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EXECUTIVE POWER AND THE CONTROL OF INFORMATION: PRACTICE UNDER THE FRAMERS

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I. INTRODUCTION

If the level of official conflict over an issue is any indication of its importance, then the control of information ranks among the most crucial issues of our time. Name the great concerns of the last decade, and you will have named the sources of that period's truly momentous information disputes. For example, the secret planning of the war in Vietnam was revealed by the publication of papers taken from the Pentagon.[1] Many believe that congressional support for the war was fraudulently obtained, when the executive branch supplied false or misleading information about specific incidents, such as the alleged attack on American vessels in the Gulf

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

CORRESPONDENCE OF ANDREW JACKSON (J. Bassett ed. 1927) [hereinafter cited as JACKSON CORRESPONDENCE];

FLORIDA TERRITORIAL PAPERS (National Archives microfilm, M-116, reel 1) [hereinafter cited as FLA. TERR. PAPERS];

THE WRITINGS OF JAMES MONROE (S. Hamilton ed. 1898-1903) [hereinafter cited as MONROE WRITINGS];

I. BRANT, JAMES MADISON, THE PRESIDENT (1956) [hereinafter cited as I. BRANT];

A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976) [hereinafter cited as A. SOFAER];

Dorsen & Shattuck, *Executive Privilege, The Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974) [hereinafter cited as Dorsen & Shattuck].

1. *See* THE PENTAGON PAPERS: AS PUBLISHED BY THE NEW YORK TIMES (1971) (particularly ch. 5, *The Covert War and Tonkin Gulf: February-August 1964*).

of Tonkin and the bombing of Cambodia.[2]

One of the three articles upon which the House Judiciary Committee recommended President Nixon's impeachment was his refusal to comply with the committee's subpoenas.[3] Information was also at the heart of the first impeachment article, involving as it did the cover-up of the Watergate burglary.[4] In addition, the action that precipitated Nixon's fall was the Supreme Court's decision requiring him, despite his claim of privilege, to turn over subpoenaed material to the district court for *in camera* inspection.[5]

Legislative investigations and litigation have revealed widespread, illegal surveillance of domestic political groups.[6] Our intelligence agencies have worked in secret to prop up some foreign governments,[7] and have encouraged murder and mayhem to undermine others.[8]

Many Americans have reacted to these and other events with heightened skepticism about the need for most forms of government secrecy. Executive secrecy is widely regarded as a cloak for evil, criminal and unconstitutional activity. Little wonder, then, that we are in the midst of a major reappraisal of the extent to which the executive should be required to surrender information in its control.[9]

Given the intense reactions to recent events, it seems especially important to stress that reappraising the so-called executive privilege requires care as much as it demands concern. A commitment to maximizing openness in government is essential if deeply ingrained practices and assumptions are to be changed. But commitment is not enough. Constitutional questions of great magnitude are at stake, as is the need for effective execution of foreign and military policy. The range of opinion on these legal and practical questions is so wide, moreover, that one should reach conclusions on them

2. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1312-13 (1972) (Marshall, J., in chambers, denying application to vacate stay); CONGRESSIONAL CONFERENCE ON THE PENTAGON PAPERS, ANATOMY OF AN UNDECLARED WAR (P. Krause ed. 1972).

3. *Debate on Articles of Impeachment, Hearings Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 449, 489 (1974).

4. *Id.* at 152-53, 331.

5. United States v. Nixon, 418 U.S. 683 (1974).

6. *See, e.g., Hearings on White House Surveillance Activities and Campaign Activities Before the House Comm. on the Judiciary,* 93d Cong., 2d Sess., Bk. VII, pts. 1-4 (1974).

7. *See, e.g.*, STAFF OF SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, COVERT ACTION IN CHILE, 1963-1973, 94th Cong., 1st Sess. (Comm. Print 1975).

8. *See* SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 465, 94th Cong., 1st Sess. (1975).

9. Perhaps the two most dramatic revisions of information policy are the War Powers Resolution, H.R.J. Res. 542, 87 Stat. 555 (1973) (requiring the President to justify, within forty-eight hours, any military action taken without a declaration of war), and the recent amendments to the Freedom of Information Act, 5 U.S.C.A. § 552 (West Supp. 1976) (discussed at notes 329-30 *infra* and accompanying text).

only after a thorough appraisal of the arguments involved. Some claim that executive privilege is a "myth" propagated by presidents and their apologists.[10] Others assert that presidents have the constitutional power to refuse to provide information to either Congress or the courts, even in an impeachment investigation.[11] Some assert that the executive branch would operate more efficiently if virtually no secrecy were permitted.[12] Others regard confidentiality as essential in conducting foreign and military matters, as well as in effectively executing domestic legislation.[13]

Recent developments have done little to clarify these issues. The House Judiciary Committee took the view that its subpoenas could properly be served on President Nixon, and that the President's failure to comply with

10. Raoul Berger, for example, has testified that the doctrine "rests on unproven assertions by the executive branch" and is a " 'myth without constitutional foundations.' " 1 *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, and S. 2073 Before the Subcomm. on Intergovernment Relations of the Senate Comm. on Government Operations and the Subcomms. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 234, 244 (1973) (statement of Raoul Berger, quoting George Ball). Professor Berger's work is frequently relied upon. *See, e.g., Memorandum Prepared in 1971 at the Request of Senator Stevenson of Illinois, reprinted in 1 Hearings, supra*, at 104, 105 n.1; Dorsen & Shattuck 12 n.33, 17 n.56, 18 & n.63, 21; Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 794 n. 24 (1975).

11. Former Attorney General Richard Kleindienst, for example, characterized executive privilege as

> the constitutional authority of the President in his discretion to withhold certain documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government, if he believes disclosure would impair the proper exercise of his constitutional functions.

1 *Hearings, supra* note 10, at 20. President Nixon's refusal to provide material during the House Judiciary Committee's determination on whether or not to vote impeachment proceedings was an even more dramatic claim of absolute privilege. The President's position was echoed by some congressmen. *Impeachment Hearings, supra* note 3, at 455-56 (remarks of Rep. Froehlich). *See generally* Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958).

12. Senator Frank Moss of Utah, during a Senate hearing, asserted that there should be no limitation on the ability of Congress to require information from the Executive, and that "executive privilege is also damaging to the Executive. It insulates him from important questions concerning issues that can be raised by some 535 inquisitive Congressmen, as well as the American people, when they are given access to information which it is their right to have." 2 *Hearings, supra* note 10, at 13. Consider, also, the suggestion of Senator Adlai E. Stevenson III, that Congress clarify the doctrine of executive privilege so as to avoid "tangled," ill-chosen usage by the Executive. 1 *id.* at 94.

13. *See, e.g., Hearing on Executive Privilege: The Withholding of Information by the Executive, Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 428, 431 (1971) (testimony of Assistant Attorney General Rehnquist). *See also* Bishop, *The Executive Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 478 n.5 (1957) (discussing Attorney General Brownell's assertion that the President has "uncontrolled discretion" to withhold material). A particularly useful discussion that focuses on the need to protect internal debate is found in Baldwin, *The Foreign Affairs Advice Privilege*, 1976 WIS. L. REV. 16, 19-20, 23-24, 46.

these demands constituted an adequate ground for impeachment.[14] On the other hand, the Committee voted against an impeachment article based on the secret,[15] unlawful bombing of Cambodia, with some members asserting that presidents had frequently acted in secret before, and that it was sufficient that Nixon had informed certain key congressmen of his actions.[16]

The Supreme Court recognized an executive privilege in *United States v. Nixon*.[17] But it deemed an undifferentiated claim, based on the need to protect presidential communications, insufficient to immunize material subpoenaed by the Special Prosecutor from *in camera* scrutiny in a criminal case.[18] The Court left unresolved what it would have required if the President had invoked the privilege on the ground of military necessity or some other more concrete claim. It also failed to decide the immensely important issue of the Court's role were Congress to seek judicial enforcement of a subpoena.[19]

How these issues will be resolved is difficult to predict, but one thing seems certain: legislators, executive officers, judges and others who participate in the ongoing reappraisal of executive privilege will consult the past in attempting to settle both constitutional and practical uncertainties. Many will do this only to justify previously formed opinions. But the potential value in examining past experience is too great to permit one to abandon the process merely because it is subject to abuse.

This is especially true in connection with executive privilege. One can find general understanding and guidance on specific constitutional and practical questions in the history of how information was handled during the formative years of experience under the Constitution. This Article will examine that period in some detail and will comment on some of the lessons one might reasonably derive from such study.

II. THE FEDERALIST ERA, 1789-1800

The Constitution contemplates that the President, in fulfilling his obligations, will acquire information useful to Congress; it provides that the President "shall from time to time give to the Congress Information of the State of the Union . . . ."[20] All of the early presidents regularly submitted information pursuant to this direction, even, at times, sensitive material which they asked Congress to keep confidential.[21] Yet, from the very

14. *Impeachment Hearings, supra* note 3, at 449, 489.

15. *Id.* at 490, 517.

16. *Id.* at 496 (remarks of Rep. Edwards); *id.* at 501-02 (remarks of Rep. Hogan).

17. 418 U.S. 683 (1974).

18. *Id.* at 713.

19. *Id.* at 707-13. *See* discussion by various scholars, *in* United States v. Nixon, *An Historical Perspective*, 9 LOY. L.A.L. REV. 11 (1974). *See generally* Dorsen & Shattuck 24-40.

20. U.S. CONST., art. II, § 3.

21. *See, e.g.*, 22 ANNALS OF CONG. 375 (1811) (transmittal by Madison of letter from

beginning, presidents withheld certain types of information from their unsolicited transmittals to Congress.

