents relating to the conduct of certain American naval officers serving in the Pacific, and of certain government agents in South America.[6] Some of the charges

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[3]Nathan Schachner, Thomas Jefferson, (New York, 1951), II, 832.

[4]Messages and Papers of the Presidents, I, 402.

[5]Schachner, Thomas Jefferson, II, 831.

[6]Congressional Record, 69th Congress, 1st Session, (Washington, 1926), 4548.

made against the principal naval officer, one Commodore Stewart, were sent to Washington by the American ambassador to Peru, a Mr. Prevost. The ambassador was in turn the subject of accusations made by others in South America. Monroe suspended the Commodore from duty pending the trial and summoned him, together with Mr. Prevost, to Washington for a showdown.[7] What the documents requested by the House contained is not clear. On January 10, the President answered the request as follows:

> In this stage the publication of those documents might tend to excite prejudices which might operate to the injury of both. . . . It is due to their [the accused] rights and to the character of the Government that they be not censured without just cause, which cannot be ascertained until, on a view of the charges, they are heard in their defense, and after a thorough and impartial investigation of their conduct. Under these circumstances it is thought that a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned.[8]

President Andrew Jackson's refusal in 1835 to communicate the charges made against the official conduct of Gideon Fitz, one-time Surveyor-General of Tennessee, has already been treated at length. The case deserves mention again at this point, for besides his fears of Senatorial encroachment on the powers of the Executive, Jackson also cited as a reason for refusing the information the fact that ". . . the citizen whose conduct is impeached

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[7] Messages and Papers of the Presidents, II, 847.

[8] Ibid.

[Mr. Fitz] would lose one of his valuable securities, that which is afforded by a public investigation in the presence of his accusers and of the witnesses against him."[9]

A case very similar to the one which occurred during Jefferson's administration took place under President Tyler. On May 18, 1842, the House requested from the Secretary of War copies of certain reports made to the War Department, which dealt with the affairs of the Cherokee Indians, and with certain injustices which had been perpetrated against them, together with all the facts in possession of the Executive relating to the subject. After consultation with the President, the Secretary of War informed the House that since negotiations for the settlement of Indian claims were at that time well under way, it was the opinion of the President and the War Department that publication of the report would be inconsistent with the public interest. Furthermore, said the Secretary, the report contained information of questionable value, obtained without the sanction of an oath, and which the persons implicated had had no opportunity to deny or explain. Promulgation of such information would, therefore, be a gross injustice to the persons involved, especially since the Department had not yet had an opportunity of calling upon the interested parties for explanations.

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[9]Messages and Papers of the Presidents, III, 1352.

This answer was not satisfactory to the House Committee on Indian Affairs, which felt that it had a right to any information dealing with subjects of House deliberation.[10] Accordingly, on January 31, President Tyler himself replied in a lengthy letter to the House. He agreed to surrender much of the information requested and previously refused, since negotiations were by that time completed. However, he flatly denied that the President was obliged to give information to the House simply because it concerned a subject of House deliberation. Moreover, concerning the persons involved, Tyler again withheld all information, since he felt it would be an injustice to them to release it.

Another reason for his refusal which had not been fully developed in the earlier letter was also treated here. This concerned the President's obligation to the Army officer who had made the report, one Lieutenant-Colonel Hitchcock. Said Tyler:

> 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.[11]

All four of these cases contain refusals of information prompted by the President's duty to respect the rights of the

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[10] Congressional Record, 83rd Congress, 2nd Session, 6265.

[11] Messages and Papers of the Presidents, V, 2076.

individual. The cases arising under Presidents Jefferson and Tyler are remarkably similar because the emphasis is placed on the questionable character of the information which might be used as evidence against some individual. In the cases under Monroe and Jackson, it is more a question of protecting the citizen's constitutional right to a public trial by jury, in the presence of witnesses. It is not difficult to see why the reasons alleged in all four of these cases might easily be construed as a protection of the public interest, since any protection of constitutional rights is to the advantage of the public. The precedents set in these four cases have undoubtedly been the most frequently used in recent times, as will later be shown.