For example, although President Washington informed Congress generally about military actions against the Wabash Indians,[22] he withheld for about a year his orders to General Arthur St. Clair authorizing offensive actions,[23] as well as an order authorizing General Anthony Wayne to attack a British-held post in American territory if necessary to defeat the Indians.[24]

Under the Constitution, Congress has no express power to compel the President to provide information. The powers to legislate and to impeach, however, imply authority to inquire into facts and conduct. Members of the very first Congress harbored no doubts as to their authority to demand, through legislation or by resolution, reports from executive officers. For example, in 1790 the Congress conducted an audit of Robert Morris' administration of funds as Superintendent of Finance under the Articles of Confederation, in spite of arguments that only the President was competent to review the conduct of executive officers.[25]

The first real confrontation between the Executive and the Congress over the control of information arose after the devastating defeat of General St. Clair by the Wabash Indians in November, 1791. Two-thirds of St. Clair's army was either killed or wounded; they literally ran from the field of battle, discarding their arms.[26] A motion was made in the House on March 27, 1792 to request the President "to institute an inquiry into the causes of the late defeat of the army under the command of Major General St. Clair . . . ."[27] This motion failed. The majority of the members

Spanish Minister to Captain General of Caraccas); 2 CONG. DEB. 828-29, 862 (1825) (copy of confidential letter from Jefferson to Congress written twenty-two years earlier, transmitted by J.Q. Adams).

22. *See* Speech by President Washington to Congress (Jan. 8, 1790), *reprinted in* AMERICAN STATE PAPERS, 1 FOREIGN RELATIONS 11-13 (1833). Congress, apparently satisfied with this information, approved increases in the Army to conduct a frontier war. *See* Act of April 30, 1790, Ch. 10, §§1, 16, 1 Stat. 119, 121; 1 ANNALS OF CONG. 966 (Gales & Seaton eds. 1790).

23. Washington's order of Oct. 6, 1789 to St. Clair authorizing "operations, offensive or defensive . . ." against the Wabash and Illinois Indians, AMERICAN STATE PAPERS, 1 INDIAN AFFAIRS 96-97 (1832), was not sent to Congress until Dec. 9, 1790. *Id.* at 83. Congress responded to the news of an offensive expedition with general expressions of approbation. Letter from Congress to President Washington (Dec. 13, 1790), *reprinted in* AMERICAN STATE PAPERS, 1 FOREIGN RELATIONS 14 (1832).

24. The Order of June 7, 1794, issued to Wayne by Secretary of War Henry Knox, provided: "If therefore in the course of your operations against the Indian enemy, it should become necessary to dislodge the party at the rapids of the Miami, you are hereby authorized in the name of the President of the United States to do it . . . ." ANTHONY WAYNE: A NAME IN ARMS 337 (R. Knopf ed. 1960).

25. 1 ANNALS OF CONG. 1168 (Gales & Seaton eds. 1790); 2 *id.* 1464-65 (1790).

26. *See generally* T.TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 17-29 (1955); F. Wilson, *St. Clair's Defeat*, in 11 OHIO ARCH. AND HIST. PUBLICATIONS 30, 39-42 (1903).

27. 3 ANNALS OF CONG. 490 (1792).

wanted the House to conduct its own inquiry, and appointed a committee with power "to call for such persons, papers, and records, as may be necessary to assist their inquiries."[28] The committee then requested Secretary of War Henry Knox to supply all papers and communications relevant to the recent military campaign. Knox laid the request before the President, who called together his distinguished Cabinet (Alexander Hamilton, Thomas Jefferson, Knox and Edmund Randolph) on March 31, 1792. After careful consideration, all agreed, in the words of Jefferson, on three points:

> [F]irst, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were [*sic*] to exercise a discretion.[29]

They also decided that the congressional request should have been directed not to Secretary Knox but to the President, who controlled all department heads and papers, and therefore the Cabinet members undertook "to speak separately to the members of the committee, and bring them by persuasion into the right channel."[30]

Apparently in response to the Cabinet's suggestion, the House addressed a formal request to the President on April 4 that he "cause the proper officers to lay before this House such papers *of a public nature*, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair."[31] The President cooperated fully, having been advised by his Cabinet "that there was not a paper which might not be properly produced . . . ."[32] Nevertheless, the wording of the request clearly indicated that the House had also concluded that the President should sometimes be enabled, if he was not entitled, to maintain the confidentiality of certain executive operations.

The practice of including in requests for information a clause which enabled the President to exercise his discretion soon became routine.[33]

28. *Id.* at 493. Representative William Smith of South Carolina opposed as unprecedented an inquiry into conduct under the executive's control, viewing it as an implied impeachment of the President. *Id.* at 491.

29. THE COMPLETE JEFFERSON 1222 (S. Padover ed. 1943). *See generally* Landis, *Constitutional Limitations on the Congressional Power to Investigate,* 40 HARV. L. REV. 153 (1926).

30. THE COMPLETE JEFFERSON, *supra* note 29, at 1223.

31. 3 ANNALS OF CONG. 536 (1792) (emphasis added).

32. THE COMPLETE JEFFERSON, *supra* note 29, at 1223.

33. For example, on Jan. 20, 1794, when the possibility arose that a letter from the Secretary of State to the British Minister had been omitted from material on Anglo-American relations transmitted earlier, the House agreed to a resolution that the President be "requested to lay before the House the omitted letter, or such parts as he may think proper." 4 ANNALS OF CONG. 250-51 (1794).

Indeed, some congressmen expressed the view that, even if a request for information contained no qualification recognizing an executive discretion to withhold, the President had the power and the duty to refuse to submit material if in his opinion disclosure would harm the national interest.[34]

The issue arose again in 1794 when the Senate requested the President to submit correspondence concerning United States relations with France. The Senate resolution contained no words enabling the President to withhold material.[35] Washington was concerned, because much of the information contained in letters from Gouverneur Morris, the American minister to France, was sensitive, and he again convened his Cabinet to seek their advice. Knox urged that all the material requested be withheld. Hamilton, Randolph and Attorney General William Bradford recommended that the President exercise his discretion and withhold whatever the public safety required.[36] Bradford specifically addressed himself to the absence of qualifying language in the resolution:

> [T]he *general* terms of the resolve do not exclude, in the construction of it, those just exceptions which the rights of the Executive and the nature of foreign correspondences require. Every call of this nature, where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated; and it could scarcely be supposed, even if the words were stronger, that the Senate intended to include any letters, the disclosure of which might endanger national honor or individual safety.[37]

Washington accepted the view espoused by the majority of his Cabinet and sent the Senate everything except "those particulars which, in my judgment, for public considerations, ought not to be communicated."[38] He

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34. During a House debate concerning a proposed request that the Secretary of the Treasury draft a plan to redeem part of the public debt, Representative John F. Mercer of Maryland, an opponent of the request, stated that executive officers hold

> the documents and information that arise in the administration of Government which this House may require of the Executive Magistrate, and which he will communicate as he sees fit. The House may go too far in asking information. He may constitutionally deny such information of facts there deputed as are [not?] fit to be communicated . . . .

3 *id.* at 707 (1792).

Other such statements were made in connection with the Jay Treaty debate. See, for example, the assertion by Representative James Hillhouse of Connecticut that the President "also had an undoubted Constitutional right, and it would be his duty to exercise his discretion on this subject, and withhold any papers, the disclosure of which would, in his judgment, be injurious to the United States . . . ." 5 *id.* at 675 (1796).

35. 4 *id.* at 38 (1794).

36. 15 THE PAPERS OF ALEXANDER HAMILTON 666-67 (H. Syrett & J. Cooke eds. 1969).

37. Letter from Attorney General William Bradford to President Washington (1793), *reprinted in* 4 THE WORKS OF ALEXANDER HAMILTON 494-95 (J. Hamilton ed. 1850) (emphasis in original).

38. 4 ANNALS OF CONG. 56 (1794).

deleted from the copies of the letters transmitted several paragraphs in which Morris appraised France's leaders and its political situation, often in colorful and derogatory terms.[39] The Senate took no action to obtain the deleted information.[40]

The most controversial debates concerning information took place after John Jay successfully negotiated the treaty with Great Britain which bears his name. The treaty was disadvantageous to the United States in that Jay, contrary to his original instructions, agreed to various restrictions on American commerce. Nevertheless, the prospect of peace and the fact that the British would withdraw from their western posts were sufficient to cause the President to seek ratification of the treaty.

Washington suppressed all information about the treaty for at least three months, from March 7 to June 8, 1795, until the Senate reconvened.[41] At that time, he sent them copies of all his instructions to Jay, including those that were potentially embarrassing to the Administration. The predominantly Federalist Senate approved the treaty in secret session on June 24.[42] When the House convened in December of that year, it was dominated by men who would later form Thomas Jefferson's Republican Party. They were highly critical of the treaty, and they had their chance to express their disapproval when Washington asked for an appropriation of $90,000 to pay for the arbitrations contemplated in the agreement. A Republican representative, Edward Livingston of New York, proposed on March 2, 1796 that

39. The National Archives microfilm, *Despatches from United States Ministers to France* (M-34, reel 6), reveals bracketed portions of the dispatches, apparently deleted in the original transmittals to Congress. In addition, one dispatch, Number 34, was withheld in its entirety, apparently because it contained nothing significant.

In addition to deleting information from Morris' letters to the State Department, Washington never submitted to Congress any part of the extensive correspondence which he carried on with Morris. Several letters between Washington and Morris indicate their understanding that the exchange was private. *See, e.g.*, Letter from President Washington to Gouverneur Morris (Dec.17, 1790), *reproduced in* PAPERS OF GEORGE WASHINGTON (Library of Congress microfilm, series 2, reel 7).

The fact that most of these "private" letters were withheld from Congress becomes apparent upon examination of AMERICAN STATE PAPERS, a government compilation of public documents published in the early 1800s. Following the letters submitted by the President pursuant to the Senate's 1794 request, Correspondence between Gouverneur Morris and Secretary of State Thomas Jefferson (1792-93), *reprinted in* AMERICAN STATE PAPERS, 1 FOREIGN RELATIONS 329-78 (1833), the publishers have printed a series of letters between Washington and Morris in order "[t]o complete the view of the French Revolution." *Id.* at 379.

40. 4 ANNALS OF CONG. 56 (1794).