In three instances presidents have been known to refuse information on the grounds that it was "confidential." The first of these cases occurred toward the end of President Theodore Roosevelt's second administration. In 1907, the United States Steel Corporation purchased the most important iron and steel concern in the South, the Tennessee Coal and Iron Company. This famous transaction, which supposedly alleviated the Panic of 1907, was made possible by the President's statement that he did not see fit to "interpose any objections." A resolution was passed in the Senate a year or so later directing the Senate Judiciary Committee to determine and report as to whether the President's action constituted a violation of the Sherman Anti Trust Law. To aid the

committee's efforts, another resolution was passed directing the Attorney General to furnish the committee with answers to the following two questions: 1. Whether legal proceedings were instituted against the United States Steel Corporation for its absorption of Tennessee Coal and Iron Company in 1907, and if not, why not? 2. Whether an opinion was rendered concerning the legality of such absorption, and if so, what was it?[12]

The request of the Senate was referred to the President and on January 6, 1909, Mr. Roosevelt replied as follows:

> After sending this letter [to the Attorney General, November 4, 1907, advising him of his action] I was advised orally by the Attorney General that, in his opinion, no sufficient grounds existed for legal proceedings against the Steel Corporation, and that the situation had been in no way changed by its acquisition of the Tennessee Coal and Iron Company.
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> 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 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.[13]

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[12] Congressional Record, 60th Congress, 2nd Session, 527-8.

[13] Ibid.

When the Senate found that it could not obtain the desired papers from the Attorney General, it summoned Herbert Knox Smith, head of the Bureau of Corporations, and ordered him to hand over all the papers he had in his office on the subject. Smith went to the President and explained that most of the papers in question had been secured in a confidential manner, and that grave trouble would certainly result from their publication. Roosevelt told Smith to secure a decision from the Attorney General's office that the papers should not be made public, but the Senate Committee retaliated by threatening Smith with imprisonment for contempt if he did not transmit the papers at once. "As soon as he reported this to me," said Roosevelt, "I ordered him in writing to turn over to me all the papers in the case, so that I could assist the Senate in the prosecution of its investigation."[14]

Roosevelt immediately saw Senator Clark, Chairman of the Judiciary Committee, and informing him of this action, "[I] told him," he said, "they would not be given to the Senate, that I could not be forced to give them, and I did not see why they should make any effort to get them unless they were prepared to go to the length of trying to have me impeached. This called for a showdown and I rather doubt if they will press their point, altho they are so foolish that I am not certain on the subject."[15]

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[14]The Letters of Archie Butt, ed. Lawrence F. Abbott, (Garden City, 1924), No. 75, 305.

[15]The Letters of Theodore Roosevelt, ed. Elting E. Morison, (Cambridge, Mass., 1952), No. 5131, 1481.

Clark then assured the President that the Senate was merely anxious to protect its own prerogative, and that the Committee was most willing to submit to his point of view, if he felt the papers should not be made public. Roosevelt nonetheless remained wary and continued to hold the papers because, as he put it: "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."[16]

As to the legality of Roosevelt's dealings with the United States Steel Corporation, the Senate subcommittee could arrive at no agreement. While the opposition felt he had no authority to permit the absorption of the Tennessee Company, Republicans in the committee and in Congress simply maintained that the question was irrelevant, since Roosevelt did not authorize the transaction, but merely said that he would not "interpose any objections."[17]

Years later, the Stanley Committee of the House undertook another investigation of this famous business deal, but efforts towards a definite conclusion were no more successful. During the hearings, competent witnesses under oath flatly contradicted one another, and were themselves contradicted by subsequent

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[16] Letters of Archie Butt, 306.

[17] Letters of Theodore Roosevelt, 1481.

witnesses. The worst that could be agreed upon, and that only by a majority of the committee, was that certain facts had been misrepresented to the President by the representatives of the Steel Corporation, and that the President had acted "hastily and unwisely."[18]

Now, when a President refuses information to a subcommittee, which is seeking to determine whether he acted legally or not in a particular instance, certain suspicions might naturally be aroused. Such a refusal might, of course, be an outright abuse of the power to withhold information, since in that case the President would not be protecting the public interest but rather his own personal interest, and that in a fraudulent manner. Moreover, there are not lacking those who feel that the old Roughrider was capable of just such an abuse, and who would not hesitate to argue *a priori* that Roosevelt must have been guilty. This, of course, remains to be proved, and in the opinion of students of the subject never will be proved conclusively, due to the confusion of the testimony given.[19] The whole tone of his correspondence on the subject, both public and private, at least shows us that if Roosevelt had anything to hide, that is, if he was in any way guilty of illegal action, he certainly was not aware of it.