41. 7 D. FREEMAN, GEORGE WASHINGTON 237-39, 248 (1957) (volume authored by J. Carroll & M. Ashworth). This suppression of information by the President was "a course which he hoped would save the treaty from slander [in the press] until the Senate could deliberate it." *Id.* at 248.

42. 4 ANNALS OF CONG. 863 (1795). Senate ratification was conditioned on the addition to the treaty of an agreement to suspend an article concerning United States trade with the British West Indies. *Id.*

the President be requested to provide the House with copies of the instructions given Jay, as well as other correspondence and documents relating to the treaty,[43] all of which had previously been supplied in confidence to the Senate. On March 7, before the resolution had been discussed, Livingston sought to amend it to except "such of said papers as any existing negotiation may render improper to be disclosed."[44]

The President read of Livingston's motion in the newspaper on March 3 and immediately sought advice from Hamilton, then a private citizen.[45] Hamilton advised the President against complying with the House resolution if it were to pass:

> [I]n a matter of such a nature the production of the papers cannot fail to start [a] new and unpleasant Game—it will be fatal to the Negotiating Power of the Government if it is to be a matter of course for a call of either House of Congress to bring forth all the communication however confidential.[46]

Meanwhile, in the House, Representative James Madison suggested casting "the resolution into such form as not to bear even the appearance of encroaching on the Constitutional rights of the Executive."[47] But his effort to allow the President discretion to withhold material failed, and an extraordinary and extensive debate then took place on Livingston's resolution. Virtually all the debate's participants shared the view that the House had broad power to seek information.[48] At the same time, the view was widely shared that the President had discretion to decline to furnish requested information.[49] The chief argument of those who opposed the resolution was that the information could not be relevant to House proceedings, since reviewing treaties was not a House function. [50]

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43. 5 *id.* at 400-01 (1796).

44. *Id.* at 426.

45. Letter from President Washington to Treasury Secretary Oliver Wolcott, Jr. (Mar.3, 1796), *reprinted in* 34 THE WRITINGS OF GEORGE WASHINGTON 481-82 (J. Fitzpatrick ed. 1940) (instructing Wolcott to seek Hamilton's advice).

46. Letter from Alexander Hamilton to President Washington (Mar. 7,1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 36, at 68-69.

47. 5 ANNALS OF CONG. 438 (1796).

48. *See, e.g., id.* at 448 (remarks of Rep. Heath: "[T]he request . . . is a Constitutional right of this House to exercise now, and at all times, founded upon a principle of publicity essentially necessary in this, our Republic, which has never been opposed . . ."); *id.* at 622 (remarks of Rep. S. Smith: the House's practice had been "[i]nvariably to ask for all and every paper that might lead to information").

49. Recognizing the House's right to request information and the President's corresponding discretion to withhold were, among others, Representative John Swanwick of Pennsylvania: "[there was] no impropriety in calling for the information which the PRESIDENT could withhold if not proper to be given." *Id.* at 449. In fact, asserted Swanwick, the House was duty-bound to call for anything necessary or useful. *Id.* Similarly, another member asserted that "each department of Government ought to be the sole judge when to make any part of its proceedings public." *Id.* at 453 (remarks of Rep. Smith).

50. *See, e.g., id.* at 439-44 (remarks of Rep. Smith); *id.* at 458 (remarks of Rep. Harper); *id.*

In addition, many of the opponents regarded the call for information as politically motivated. The papers requested would have shown that John Jay had departed from his instructions in accepting some British positions that were very unpopular in America. In fact it would appear that publicity was the motion's primary purpose, since the information had been made available to the House Committee on American Seamen, whose chairman was none other than Representative Livingston, and could have been seen by "any member of that House who would request it."[51] Nevertheless, the resolution was adopted on March 24, by a vote of 62-37.[52]

Washington immediately sought the advice of his Cabinet.[53] Every Cabinet member advised that the House had no constitutional right to demand and obtain the papers and that, even if the request were proper, the President possessed discretion to deny it. The Cabinet was divided, however, on whether compliance would be expedient.[54] Private citizen Hamil-

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at 478 (remarks of Rep. Griswold); *id.* at 553-54 (remarks of Rep. Bradbury); *id.* at 593-94 (remarks of Rep. Smith). Further, the request was seen as improper and embarrassing to the President for forcing him to decide whether to do his duty in refusing the material, or to accede to the request because of his desire to cooperate with Congress. *Id.* at 457 (remarks of Rep. Smith). Supporters of the resolution countered that the House could consider the merits of any treaty dealing with matters specifically delegated to the Congress by the Constitution. *See, e.g., id.* at 445-46 (remarks of Rep. Nicholas); *id.* at 449-50 (remarks of Rep. Swanwick); *id.* at 464-65 (remarks of Rep. Gallatin); *id.* at 545-47 (remarks of Rep. Holland); *id.* at 560-63 (remarks of Rep. Page); *id.* at 632 (remarks of Rep. Livingston). In any event, the House could use the information in considering actions against executive officers, *see,e.g., id.* at 575 (remarks of Rep. Brent); *id.* at 601 (remarks of Rep. Lyman), or simply to gain intelligence on the state of the Union, *id.* at 593 (remarks of Rep. Findley).

51. *Id.* at 461 (remarks of Rep. Harper).

52. *Id.* at 759.

53. Letter from President Washington to Secretaries of State, Treasury and War and the Attorney General (March 25, 1796), *reprinted in* 34 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 45, at 505.

54. According to Attorney General Charles Lee, "The President has the right to decide whether he will comply with a request for papers on a subject properly under Congress' cognizance and which may with propriety be communicated to them." In the area of foreign relations, Lee believed that the President "may withhold from [the House] the confidential communications between foreign ministers and our own on the subject of a Treaty either pending or concluded when . . . He shall think it best," and that the President is "bound by the Considerations of Good Faith" to American and foreign ministers to do so on occasions. Letter from Attorney General Charles Lee to President Washington (March 26, 1796), *reproduced in* PAPERS OF GEORGE WASHINGTON, *supra* note 39, series 4, reel 109. James McHenry concluded that "the President is the sole judge of what or whether any papers ought to be laid before the House at this juncture." Letter from Secretary of War James McHenry to President Washington (March 26, 1796), *reproduced in id.* Oliver Wolcott, Secretary of Treasury, said that the President should give as one of the reasons for denial: "That in the exercise of the duties committed to the President, secresy [*sic*] and personal confidence are sometimes essential, and that a regard to the public interests and to the obligations of good faith, will not always permit a full disclosure of all documents connected with foreign negotiations." Letter from Secretary of the Treasury Oliver Wolcott to President Washington (March 26, 1796), *reprinted in* 1 MEMOIRS OF THE ADMINISTRATION OF WASHINGTON AND JOHN ADAMS 317 (G. Gibbs ed. 1846). Secretary of State Timothy Pickering sent Washington a draft of the message eventually sent to the

ton, who had been allowed to review Jay's instructions, recommended non-disclosure since publication "[would] do no credit to the administration."[55] Washington refused the House request, primarily on the ground that the papers were relevant to no House function "except that of an impeachment; which the resolution had not expressed."[56] His message therefore did not state a full-blown theory of executive privilege. The message did, however, suggest such a doctrine in describing the reasons why full disclosure might have been dangerous.[57]

At this point, Congress confronted for the first time the problem of deciding how to deal with a presidential refusal to provide information. On March 31, 1796, several Republicans sought to have the President's message referred to a Committee of the Whole.[58] Although no one in favor of the referral believed that it might lead to a further demand, they contended that the President's reasons for refusing to comply, if allowed to stand without response, might be regarded as an accurate statement of the House's powers.[59] The House reporter recorded Madison's comments, which expressed the prevailing view of the House:

> He [Madison] thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations on the subject submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that the Executive had a right, under a due responsibility, also to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the PRESIDENT had been

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House. The draft contained a passage, omitted from the final version, asserting executive discretion as to when and how to comply with information requests. Draft of Washington's Speech to the House of Representatives (March 26, 1796), *reproduced in* PAPERS OF GEORGE WASHINGTON, *supra* note 39, series 4, reel 109.

55. Letter from Alexander Hamilton to President Washington (March 28, 1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 36, at 83. Supplementing this frank, political view Hamilton wrote a letter stating that the request should also be denied because of the need for discretion in divulging the details of international negotiations, and because the House lacked any function related to the demand. Letter from Alexander Hamilton to President Washington (Mar. 29, 1796), *reprinted in id.* at 86-102 (containing a draft of a reply to the congressional request); *see* 7 D. FREEMAN, *supra* note 41, at 354.

56. 5 ANNALS OF CONG. 760 (1796).

57. The nature of foreign negotiations requires caution; and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. . . . [T]o admit . . . a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.

Id.; see Letter from President Washington to Alexander Hamilton (Mar.31, 1796), *reprinted in* 35 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 45, at 6-8.

58. 5 ANNALS OF CONG. 762 (remarks of Rep. Blount and Rep. Giles).

59. *See, e.g., id.* at 764-65 (remarks of Rep. Harper).

> founded simply on a representation, that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it. But the Message had contested what appeared to him a clear and important right of the House; and stated reasons for refusing the papers, which, with all the respect he could feel for the Executive, he could not regard as satisfactory or proper.[60]

In spite of Federalist insistence that the President's refusal was final,[61] the message was referred to committee.[62] After considerable discussion, the Committee of the Whole passed two resolutions. The first affirmed a discretionary role for the House in implementing treaties that regulate subjects assigned by the Constitution to Congress. [63] The second declared it unnecessary in requests for information from the President, "which may relate to any Constitutional functions of the House, that the purpose for which such information may be wanted, or to which the same may be applied, should be stated in the application."[64]

While these resolutions did little more than vent the majority's frustration, the House still held the highest trump. Without a $90,000 appropriation, Washington could not implement the treaty. A second major debate ensued in which Fisher Ames spoke so movingly in favor of the treaty that even crusty old John Adams, the Vice President, openly wept in the House gallery. Behind-the-scenes threats, promises and personal pressure split the Republican majority, resulting in a 51-48 vote in favor of the appropriation.[65] This close vote dramatically demonstrated what the House could have done had it thought that the information was really necessary to judge the treaty's merits.