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[18]Henry R. Seager and Charles Gulick, Jr., *Trust and Corporation Problems*, (New York, 1929), 230-235.

[19]*Ibid.*, 235.

And since it cannot be proved that his action was culpable, the reason he actually gave for refusing the information, namely to protect the sacred word of the United States Government to the individual, ought to be accepted as Roosevelt's real and sincere reason for the refusal.

Another case of the refusal of confidential information took place when a special Senate investigating committee was appointed on March 12, 1924, to look into the proceedings of the Bureau of Internal Revenue. A request was made of the Secretary of the Treasury for a list of the companies whose tax returns he was alleged to be investigating.[20]

President Coolidge considered the Senate's action to be an unwarranted intrusion into the proceedings of the Executive Department. He 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."[21]

A similar case occurred in 1932 when the House requested all documents pertaining to a Treasury Department investigation of the

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[20]Ernest J. Eberling, Congressional Investigations, (New York, 1928), 277.

[21]Congressional Record, 68th Congress, 1st Session, 6087.

importation of ammonium sulphate. The request was refused by Secretary of the Treasury Ogden Mills who said: "It has been the practice of the Department in acting under this statute to treat all information furnished by interested persons as confidential and not to disclose it unless such persons consent to the disclosure . . . . 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."[22] The letter was received by the House without comment.

The only wartime exercise of the power came at the outset of the Civil War, when the Senate on March 25, 1861, requested President Lincoln to transmit certain dispatches sent to the War Department by Major Robert Anderson, commanding officer at Fort Sumter. The dispatches contained such top secret information as the detail's food supply and the position and strength of enemy forces as well as of the Union forces.[23]

On the following day, the President replied that he had examined the correspondence, and concluded his letter by saying that he had, "with the highest respect for the Senate, come to

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[22] Ibid., 72nd Congress, 1st Session, 11669.

[23] Carl Sandburg, Abraham Lincoln, the War Years, (New York, 1940), I, 188.

the conclusion that at the present moment the publication of it would be inexpedient."[24]

In 1930, for the first time since Washington's use of the power in 1796, information was withheld concerning the negotiations of a treaty. When the London Naval Treaty was submitted to the Senate for ratification early in July, 1930, the Committee on Foreign Relations requested from Secretary of State Stimson all papers concerned with the negotiations prior to and during the London Conference. Some of these documents were handed over, but the Secretary explained that he had been directed by the President to refuse certain others, the disclosure of which would not be compatible with the public interest. The Foreign Relations Committee was indignant at this treatment, and pressed its right to have free and full access to the papers. A resolution was adopted which asserted that the documents were "relevant and pertinent when the Senate is considering a treaty for the purpose of ratification."[25]

This resolution prompted Stimson to write a short note to the Senate, simply restating his previous stand. Congress adjourned early in July, 1930, but President Hoover immediately called back the Senate to consider the treaty. After three days of the special session, a resolution was passed by a vote of fifty-three to

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[24] Messages and Papers of the Presidents, VII, 3213.

[25] Congressional Record, 71st Congress, 2nd Session, 12030.

four, requesting the President to submit to the Senate all the documents relating to the treaty, if not incompatible with the public interest, together with whatever recommendations he might see fit concerning their use.[26]

The President replied on the following day, pointing out that the number of informal reports and statements given to the Government in confidence was very great. The President, he said, had an obligation to keep secret all the negotiations of a treaty, according to the time-honored custom among nations, in order to preserve friendly relations with other countries. Hoover was sure that the Senate would not care to have him violate such a trust, which is the invariable practice of nations. He concluded: "In view of this, I believe that to further comply with the above resolution would be incompatible with the public interest."[27]

A heated debate followed, for the Senate was far from satisfied with this reply of the President. Finally, Senator Norris proposed a resolution calculated to save the Senate's face, which allowed the treaty to be ratified, but with the clear and explicit understanding that there were no secret papers or agreements tending to modify the terms of the treaty. This measure, together

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[26]Nelson McGeary, The Development of Congressional Investigative Power, (New York, 1940), 103-104.