The essentially political nature of disputes over information was reflected again in the only important information controversy during the John Adams administration—the XYZ Affair. America's ministers to France sent Adams certain coded dispatches describing the demeaning treatment they had received, which included an effort by agents of French Minister Talleyrand to force them to pay a bribe. Adams received the dispatches on March 4, 1798, along with an uncoded letter describing the latest French

60. *Id.* at 773 (remarks of Rep. Madison).

61. *See, e.g., id.* at 762 (remarks of Rep. Thatcher); *id.* at 763 (remarks of Rep. Sedgwick); *id.* at 763-64 (remarks of Rep. Sitgreaves).

62. *Id.* at 768, 771.

63. [W]hen a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

Id. at 771.

64. *Id.* at 771-72.

65. *Id.* at 1291; *see* J.COMBS, THE JAY TREATY 184-88 (1970).

decree against American shipping. He sent the uncoded letter to Congress immediately, along with a message urging them to adopt the military measures he had recommended to prepare for war against France.[66] He delayed sending the coded dispatches, however, because he felt the negotiators' lives might be jeopardized by disclosure.[67]

This failure to submit to Congress all available information led Republicans to speculate that the dispatches would prove that the Federalists had negotiated with France in bad faith.[68] Senator Joseph Anderson moved on March 20 that the Senate request the President to supply the dispatches, apparently hoping that disclosure would ease the pressure for war preparations.[69] When Alexander Hamilton learned of Anderson's motion, he immediately wrote to his friend, Secretary of State Timothy Pickering. Apparently aware that the contents of the dispatches would greatly aid the Federalist effort to arm the nation for war against France, he urged their immediate disclosure.[70] Pickering agreed,[71] and he soon convinced President Adams that disclosure was essential to support the Administration's policy. Nevertheless, the President was understandably reluctant to take the initiative, having already decided to delay disclosure in order to avoid endangering his negotiators.[72]

Leading Republicans in the House misjudged the situation. They thought Adams was protecting himself and began to criticize his action.[73] Representative John Allen of Connecticut, an Administration supporter, responded to Republican charges by introducing a resolution requesting the President to provide the dispatches "*or such parts thereof as considerations of public safety and interest in his opinion, may permit.*"[74] In response to Republican objections to the limitations in his motion, Allen obligingly agreed to eliminate the language and asked only for a qualification identical to the one used earlier in requesting the Jay Treaty papers.[75] This accommodating gesture served only to make Republicans all the more suspicious, and John Nicholas of Virginia moved to strike Allen's proposed qualifications, threatening to vote against the resolution if it contained any exception.[76] Much to Nicholas' consternation, Allen agreed to accept an unqual-

66. 7 ANNALS OF CONG. 1200-01 (1798).

67. *See* 2 P.SMITH, JOHN ADAMS 955 (1962).

68. *See* 8 ANNALS OF CONG. 1254-65 (1798).

69. 7 *id.* at 525 (1798).

70. Letter from Alexander Hamilton to Secretary of State Timothy Pickering (Mar.23, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 36, at 368.

71. Letter from Secretary of State Timothy Pickering to Alexander Hamilton (Mar.25, 1798), *reprinted in id.* at 370-77.

72. *See* 2 P. SMITH, *supra* note 67, at 959.

73. *See, e.g.*, 8 ANNALS OF CONG. 1349 (1798) (remarks of Rep. Giles).

74. *Id.* at 1358 (emphasis in original).

75. *Id.* at 1368. See text accompanying note 44 *supra*.

76. 8 ANNALS OF CONG. 1368 (1798).

ified request, stating that he did not want to "give gentlemen an opportunity of voting against the resolution."[77] "[T]he President," he continued, "would be authorized by the Constitution to retain such parts of the papers as he may think it improper to communicate, [and] therefore, it was immaterial whether the resolution contained any exception . . . ."[78]

The unqualified request was then approved overwhelmingly.[79] Though he suggested in his response to Congress that he possessed discretion to withhold the material, Adams, probably with considerable pleasure, transmitted the secret dispatches to both the House and Senate.[80] Republicans reeled in shock and despair at what they read. Federalists rejoiced. The XYZ Affair became public issue number one, and America was speeded on its way to war with France.

III. INFORMATION PRACTICES UNDER THOMAS JEFFERSON

A fundamental tenet of Republican party ideology in 1800 was the desirability of greater openness in government. Republicans called generally for legislative control of important military and foreign affairs decisions. To accomplish such a shift in power, the legislature would have to request information more frequently and forcefully, and the executive would have to be more willing to provide it.[81]

Jefferson, the leading Republican, was therefore considered an advocate of openness. Once elected President, however, Jefferson sent Congress less material than either Washington or Adams had submitted. In addition, he expanded the use of codes, especially in diplomatic correspondence, and withheld most encoded letters from Congress.[82] More significantly, he

77. *Id.*

78. *Id.* at 1368-69. While Federalist statements such as Allen's, asserting an inherent executive discretion to withhold information, were undoubtedly part of an overall political strategy, the same cannot be said of the argument of Republican Albert Gallatin, *id.* at 1371, that if

> after having examined the dispatches, [the President] is convinced it will be highly injurious to the public welfare, or endanger the safety of our Commissioners, or prevent the happy issue of our negotiation, to communicate the information he will either give it, or state his reasons for withholding it to the House.

79. *Id.* at 1371.

80. Adams chose to transmit to both the House and Senate all the instructions and letters, "omitting only some names, and a few expressions descriptive of the persons" who had attempted to obtain bribes from the envoys. He requested that the materials "be considered in confidence until the members of Congress are fully possessed of their contents and shall have had opportunity to deliberate on the consequences of their publication; after which time, I submit them to your wisdom." *Id.* at 1374-75.

81. The principles of Jeffersonian Republicanism have been gathered in several sources. *See, e.g.*, H. ADAMS, JOHN RANDOLPH 33-34 (1899); 4 D. MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT xvi-xix, 436-37 (1970); L.WHITE, THE JEFFERSONIANS 13-15, 550-53 (1959).

82. Jefferson's papers contain coded letters dating back to 1785, when, as Minister to Paris, he corresponded with John Adams, then Minister to London. 13 PAPERS OF THOMAS

added a new dimension to executive secrecy by setting up a system of dual correspondence in conducting foreign affairs. One set of letters was treated as official, and kept in State Department files; the other was deemed "private" or "confidential" and held by Jefferson in his personal custody.[83] One apparent purpose of this system was to keep the "private" statements he made in conducting foreign affairs out of the hands of Congress and the public.

Congress realized that information was being withheld,[84] and some members specifically charged that a system of dual correspondence existed.[85] Nevertheless, both houses were dominated by Republicans who in general felt duty-bound to protect the executive from embarrassment and interference. Motions to investigate or to request information concerning important foreign or military matters were therefore repeatedly rejected.[86] Federalist Representative Barent Gardenier of New York was led at one point to remark: "Darkness and mystery overshadows this House and this whole nation. We know nothing, we are permitted to know nothing. We sit here as mere automata; we legislate without knowing, nay, sir, without wishing to know, why or wherefore."[87] Those requests for information which were passed almost invariably included qualifications permitting the President to withhold sensitive material.[88] In addition, the requests often

JEFFERSON 2262-64 (Library of Congress microfilm, reel 7). He developed a highly sophisticated code, even by today's standards. *See generally* D.KAHN, THE CODE BREAKER 192 (1967); 6 PAPERS OF THOMAS JEFFERSON x-xi (J. Boyd ed. 1952).

83. Jefferson explained his policy in a letter to Robert Livingston, then Minister to France, which set forth three categories into which Jefferson divided information. 8 THE WRITINGS OF THOMAS JEFFERSON 143-44 (P. Ford ed. 1897). Numerous examples of Jefferson's use of "private" correspondence may be found. *See, e.g.*, Letter from President Jefferson to James Monroe (Jan. 13, 1803), *reprinted in id.* at 190 ("private" instructions to the American negotiator in France, which were not turned over to Congress with the other papers about the Louisiana Purchase characterized by Jefferson as relevant and important); Letter from President Jefferson to Secretary of State Madison (Aug. 27, 1805), *reprinted in* 10 THE WORKS OF THOMAS JEFFERSON 172 (Fed. ed. 1905) (one of many letters discussing strategies and alternatives respecting relations with Britain, virtually all withheld from Congress).

84. *See* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 83, at 172; 19 ANNALS OF CONG. 1081 (1809) (remarks of Rep. Burwell); *id.* at 1086 (remarks of Rep. Macon).

85. *See, e.g.*, 19 ANNALS OF CONG. 424 (1809) (remarks of Sen. Hillhouse).

86. *See, e.g.*, 12 *id.* at 312, 352, 357, 359-61, 368 (1803) (resolution requesting documents relating to Spain's cession of Louisiana to France); 17 *id.* at 1240 (1807) (resolution requesting information about French decree prompting imposition of embargo); 18 *id.* at 1461 (1808) (resolution proposing an inquiry into allegation that James Wilkinson had received moneys from Spain while an officer of the United States); WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 23-24 (E. Brown ed. 1923) (request for documents showing France's title to Louisiana).

87. 18 ANNALS OF CONG. 1656 (1808).

88. *See, e.g.*, 15 *id.* at 71 (1806) (Senate motion requesting President to supply copy of letter from Monroe to Secretary of State Madison "if he shall judge the same to be proper . . ."); 16 *id.* at 336 (1807) (House request for information relating to Burr conspiracy "in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed . . ."). That a motion for information was qualified was no guarantee of its adoption,

called only for the correspondence of the Secretary of State, [89] thus enabling Jefferson to withhold his "private" correspondence.