[27]Senate Document No. 216, 71st Congress, Special Session 2.

with the President's willingness to make the concession of allowing certain key senators to see the papers, secured the ratification of the treaty. On July 21, it was finally passed by a vote of fifty-eight to nine.[28]

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[28]McGeary, The Development of Congressional Investigative Power, 104.

CHAPTER V

CONCLUSIONS

Very little need be said at this point on the origin of the power, as that has been sufficiently treated in Chapter II. Though the power was not actually exercised until 1796 in connection with the Jay Treaty, the principles on which it rests were established with President Washington's interpretation of the constitutional doctrine of separation of powers in 1792. According to Washington and his cabinet, who foresaw that the decision they made would serve as a precedent, four principles were set down. Their conclusions were that:

> . . . (1). the House was an inquest, and, therefore, might institute inquiries. (2). that they might call for papers generally. (3). that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public. Consequently, were to exercise a discretion. (4). that neither the commee nor House had a right to call on the head of a deptmt, who and whose papers were under the Presidt. alone, but that the commee should instruct their chairman to move the house to address the President.[1]

Careful study of the development of the power reveals that in the 164 years of its existence the norm set down by Washington of compatibility with the public interest has been interpreted

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[1]Jefferson, Writings, II, 213-14.

in five different ways, or to put it differently, the precedents examined group themselves in five different categories. While it is true that theoretically any President could introduce new grounds for refusal by a new interpretation of what is demanded by the public interest, nevertheless, the fact remains that presidents have been much more ready to follow precedents already established, than to set new ones themselves. The last real innovation in the power dates back to Lincoln's administration. This fact, together with the reverence for tradition reflected in numerous letters of Presidents and Attorneys-General citing precedents to justify their own actions, plus the apparent adequacy of the power as it exists today, make innovation much less likely than it was one hundred or more years ago. These five categories represent, then, the practical limitations of the power as it has developed over the years and as it exists today. It might be helpful to recall them briefly.

A frequent justification of refusals has been to protect the powers of the Chief Executive against congressional encroachment. Thus the President may be defending his right to consult privately and in confidence with a cabinet advisor, as did Jackson in 1833. Or he may be protecting a particular power, such as the power to remove officials from office, which Cleveland upheld in 1886. Or his refusal may be based simply on the constitutional right possessed by every citizen to refuse to testify against himself. Such were the refusals of Jackson in 1837 and Grant in 1876.

Another reason which has been advanced quite often, especially in recent years has been that the requested information constituted what in modern times has come to be known as "unevaluated evidence." It will, no doubt, come as a surprise to some to learn that the numerous refusals of F.B.I. and State Department files to congressional committees during the Truman Administration were well-founded in historical precedent. The earliest case of this type may be traced as far back as the Jefferson administration, when in 1807 the President refused to transmit to the House evidence "containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts."[2] Closely resembling this case were the two cases which occurred in the administrations of Presidents Monroe and Jackson (1835). Although the point at issue was not the character of the evidence, the principle involved was nonetheless the same, namely the protection of the rights of the individual citizen.

A third type of refusal was the cry of "confidential information" resorted to by Theodore Roosevelt, and after him by Presidents Coolidge and Hoover. The development of the power along this line is particularly interesting. Prior to Mr. Roosevelt's refusal, no president had ever put off a congressional request with such an air of casualness, and few with such

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[2] Messages and Papers of the Presidents, I, 400.

self-assurance as these cases exhibit. Even Roosevelt went at least so far as to explain that his action was prompted by his concern that the "word of this Government to the individual be kept sacred."[3] Yet no such explanation accompanited the refusals under Coolidge in 1924 and Hoover in 1932, and in the latter case the House did not even see fit to comment on, much less object to the refusal, a good illustration of the strength the power had gained by that time.

There was only one case of a refusal of information for reasons of wartime security, that which took place early in the administration of President Abraham Lincoln.

As for treaties with foreign powers and the secrecy usually attendant on such negotiations, there were but two instances of such a refusal. The first, which occurred in 1796 during Washington's disagreement with the House over the Jay Treaty, was also the first time the power was ever exercised under any circumstances. The only other incident of this type did not take place until the administration of President Herbert Hoover in 1930. Nevertheless, a striking development did take place within this sphere of usage. Washington, it will be recalled, refused information to the House, which, as he stated at the time, does not share in the treaty-making power. Yet his letter indicates that just as he had surrendered all requested information, even

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[3]Letters of Archie Butt, 306.

secret, to the Senate at the time of its deliberation, so too would he have granted the request of the House, had that body also shared in the power over treaties.[4] However, President Hoover did not hesitate to refuse even the Senate in his exercise of the power 134 years later, a fact indicative of the growth of the power both within the sphere of treaty negotiations, as well as in general.

These then are the five categories which show the bounds of the President's power to withhold information from Congress: protection of the constitutional powers of the President against congressional encroachment; protection of the individual's right to a fair trial by jury; confidential information; wartime security; treaty secrecy.

Consideration should be given to one other aspect of the power's development, and that concerns its extension to the heads of Executive Departments. It was the mind of President Washington, as well as of his cabinet, that Congress neither could nor should attempt to compel an executive official. All requests were to be directed to the President, who would then decide what should be done by his lesser officials.[5] Indeed, Secretary of War Knox did appear before a congressional committee in 1792, but this action was purely voluntary.

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[4] Messages and Papers of the Presidents, I, 186-88.

[5] Jefferson, Writings, II, 213-14.

Nevertheless, the House resolution adopted in 1837 boldly stated: "Resolved that the President of the United States be requested and heads of the several departments be directed to furnish this committee with a list, etc. . . . "[6] Although President Jackson's reply allowed department heads to choose their own course, it indicated that he would back up a refusal on their part, and the case ended in a victory for the President before the issue of department heads could develop much further.

No other refusals of information involved executive officers other than the President until 1886, when the Senate concentrated exclusively upon cabinet officers and especially on the Attorney General in its requests. President Grover Cleveland, it will be recalled, was convinced that the Senate was trying to control these heads of executive departments against the President, even in executive matters. Accordingly, he vigorously denied the Senate's right to such a power and assumed all responsibility for refusals made by lesser executive officials.

Yet the steadfast insistence of Jackson and Cleveland on the dependence of executive officials on the President in this matter, was not enough to establish the principle, for twenty years later witnessed one of the most flagrant attempts on the part of Congress to force information from an executive official. When the Senate in 1909 directed the Attorney General to transmit certain

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[6]Register of Debates in the United States Congress, 24th Congress, 2nd Session, XIII, Appendix, 199.

information, he simply referred the demand to President Theodore Roosevelt who replied in words that have since become famous: "Heads of 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."[7] The Senate then summoned another executive official of lesser stature, the Head of the Bureau of Corporations, and threatened him with imprisonment for contempt if he refused to hand over certain papers. Roosevelt met this challenge by taking personal possession of all the desired papers and then making the refusal himself. With this the Senate backed down, and the most serious effort to force information from department heads was defeated. Congress has never, either prior or subsequent to this incident, successfully subpoened a department head, nor held one to be in contempt.[8] This was the closest they ever came to it, and their failure at this time marks the turning point in the battle over department heads.

An epilogue came in 1932 when Secretary of the Treasury Ogden Mills refused certain confidential information to the House. The case is interesting for it shows the completeness of the President's victory. The reason given by Mills was vague and brief; the official involved was one over whom past Congresses had

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[7]Congressional Record, 60th Congress, 2nd Session, 527-8.

[8]Edward S. Corwin, The President, Office and Powers, (New York, 1941), 139.

felt they had a rather unique power, the Secretary of the Treasury. Nevertheless, the refusal was received without a single comment or objection on the part of the House. Since that time, no one has disputed the fact that in matters of requested information, department heads are identical with and hold the same power as the President, as long as the Chief Executive chooses to back them up.