It is in the context of such legislative deference that one must judge the significance of the fact that Jefferson never expressly invoked a privilege to withhold material from Congress. He had no need to do so. Had Congress been less deferential, Jefferson may well have relied on the executive discretion he had advised Washington that the President possessed.[90] One incident seems particularly illustrative. During 1802, the House appeared on the verge of passing a resolution requesting information about expenditures made to repair a captured French ship. Several members wanted to ask why the project had been undertaken. Representative William Giles, a leading Republican, reluctantly supported the resolution, stating that he "had never felt any disposition to deny useful information to the members of the House . . . ."[91] Jefferson promptly wrote to Giles, expressing his disapproval of the part of the resolution relating to his purpose, and threatening to refuse compliance.[92] The next day, Giles returned to the House floor and had that clause stricken from the request.[93]

Toward the end of Jefferson's second term, however, Congress demonstrated how effectively it could use its powers to obtain information when it chose to do so. By 1808, many Republicans had become disenchanted with Jefferson's embargo policy and were also not convinced of the need to augment the military, as Jefferson desired. Nonetheless, they persisted in refusing to pass information requests, insisting that the President could be trusted to supply information when it was necessary to act.[94] At the same

though adding a qualification enabled Jefferson's political opponents to argue more effectivcly that Congress should request information, since, they asserted, the President could always withhold material the disclosure of which might be harmful. *See, e.g.*, 12 *id.* at 312 (1803) (resolution and remarks of Rep. Griswold); 18 *id.* at 1640 (1808) (resolution and remarks of Rep. Van Dyke).

89. *See, e.g.*, 19 *id.* at 306, 309-10 (1809).

90. See note 29 *supra* and accompanying text.

91. 11 ANNALS OF CONG. 1140 (1802).

92. Letter from President Jefferson to Representative Giles (April 6, 1802), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 83, at 141-43.

93. 11 ANNALS OF CONG. 1142-52 (1802). On one occasion, Jefferson provided inaccurate information about a naval encounter, and managed to obtain from Congress an authorization to conduct war against Tripoli that was strikingly similar to the Gulf of Tonkin resolution. This encounter is described in A.SOFAER 210-14. An analysis of the Navy's instructions indicates that offensive action was authorized, contrary to the impression Jefferson communicated in his famous statement to Congress characterizing the squadron as "[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense . . . ." 11 ANNALS OF CONG. 11-12 (1801). Congress responded to Jefferson's request for an act authorizing offensive measures by passing the Act of Feb. 6, 1802, ch.4, § 2, 2 Stat. 130, which explicitly authorized the President to capture and make prizes of any Tripolitan vessel and "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require." *Id.* Compare this with the Gulf of Tonkin Resolution, Aug. 10, 1964, § 1, 78 Stat. 384.

94. *See, e.g.*,, 18 ANNALS OF CONG. 1640 (1808) (remarks of Rep. Dawson); *id.* at 1644-45 (remarks of Rep. Van Horn).

time, however, they began to resist increases in the size of the military primarily because the necessary information had not been provided, thus pressuring the President to provide more information in support of his policies.[95]

The only important confrontation over information between a President and the federal courts prior to *United States v. Nixon*[96] took place during Jefferson's administration. Chief Justice John Marshall indicated that he regarded executive confidences as privileged when, in *Marbury v. Madison*,[97] the Court stated its grounds for excusing Attorney General Levi Lincoln from answering one of several questions related to Marbury's commission. [98] At the same time, however, the Court made it equally clear that material information had to be revealed where it had not been communicated to the official in confidence.[99]

These propositions were reaffirmed during the trial of Aaron Burr, over which Marshall presided. Although Jefferson insisted that his presence could not be demanded, and that his judgment of what the public interest required to be disclosed was final, he accepted subpoenas for documents and supplied information.[100] Marshall, on the other hand, insisted at various points on judicial review of the propriety of any withholding, under a standard that would defer to the President's judgment absent proof that the information was essential to avoid injustice. Marshall made clear, however, that the remedy he contemplated for executive withholding would be dismissal of the prosecution, rather than an order directing the President to appear or punishing any executive officer.[101]

These rulings and positions are clearly set forth in the record of the case. What becomes clear only upon close examination of the available evidence is that Jefferson secretly withheld material covered by the first subpoena Marshall issued. That subpoena called for a letter of October 21, 1806 from the Government's chief witness, General James Wilkinson, "together with the documents accompanying it."[102] Jefferson never re-

95. *See, e.g., id.* at 1690-92 (1808).

96. 418 U.S. 683 (1974). See note 5 *supra* and accompanying text.

97. 5 U.S. (1 Cranch) 137 (1803).

98. *Id.* at 145.

99. *Id.* at 144.

100. Letters from President Jefferson to U.S. Attorney George Hay, *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 83, at 55n-64n. The President insisted on his "necessary right . . . to decide, independently of all other authority, what papers coming to him as President, the public interests permit to be communicated, and to whom . . . ." 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 83, at 398-99.

101. *See* 3 T. CARPENTER, THE TRIAL OF COL. AARON BURR 290-94 (1808); 1 D.ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON 181-87, 535-36 (1808); Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege,* 88 HARV. L. REV. 13, 23-31 (1974).

102. The original subpoena is on file at the Clerk's office, at the federal district court,

vealed, even to his counsel, that the letter expressly described was accompanied by another letter from Wilkinson of the same date, and a memorandum detailing Wilkinson's perception of the conspiracy and its participants.[103] These documents would have helped destroy whatever was left of Wilkinson's credibility and were, therefore, arguably "essential" to the defense of a capital case. But Jefferson apparently regarded them as "private" or "confidential" and therefore withheld them without comment.

IV. SECRECY AS A TOOL OF EXPANSIONISM, 1809-1825

In general, information practices established in prior administrations were followed by Presidents James Madison and James Monroe. Both men voluntarily submitted large quantities of material.[104] However, they also withheld a considerable amount of information, including "private" letters and "confidential" communications.[105] While Congress exercised its investigative powers more freely,[106] many requests for critically important information were blocked by administration supporters.[107] In addition, both houses almost invariably added qualifications to the information requests they passed, enabling the Executive to withhold material when it deemed such action to be in the public interest.[108]

Eastern District of Virginia, in Richmond. The author has had access to a copy of the subpoena, kindly supplied by Professor Dumas Malone.

103. 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 83, at 405 n.1; *see* 5 D. MALONE, *supra* note 81, at 248-49, 325.

104. Even material on potentially dangerous international situations was submitted. Madison, for example, informed Congress of threats made by Algiers. Letter from President Madison to Congress (Feb.23, 1815), *reprinted in* 2 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 539 (1917). Monroe communicated material pertaining to delicate relations with Spain. 31 ANNALS OF CONG. 13-14 (1817).

105. Some material was withheld because its transmittal was unnecessary for conveying to Congress an accurate picture of the issues involved. But both presidents went further than this in their withholding practices. *See, e.g.*, Letter from William Pinkney, Minister to Britain, to Secretary of State Robert Smith (Jan. 4, 1810) (discussed in Letter from William Pinkney to President Madison (Aug.13, 1810), *reprinted in* W. PINKNEY, LIFE OF WILLIAM PINKNEY 244-45 (1853)) (concerning a conversation between Pinkney and Foreign Secretary Lord Wellesley, publication of which might have produced "serious embarrassment"); Letter from President J.Q. Adams to Thomas Randall (April 29, 1823), *reprinted in* 1 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES CONCERNING THE INDEPENDENCE OF THE LATIN-AMERICAN NATIONS 185-86 (W. Manning ed. 1925) (foreign agent instructed to transmit collected information in "confidential" communications).

106. *See* L.WHITE, *supra* note 81, at 95, 98-101 ("every department submitted an annual report which was transmitted to Congress with the President's annual message and referred to the appropriate committee"). *See also* 21 ANNALS OF CONG. 1533 (1810) (House inquiry into high mortality rate of troops in New Orleans). For additional examples of investigations as well as a listing of requests for information see A. SOFAER 239-48.

107. *See, e.g.*, 23 ANNALS OF CONG. 267, 271 (1812) (relating to President's recommendations that war be declared against Britain); 26 *id.* at 302 (1813) (an unsuccessful attempt to block a request for information concerning France's revocation of decrees against neutral shipping); 28 *id.* at 1275 (1815) (declaration of war against Algiers); 35 *id.* at 948-49 (1820) (extent of territory in New World that Spanish Minister Onis was authorizcd to cede to the United States).

108. This was particularly true when the subject matter concerned foreign affairs. See the

Madison and Monroe took advantage of the discretion allowed by Congress. In some situations they informed Congress of their actions, thus giving the legislature an opportunity to consider some response. [109] At other times they withheld material without revealing that they had done so. Several of these situations will be examined in detail in order to illustrate how, early in American history, executive secrecy became an integral part of an aggressive foreign policy.

A. *Secrecy and the War of 1812*

Britain and France were at war when Jefferson left office. Part of each nation's strategy was to place restrictions on the rights of neutrals to trade with its enemy,[110] and many American vessels were seized because of these restrictions.[111] Congress first adopted an embargo on all trade with Europe[112] and later substituted a law prohibiting trade with the belligerents.[113] On May 1, 1810, the no-trade policy was revoked by a law which authorized President Madison to reimpose it upon either one of the belligerents if the other revoked its restrictions on neutral commerce.[114]

Congress' termination of nonintercourse was of far greater benefit to Britain than to France. It enabled England to obtain imports badly needed to sustain its war effort. France, however, could not benefit from the bill, because it lacked an effective navy to convoy merchant ships.[115] Madison anticipated that "this very inequality . . . may become a motive with [France] to turn the tables on G. Britain, by compelling her either to revoke her orders, or to lose the commerce of this country."[116] Napoleon promptly

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list of examples collected in A. SOFAER 244 n.61. On several occasions, language authorizing withholding was specifically added to proposed, unqualified requests. *See, e.g.*, 26 ANNALS OF CONG. 310 (1813); 31 *id.* at 406, 408 (1817); 38 *id.* at 733-34 (1822).

109. *See, e.g.*, 21 ANNALS OF CONG. 1622-24, 1659 (1810); 1 CONG. DEB. 164-65 (1825).

110. *See generally* S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 139-40, 148-51 (4th ed. 1955).