The principal, and possibly the only, disadvantage of the President's power of refusal lies in the fact that the final decision as to whether the information in question would be compatible with the public interest rests with the President alone. Even if he is the person best qualified to determine this, it is immediately evident that such a provision does open the door to a certain amount of abuse. For example, such an abuse would occur if the President were to refuse information in order to hide a certain fraud within the Executive Department. In that case, he might avow that his refusal was dictated by a regard for the public interest. Indeed it would be, as a protection of rights guaranteed by the Fifth Amendment. But would not revelation of the fraud be of greater immediate value to the nation's welfare?

This disadvantage is obvious from an examination of the very nature of the power. Yet in the analysis we have conducted of the various historical cases, no evidence of such an abuse has been detected. In all the cases considered there are but two which might arouse a few suspicions, the Jackson case of 1837, and that under Theodore Roosevelt in 1909. However, as already pointed out

in the treatment of those cases, no abuse could be proved, and as the reasons for refusing the information were otherwise perfectly in accord with the principles laid down by Washington, the only course is to accept them as they stand.

This disadvantage of the power is undoubtedly offset to a certain degree by congressional power over legislation and appropriations. Washington's second case of 1796 has given us an excellent illustration of the pressure which the House can exert upon a president. Then too, there is public opinion, which may be stirred up by Congress or by the Press. In the Teapot Dome scandal of 1924, Attorney General Harry M. Daugherty requested the aid of President Coolidge in denying certain information to the congressional investigating committee. The President very wisely refused this favor on the grounds that he could hardly rely on the Attorney General's word as to what papers should be refused, since Daugherty was not in a position to offer disinterested advice. Coolidge solved the problem by requesting Daugherty's resignation, and by following the advice of his successor.[9] Had the President attempted to support his Attorney General, who was later convicted of fraud, Congress would certainly have probed all around the situation, raising a great deal of suspicion in the public mind, and eventually provoking serious political difficulties for the Executive.

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[9]Congressional Record, 84th Congress, 2nd session, 9879.

On the other side of the ledger, there are a number of distinct advantages to be found in this executive power. Protection of the President's legitimate constitutional powers must always be considered an advantage of great value under a government such as ours. So much depends on secrecy in time of war, both in lives and materials, that it is clearly an advantage for the Commander-in-Chief to have the power of enforcing wartime security. It would be a great handicap indeed if the President were forced to reveal every piece of information, even the most confidential, to congressional investigating committees. As for the secrecy involved in the negotiation of a treaty, a great deal depends on just what is kept secret, but as this is a procedure absolutely essential and necessary for the conclusion of an agreement with a foreign power, it must be conceded that there is some advantage in the President's maintenance of it.

Always an important consideration, and just as much of an advantage today as ever, is the confidential relation between the President and his advisers. Three presidents mentioned this as at least a secondary reason for their refusals of information, Jackson in 1833, Cleveland, and Tyler. Yet this confidential relationship would not last long if Congress had the power to demand an account of the advice given by an adviser. For advisers will soon cease to be of any value if they cannot be guaranteed that what they say or write will be held in confidence; "that the man or the office they advise will appreciate the fact that they

are expressing opinions and that, probably, they are not the only ones asked for opinions and advice. The minute an effort is made . . . to determine whether the opinions or the advice on which a decision was made was 'right', (with retribution and criticism for those who were not 'right') independent thought which alone produces sound decisions will be stymied or killed."[10]

The last advantage of the power and undoubtedly the most important today, for just about every recent case of refusal has been for this reason, is the protection it enables the President to give to the individual from congressional investigating committees. The efforts of these committees to remove subversive elements from the Government are certainly deserving of praise, but it has happened that, through an excess of zeal and possibly a certain amount of thoughtlessness, committees have sought files and information from various executive departments which contained large amounts of "unevaluated evidence." This term was explained by Attorney General Robert Jackson in 1941 and again by Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation in 1950. Said Jackson of such F.B.I. files: "Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include

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[10]Harry S. Truman, Memoirs, Vol. II: Years of Trial and Hope, (Garden City, 1956), 454.

leads and suspicions, and sometimes even the statements of malicious or misinformed people."[11] This statement, and another made by President Truman in which he expressed the spirit of the Loyalty Program inaugurated in 1947 as such that "rumor, gossip, or suspicion will not be sufficient to lead to the dismissal of any employee for disloyalty,"[12] are strikingly reminiscent of the words of Thomas Jefferson in 1807. We recall his refusal to hand over to the House certain information because it contained "such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts."[13] This protection of the constitutional rights of the individual has become one of the outstanding advantages of the President's power to refuse information.