111. *See, e.g.*, AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 422 (1832) (extract of report from American chargé d'affaires in London to Secretary of State, listing twenty-six American merchantmen condemned by the British Court of Admiralty in three sessions, June-July 1811); *id.* at 506 (list by American chargé d'affaires in Paris of eight American vessels seized by French privateers between November 1810 and May 1811).

112. Act of Dec. 22, 1807, ch. 5, § 1, 2 Stat. 451.

113. Act of Mar. 1, 1809, ch. 24, §§ 1-4, 2 Stat. 528.

114. Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606.

115. *See* S. BEMIS, *supra* note 110, at 151.

116. Letter from President Madison to Thomas Pinckney, U.S. Minister to Great Britain (May 23, 1810), *reprinted in* 8 THE WRITINGS OF JAMES MADISON 96, 99 (G. Hunt ed. 1908). *See also* A. CARR, THE COMING OF WAR 278-79 (1960) (discussing the politics behind the Madison approach, the bill known as Macon No. 2). For his part, Napoleon reasoned that "[i]f he could induce the American Government to believe that he was prepared to revoke his decrees, and if upon that basis the Non-intercourse Act should be revived against England, there was an excellent chance that a second Anglo-American war would result." Tansill, *Robert Smith*, in 3 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 178 (S. Bemis ed. 1927).

obliged by informing the American government that, as a consequence of the Act of May 1, 1810, French restrictions on American commerce were revoked and that "after the 1st of November they will cease to have effect; it being understood that, in consequence of this declaration, the English shall revoke their Orders in Council . . . or that the United States, conformably to the act you have just communicated, shall cause their rights to be respected by the English."[117]

Napoleon's order arrived in the United States in the form of a letter from the French Foreign Minister, with no evidence to confirm the validity of its contingent and noncomprehensive representations. Furthermore, Madison simultaneously received correspondence from the American minister to France indicating that seizures of American merchant vessels by French privateers continued as of September 10, 1810.[118] Despite the doubts these facts raised about France's intentions, Madison accepted the French order as adequate, hoping thereby to "bring England to the point."[119] On November 2, the day after Napoleon's promise was to become effective, Madison issued a proclamation declaring that France had repealed its decrees and warning Britain that Anglo-American trade would end unless Britain's restrictions were repealed within three months. [120] Members of Madison's Cabinet concurred in his decision, but sensed its gravity. Secretary of State Robert Smith told French Minister Turreau: "The Executive thinks that the measures he shall take in case England continues to restrict our communications with Europe will lead necessarily to war."[121] Albert Gallatin also viewed war as inevitable after the proclamation if noninter-

117. Letter from Duke of Cadore to U.S. Minister John Armstrong (Aug. 5, 1810), *reprinted in* 22 ANNALS OF CONG. 1235-36 (Appendix); *see* Tansill, *supra* note 116, at 178-79.

118. Letter from U.S. Minister Armstrong to President Madison (Sept. 10, 1810), *reproduced in* DESPATCHES FROM UNITED STATES MINISTERS TO FRANCE (National Archives microfilm M-34, reel 14); *cf.* Letter from U.S. Minister Armstrong to Secretary of State Smith (Sept. 10, 1810), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 387 (1832) (indicating that French considered the Berlin and Milan decrees restricting neutral commerce to govern American shipping until Nov. 1, 1810).

119. Gales, *Recollections of the Civil History of the War of 1812: Entry of Sept. 27, 1810,* National Intelligencer, July 30, 1857 (diary kept by the proprietor of the *National Intelligencer*).

After his resignation as Secretary of State in Madison's cabinet, Robert Smith maintained that Madison had actively prevented him from obtaining more definite evidence from the French. Smith, by his account, had drafted a letter (Feb. 20, 1810) to French envoy Serrurier seeking "any assurance or explanation in relation to the revocation or modification of [the Berlin and Milan] decrees." Smith, on proposing this correspondence to Madison, was "told by him that it would not be expedient to send to Mr. Serrurier any such note." R. SMITH, ADDRESS TO THE PEOPLE OF THE UNITED STATES 13-14 (1811). *Cf.* "Memorandum as to R. Smith, April 1811," in 8 THE WRITINGS OF JAMES MADISON, *supra* note 116, at 137-142 (maintaining that Madison had advised Smith of his dissatisfaction with Smith's conduct of the Department of State).

120. 22 ANNALS OF CONG. 1248 (Appendix) (presidential proclamation of Nov. 2, 1810).

121. Letter from Secretary of State Smith to President Madison (Sept. 28, 1810), *reproduced in* THE PAPERS OF JAMES MADISON (Library of Congress microfilm, series 2, reel 26).

course with Britain were resumed.[122]

Congress reconvened on December 3, 1810, and had two months to ratify or reject Madison's decision. Britain had by then announced its willingness to repeal its trade restrictions, but only when the French repeal of its decrees "shall have actually taken effect."[123] The letters Madison had received indicating that France was continuing as of September to enforce its restrictive decrees were therefore important for Congress to consider in making its decision. But Madison withheld all material indicating that France had continued to seize American vessels; at the same time he communicated comprehensive information to Congress and the public indicating Britain's intransigence. The "general process of selection," historian Irving Brant has noted, "left no doubt that, having determined to stand by his action of November 2, President Madison preferred to disclose nothing that would give a handle to assailants of it."[124]

In spite of their lack of complete information, Representative John Randolph and others argued that France's revocation was inadequate in that it was unofficial, qualified and conditional, and that the French seizures continued.[125] Nevertheless, the House adopted a bill that confirmed Madison's action and authorized him to lift nonintercourse only if Britain should cease violating America's neutral commerce.[126] This set the stage for an even more significant withholding of information.

On April 21, 1812, Britain formally declared its readiness to revoke its restrictions if France absolutely revoked its decrees by some authentic and unconditional act.[127] The American Minister to France, Joel Barlow, called France's attention to the new British declaration and urged that France publish an authentic act of repeal, effective November 1, 1810.[128] The French Foreign Minister, the Duke of Bassano, surprisingly replied that a

122. The only report of Albert Gallatin's view appears in an interview with Joseph Gales where he asserted that "the President must issue his proclamation." Interview of Oct. 4, 1810, *reprinted in* National Intelligencer, July 30, 1857. *See also* Letter from Paul Hamilton to President Madison (Sept. 25, 1810), *reproduced in* THE PAPERS OF JAMES MADISON, *supra* note 121, series 1, reel 12; Letter from C.A. Rodney to President Madison (Sept. 26, 1810), *reproduced in id.*; 5 H. ADAMS, HISTORY OF THE UNITED STATES 303 (1889) (referring to statements made to and recorded by Turreau).

123. *See* Letter from Lord Wellesley, Foreign Office, to Thomas Pinckney (Aug. 31,1810), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 366 (1832) ("whenever the repeal of the French decrees shall have actually taken effect, and the commerce of neutral nations shall have been restored . . .").

124. 5 I. BRANT 226.

125. *See, e.g.*, 22 ANNALS OF CONG. 867-68 (1811) (remarks of Rep. Randolph); *id.* at 919-20 (remarks of Rep. Emott).

126. *Id.* at 1095 (House bill of Feb. 27, 1811).

127. Declaration of the Prince Regent (April 21, 1812), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 429, 430 (1832).

128. Letter from Joel Barlow to Duke of Bassano (May 1, 1812), *reprinted in id.* at 602.

Decree of St. Cloud, dated April 28, 1811, had already definitively revoked France's restrictions. Barlow asked why the decree had not earlier been published or communicated. Bassano said it had in fact been supplied to Barlow's predecessor, Jonathan Russell, as well as to the French Minister in Washington, Serrurier.[129] Barlow asked for a copy, and Bassano soon sent him what purported to be the decree.[130]

Barlow sent the decree to Madison on May 12, 1812, noting his suspicion that it "was created last week."[131] He regarded the decree as potentially useful to the United States in justifying its policy toward Britain, but he as well as Russell and others were convinced the decree was a fraud, and told Madison as much in "confidential" letters.[132] The British, too, found the decree a palpable "juggle,"[133] but pressure against war with the United States became intense, [134] and Britain repealed its trade restrictions on June 23, 1812.[135] By that time, however, the United States had declared war.

Madison had recommended war on June 1, 1812.[136] On that date he could not yet have received Barlow's letter of May 12, but he must have at least suspected that France had never formally revoked its earlier decrees. Nevertheless, he refused to accept Britain's conditional offer to revoke its restrictions, as he arguably could have done under the discretion delegated to him by the most recent nonintercourse act. Instead, he made repeal of the trade restrictions a subordinate issue and directed the attention of Congress and the public to British impressment of American seamen.[137]

Congress declared war on June 18.[138] The vote in the House was 79 to

129. Extract of letter from Joel Barlow to Secretary of State Smith (May 12, 1812), *reprinted in id.* at 603.

130. Letter from Duke of Bassano to Joel Barlow (May 10, 1812) (with translated copy of the Decree of St. Cloud), *reprinted in id.* According to Henry Adams, Bassano was simply lying. 6 H. ADAMS, *supra* note 122, at 255.

131. Letter from Joel Barlow to President Madison (May 12, 1812), *reproduced in* THE PAPERS OF JAMES MADISON, *supra* note 121, series 1, reel 14.

132. DESPATCHES FROM UNITED STATES MINISTERS TO GREAT BRITAIN, 1791-1906 (National Archives microfilm, M-30, roll 14).

133. *See* 23 PARLIAMENTARY DEBATES 288 (Hansard ed. 1812) (remarks of Lord Castlereagh to House of Commons, May 22, 1812).

134. *See* The Morning Chronicle, May 23, 1812, at 2, cols. 2-4 (report of attacks on the St. Cloud Decree in Parliament, accompanied by the editorial assertion that, although the Decree's date was fraudulent, Britain should still repeal the Orders in Council).

135. Decree of Prince Regent, *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 433 (1832).

136. *See* Message of President Madison to Congress (June 1, 1812), *reprinted in id.* at 405-07.

137. Beginning in March, 1812, the Administration authored a five-part series on the evils of impressment in the *National Intelligencer*, entitled "Impressed Seamen." Brant describes this media event, along with Madison's publicizing of a "spy" incident, as the Administration's "final drive in Congress for war measures." 5 I. BRANT 415.

138. Act of June 18, 1812, ch. 102, 2 Stat. 755.

49;[139] in the Senate the decision was even closer, 19 to13.[140] After providing support for war preparations, Congress adjourned on July 6.[141]

During the legislature's recess, Madison received the letters from his ministers concerning the Decree of St. Cloud.[142] When Congress reconvened in November, the President announced that France had issued a formal decree of revocation, but only hinted at any question as to the Decree's authenticity and communicated none of the letters he had received or written that reflected adversely upon the decree.[143]

Information about the Decree's promulgation was clearly pertinent to whether peace should be made with Britain in light of its repeal of trade restrictions. The Senate on January 18, 1813 requested the President to provide the French decree "together with such information as he may possess, concerning the time and manner of promulgating the same; and, also, any correspondence or information touching the relations of the United States with France, in the office of the Department of State, not heretofore communicated, which, in the opinion of the President . . . is not incompatible with the public interest to communicate."[144] Madison purported to comply with this request on January 26, enclosing several extracts of letters between Barlow and Bassano, and between Barlow and the Secretary of State.[145] He withheld other letters, however, including those describing the Decree as having been concocted in response to Britain's declaration. He did not advise the Senate that he was withholding relevant material because it was "private" or "confidential," or because its disclosure might injure the interests of the United States. He merely withheld the material without revealing its existence. A similar information request was passed by the House on March 1, 1813,[146] and was treated by Madison in the same manner.[147]

Opposition to the war continued in Congress. Some members seized upon the statement in one of Barlow's letters that Bassano claimed to have given the Decree to Russell soon after its alleged issuance, suggesting that Russell or someone else in the Administration may have intentionally suppressed the Decree's publication to prevent Britain from repealing its own restrictions.[148] Daniel Webster moved in the House for information

139. 24 ANNALS OF CONG. 1637 (1812).

140. *Id.* at 297-98.

141. *Id.* at 315-21 (Senate bills augmenting military and naval establishments; adjournment).

142. See notes 131-32 *supra* and accompanying text.

143. *See* 25 ANNALS OF CONG. 14 (1813) (President's Annual Message to Congress, Nov. 4, 1812).

144. *Id.* at 54.

145. *Id.* at 1246-50 (Appendix).

146. *Id.* at 1151.

147. *See* Letter from President Madison to Congress (Mar. 3, 1813), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 608 (1832).

148. *See, e.g.*, 26 ANNALS OF CONG. 231-34 (1813) (remarks of Mr. Shipherd). During the

concerning when and by whom the Government received its first intelligence of the Decree and whether Madison had ever acquired from France "any explanation of the reasons of that decree being concealed . . . ."[149] After extensive debate, the request was adopted with a qualification authorizing Madison to withhold information which it would be inconsistent with the public interest to communicate.[150] On July 12, 1813, the President supplied much of the information requested, but again the letters from Barlow and others describing the French decree as fraudulent were withheld without comment.[151]

Opponents of the war unquestionably used the controversy over the Decree of St. Cloud, as Irving Brant states, "to insinuate that Madison had brought on the war by concealing this decree."[152] Madison did not conceal the Decree. He did, however, withhold material that, if revealed, would have suggested that it was a sham. Such information would have given the opposition a powerful argument for reconsidering the declaration of war at a point when the nation was not yet geared up for the conflict.

B. *Efforts to Seize the Floridas*

1. *West Florida, 1810.* By virtue of the Louisiana Purchase, the United States acquired title to all land held by the French in the southern portion of the continent. At the time of the Purchase, West Florida, consisting of the area between the Mississippi and Perdido Rivers and including the town of Mobile, was claimed by the French but was under Spanish occupation. President Jefferson asserted that the United States had acquired this territory from the French,[153] and Congress gave apparent approval to this claim in acts authorizing the President to occupy "the territories ceded by France,"[154] and to establish "whenever he shall deem it expedient," a

argument, several members asserted a broad right to demand information "on subjects which are interesting to our constitutents." *Id.* at 231. Thomas Grosvenor of New York asked:

> How can we speak or act upon subjects inseparably connected with our foreign relations, if the Executive, the only organ of communication with other nations, may be suffered at his sovereign will and pleasure to withhold from us all his correspondence? By admitting such a course of practice, the President has had the destinies of this nation in his hands, . . . [making it understandable how the nation has been plunged into] an unnecessary and a wanton war.

Id. at 201. He particularly condemned the practice of communicating only "garbled *extracts* of letters from and to the French Governmcnt." Unlike the British system, he continued, where the executive runs foreign relations until it loses Parliament's confidence, "the foundation of our whole system of Government is *responsibility*. The President and most of his dependents are by the Constitution obnoxious to the animadversions of this House. And every official man in the Republic is responsible to the people." *Id.* (emphases in original).

149. *Id.* at 151 (resolutions offered by Rep. Webster).

150. *Id.* at 302, 308-10.

151. *Id.* at 433; 27 *id.* at 2061-83 (1814) (Appendix).

152. 6 I. BRANT 185 (1961).

153. *See* 4 D. MALONE, *supra* note 81, at 306-09. *See generally* I.COX, THE WEST FLORIDA CONTROVERSY, 1798-1813, at 64-101 (1918).

154. Act of Oct. 31, 1803, ch. 1, § 1, 2 Stat. 245.

separate customs district at Mobile, *i.e.*, at the very heart of the disputed area.[155] Spain became acutely concerned, but Jefferson took no action to seize disputed land.[156]

As soon as James Madison assumed the presidency, however, he received news that West Florida was ripe for takeover by the United States.[157] During the following summer William Claiborne, Governor of the Orleans Territory, wrote an extraordinary letter to William Wykoff, Jr., a judge of the parish at West Baton Rouge. Claiborne first noted that Spain's fall to Napoleon seemed inevitable. He then stated that, although the United States claimed the land from the Mississippi eastward to the Perdido, he was "persuaded [that] under present circumstances, it would be more pleasing that the taking possession of the Country, be preceded by a Request from the Inhabitants.—Can no means be devised to *obtain such Request?*" He went on to suggest how Wykoff and his friends should proceed:

> The most elligible [*sic*] means of obtaining an expression of the wish of the Inhabitants of Florida, can best be determined by themselves. —But were it done, thro' the medium of a Convention of Delegates, named by the people, it would be more satisfactory. —In the event, that a Convention is called, it is important that every part of the District as far at least as the Perdido be represented, and therefore I feel solicitous, that you should be at some pains to prepare for the occasion the minds of the more influential characters in the vicinity of Mobile.— Whether this can be done, by yourself in person, or by some Citizen of Baton Rouge in *your confidence*, is left to your discretion.[158]

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155. Act of Feb. 24, 1804, ch. 13, § 11, 2 Stat. 251, 254.

156. In 1804, Secretary of State Madison assured Spain that the so-called Mobile Customs Act would not be extended "beyond the acknowledged limits of the United States" unless Spain so agreed. Letter from James Madison to Marquis D'Yrujo (March 19, 1804), *reproduced in* MONROE PRESIDENTIAL PAPERS (Library of Congress microfilm, series 1, reel 3). This restraint was observed by Jefferson, although in fact he expressed a desire that West Florida, and even East Florida, should become part of the United States, by force if necessary, but only with Congress' consent. *See, e.g.*, Letter from President Jefferson to Secretary of War Henry Dearborn (August 12, 1808), *reprinted in* 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 83, at 43 (1905) (suggesting that the embargo could be used as "a pretext" for taking good military positions to conquer Mobile, Pensacola and St. Augustine). Similarly, Jefferson had written Madison on August 16, 1807, that

> As soon as we have all the proofs of the western intrigues, let us make a remonstrance & demand of satisfaction, and, if Congress approves, we may in the same instant make reprisals on the Floridas . . . . I had rather have war against Spain than not, if we go to war against England. Our Southern defensive force can take the Floridas, volunteers for a Mexican army will flock to our standard, and rich pablum will be offered to our privateers in the plunder of their commerce & coasts. Probably Cuba would add itself to our confederation.

Id. at 476-77.

157. Mississippi businessman John Adair, an alleged accomplice of Aaron Burr and a former Senator from Kentucky, informed Madison that the people of West Florida were "as ripe fruit waiting the hand that dares to pluck them." Letter from John Adair to President Madison (Jan. 9, 1809) *quoted in* I. COX, *supra* note 153, at 327-28.

158. Letter from William Claiborne to William Wykoff (June 14, 1810), *reprinted in* 5

Available evidence establishes that Claiborne's letter and plan were authorized by the President. First, Secretary of State Robert Smith wrote to Wykoff, officially selecting him

> for the confidential purpose of proceeding without delay into East Florida, and also into West Florida, as far as [P]ensacola for the purpose of diffusing the impression that the United States cherish the sincerest good will towards the people of the Floridas as neighbours . . ., and that in the event of a political separation from the parent Country, their incorporation into our Union would coincide with the sentiments and policy of the United States.[159]

Secondly, Madison wrote Smith on July 17 that Governor David Holmes of the Mississippi Territory should be encouraged to report information about West Florida, and

> also to be attentive to the means of having his militia in a state for any service that may be called for. In the event either of foreign interference with W.F. or of internal convulsions, more especially if threatening the neighboring tranquility, it will be proper to take care of the rights and interests of the U.S. by every measure within the limits of the Ex. authority . . . . Will it not be advisable to apprize [*sic*] Gov. H. confidentially, of the course adopted as to W.F. and to have his co-operation in diffusing the impressions we wish to be made there?[160]

Smith wrote to Holmes on July 21, passing on Madison's instructions and "extracts of a letter from Governor Claiborne to Col. William Wykoff, written under a sanction from the President . . . . The instructions contained in this letter are entirely confidential and are to be executed in a manner the least calculated to incite alarm."[161]

Confident of American support, the West Florida rebels began their "revolution." They went through the precise steps Claiborne had suggested: a convention of delegates from the entire territory was held; a government was formed; an Act of Independence was adopted; and a request was issued that the United States "take the present Government and people of this State under their immediate and special protection as an

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OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE, 1801-1816, at 31-33 (D. Rowland ed. 1917) (emphasis in original). The letter was written in Washington and, according to Brant, "from the house of the President." 5 I. BRANT 175. No evidence has been found to support Brant's statement. The phrase may have been taken by Brant from a later letter written by one of the revolutionaries, Fulwar Skipwith, to John Graham which is cited in Padgett, *The West Florida Revolution of 1810*, 21 LA. HIST. Q. 164-65 (1938).