In conclusion, we should like to point out once more that this thesis is not intended as a treatment of the legal aspects of the problem. Neither does it propose any alteration of the President's power to refuse information to Congress, as that power exists today, for this belongs to the realm of political science. It is merely an historical treatment of certain precedents which

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[11] Alan Barth, The Loyalty of Free Men, (New York, 1951) 159.

[12] Nathaniel Weyl, The Battle Against Disloyalty, (New York, 1951), 187.

[13] Messages and Papers of the Presidents, I, 400.

have occurred in history, made with a view to determining the origin of the power, the development of the power up to the present time, and the advantages and disadvantages in that power as history presents them.

BIBLIOGRAPHY

I. PRIMARY SOURCES

Adams, John. Letters Addressed to His Wife, Edited by Charles F. Adams. Boston, 1841.

Annals of Congress. Washington, 1792-1825.

Butt, Archie, Letters. Edited by Lawrence F. Abbott. Garden City, 1924.

Cleveland, Grover. Letters. Edited by Allan Nevins. New York, 1933.

-----. Presidential Problems. New York, 1904.

Congressional Globe. Washington, 1825-76.

Congressional Record. Washington, 1877-____.

Great Debates in American History. Edited by Marion M. Miller. 14 Vols. New York, 1913.

Jefferson, Thomas. Writings. Edited by P. L. Ford. 2 vols. New York, 1904.

Madison, James. Letters and Other Writings. Editor anonymous. 4 vols. New York, 1884.

Messages and Papers of the Presidents. Edited by James D. Richardson. 20 vols. New York, 1897-1917.

Register of Debates in the United States Congress. Washington.

Roosevelt, Theodore. Letters. Edited by Elting E. Morison. 8 vols. Cambridge, Mass., 1951.

Washington, George, Writings. Edited by J. C. Fitzpatrick. 39 vols. Washington, 1931-40.

II. SECONDARY SOURCES

A. BOOKS

Barth, Alan. The Loyalty of Free Men. New York, 1951.

Bassett, John S., The Federalist System. New York, 1907.

-----. The Life of Andrew Jackson. New York, 1931.

Beveridge, Albert J.. The Life of John Marshall. 2 vols. Boston, 1919.

Binkley, W. E.. The Powers of the President. Garden City, 1937.

Bowers, Claude. Jefferson and Hamilton. Boston, 1925.

Corwin, Edward S.. The President--Office and Powers. New York, 1941.

-----. The President's Control of Foreign Relations. Princeton, 1917.

Cresson, W. P.. James Monroe. Richmond, Va.. 1946.

Eberling, Ernest J.. Congressional Investigations. New York,

Freeman, Douglas Southall, George Washington. 5 vols. New York, 1948.

Ford, Henry J.. The Cleveland Era. New Haven, 1921.

Gibbs, George. Memoirs of the Administrations of Washington and Adams. New York, 1846.

James, Marquis. The Life of Andrew Jackson. New York, 1938.

McGeary, Nelson. The Development of Congressional Investigative Power. New York, 1940.

McElroy, Robert. Grover Cleveland, The Man and the Statesman. 2 vols. New York, 1923.

McMaster, John B.. A History of the People of the United States. 8 vols. New York, 1914.

Nevins, Allan. Grover Cleveland, A Study in Courage. New York, 1932.

Sandburg, Carl. Abraham Lincoln: The War Years. 4 vols. New York, 1939.

Schachner, Nathan. The Founding Fathers. New York, 1954.

-----. Thomas Jefferson. 2 vols. New York, 1951.

Schlesinger, Arthur M. Jr.. The Age of Jackson. Boston, 1945.

Swisher, Carl Brent. American Constitutional Development. New York, 1943.

APPROVAL SHEET

The thesis submitted by Mr. Paul Alfred Becker, S.J., has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

January 6, 1958
Date

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