159. Letter from Secretary of State Smith to William Wykoff (June 20, 1810), *reprinted in* 9 TERRITORIAL PAPERS OF THE UNITED STATES 883-84 (C. Carter ed. 1940).

160. Letter from President Madison to Secretary of State Smith (July 17, 1810), *reprinted with minor variations in* 8 THE WRITINGS OF JAMES MADISON, *supra* note 116, at 105-06.

161. Letter from Secretary of State Smith to Governor Holmes (July 21, 1810), *reproduced in* DOMESTIC LETTERS OF THE DEPARTMENT OF STATE (National Archives microfilm, M-40, reel 13).

integral and inalienable portion of the United States."[162]

When presented with the West Floridians' request for protection, however, Madison realized that to agree to the request would be implicitly to recognize West Florida as an independent state. This in turn could be construed as an abandomnent of the United States claim under the Louisiana Purchase, and could also provide Spain with just cause for war.[163] These considerations, together with the fact that the revolutionaries were determined to seize large tracts of land for their own benefit, led Madison to issue a proclamation on October 27, 1810 which announced the seizure of parts of West Florida in behalf of the United States under the claim arising out of the Louisiana Purchase.[164]

Congress was not officially informed of Madison's proclamation until December 5.[165] For many Congressmen, this was the first they had heard of Madison's actions. The proclamation and accompanying orders had been kept from public view, except in West Florida itself, in order to enable Claiborne to assume full control of West Florida without arousing any European nations. Madison thereby "presented European ministries with a *fait accompli*," as Brant suggests.[166] But he presented Congress with one as well.

Even after he submitted a copy of his proclamation to Congress, Madison continued to withhold all of the correspondence pertaining to the West Florida "revolution." Instead, he told Congress that he had moved into the area because Spanish authority had been subverted and action was required to assure control of an area "to which the title of the United States extends . . . ."[167]

The legality of the takeover was intensely debated in Congress.[168] Yet no demand for information was made; a motion to form a committee to

162. Letter from John Rhea, President of the Convention of Florida, to Governor Holmes (Sept. 26, 1810), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 396 (1832); *see* Declaration by the Representatives of the People of West Florida in Convention Assembled, *reprinted in id.*

163. *See* 5 I. BRANT 179-87; I. COX, *supra* note 153, at 487-90.

164. 22 ANNALS OF CONG. 1257-58 (1810) (Appendix); 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 465-66 (J. Richardson ed. 1897).

165. 22 ANNALS OF CONG. 12-13 (1810) (President's Annual Message to Congress, Dec. 5, 1810).

166. 5 I. BRANT 186, 187-89. Brant presents several reasons for Madison's failure to call Congress back into session early:

> If the convention forces [the local independence movement] stayed in power, delay would fortify their claim to sovereignty and entrench the land speculators. Within six weeks Spanish troops from Cuba or Vera Cruz (both rumored to be coming) might convert the revolution into a hard and bloody struggle. Stories of a British landing at Pensacola heightened the tension.

Id. at 184.

167. 22 ANNALS OF CONG. 12-13 (President's Annual Message to Congress, Dec. 5, 1810).

168. *See id.* at 37-65.

inquire into the title of the United States to West Florida and to request the President to supply "all the documents, papers, or other evidences in his possession, relating to the title of the United States," was defeated.[169] Eventually, Congress passed legislation absorbing the seized area into the United States.[170]

2. *East Florida, 1811-1813.* The Madison administration justified its takeover of parts of West Florida on the ground that the area had been acquired as part of the Louisiana Purchase. At the same time that plans were laid for getting West Floridians to revolt and request American intervention, however, identical moves were attempted in East Florida, an area over which the United States had no claim to title.

On June 20, 1810, the same day as his letter to Wykoff,[171] Secretary of State Smith wrote to Senator William H. Crawford of Georgia, sending information "of the policy of the President, in relation to the Floridas," and asking him to appoint an agent to implement administration policy east of the Perdido.[172] Crawford confided the "execution of the delicate trust" to General George Mathews, former Governor of Georgia.[173] Smith was delighted with the choice: "It was indeed a most fortunate circumstance that threw in your way Genl. Mathews, who well understanding the views of the executive, cannot but be happy in promoting them."[174]

Mathews was initially unable to bring about any change in East Florida, primarily because Americans were far less numerous there than in West Florida. In December, 1810, however, the Spanish Governor indicated to the Secretary of State that he might be willing to surrender the area to the United States.[175] President Madison then sought and obtained legislation authorizing him to accept surrender of the territory, or to assume control in the event of a foreign occupation.[176] Significantly, the law authorized taking

169. *Id.* at 28.

170. 24 *id.* at 1379 (1812); 23 *id.* at 238 (1812); *see* Act of May 14, 1812, ch. 84, § 1, 2 Stat. 734.

171. See note 158 *supra* and accompanying text.

172. Letter from Secretary of State Smith to Senator Crawford (June 20, 1810), *reproduced in* DOMESTIC LETTERS, *supra* note 161, M-40, reel 13.

173. Letter from Senator Crawford to Secretary of State Smith (Sept. 20, 1810), *reproduced in* MISCELLANEOUS LETTERS OF THE DEPARTMENT OF STATE (National Archives Microfilm M-179, reel 23).

174. Letter from Secretary of State Smith to Senator Crawford (Oct. 2, 1810), *reproduced in* DOMESTIC LETTERS, *supra* note 161, M-40, reel 13.

175. Letter from Governor Vizente Folch to Secretary of State Smith (Dec. 2, 1810), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 398 (1832). Brant treats this letter as referring only to West Florida, 5 I. BRANT 237; however, Madison apparently believed that the letter also referred to at least parts of East Florida, since he sent it to Congress as support for a request for a bill authorizing the occupation of East Florida. 22 ANNALS OF CONG. 370 (1811) (letter from President Madison to Congress, Jan. 3, 1811).

176. 22 ANNALS OF CONG. 375, 377 (1811).

possession pursuant to an agreement with "the local authority" in the event that the Spanish authorities were subverted.[177]

Mathews was made an official agent of the United States, charged with implementing the new legislation. Confidential orders from the Secretary of War instructed local garrisons to cooperate with him, and supplies and gunboats were sent to the area.[178] Mathews reported on February 25, 1811 that he had found several local "Gentelmen [*sic*] . . . well disposed to sarve [*sic*] our Govrnment [*sic*]," but that nothing could presently be attempted, because not one soldier or armed vessel had arrived in the St. Mary's River, which flows between Georgia and Florida. He hoped when he returned to the area in April "to have it in [his] power to carry the President's wishes into afect [*sic*]."[179]

In spite of his earlier statement,[180] the Spanish Governor refused to surrender the territory. Mathews then sought the local American commander's cooperation,[181] which was refused.[182] He immediately complained of this to the new Secretary of State, James Monroe.[183] But while Monroe replied to other letters from Mathews,[184] he made no official comment on the dispute over Mathews' instructions. Instead, he instructed Mathews in a "private" letter to continue work in East Florida, and to supply information.[185]

177. Act of Jan. 15, 1811, § 1, 3 Stat. 471. This so-called No-Transfer Act did not expressly require that voluntary surrender be made by "Spanish authorities," as Madison had originally contemplated in his message to Congress.

178. ORDERS FROM SECRETARY OF WAR (National Archives microfilm, M-6, roll 5, at 41).

179. Letter from General Mathews to Secretary of State Smith (Feb. 25, 1811), *reproduced in* FLA. TERR. PAPERS.

180. See note 175 *supra* and accompanying text.

181. Letter from General Mathews and General McKee to General Covington (May 9, 1811), *reproduced in* FLA. TERR. PAPERS.

182. Letter from General Covington to General Mathews and General McKee (May 10, 1811), *reproduced in* FLA. TERR. PAPERS (insisting that requisitions had to be approved by the commanding general, except "in the event of an attempt to occupy any part of the Territory in question by the troops of a foreign power . . .").

183. Letter from General Mathews and General McKee to Secretary of State Monroe (May 11, 1811), *reproduced in* FLA. TERR. PAPERS.

184. On June 29, 1811, Monroe replied to seven letters from Mathews and McKee, some of which had been written subsequent to the letter describing the dispute with Covington, but which did not mention the Covington matter. He wrote that "[a]s it appears that there is no longer any probability that Governor Folch will deliver up the country under his jurisdiction, in the manner he proposed, the president thinks it is useless for you to remain longer where you are." Letter from Secretary of State Monroe to General Mathews and General McKee (June 29, 1811), *reproduced in* DOMESTIC LETTERS, *supra* note 161, M-40, reel 14.

185. Monroe explained that his official letter of the same day, see note 184 *supra*, was "not intended to interfere with the state of things relating to East Florida, especially if you entertain any reasonable hope of success there . . . ." Letter from Secretary of State Monroe to General Mathews and General McKee (June 29,1811), *reproduced in* DOMESTIC LETTERS, *supra* note 161, M-40, reel 14.

On August 3, Mathews provided Monroe with an explicit statement of his plans. "The quiet possession of E. Florida," he wrote, "could not be obtained by an amicable negotiation with the powers that exist there." But, he added, "the inhabitants of the province are ripe for revolt." Though they were incompetent to effect a thorough revolution without external aid, he stated that "if two hundred stand of arms & fifty horsemen swords were in their possession I am confident they would commence the business, and with a fair prospect of success. These could be put into their hands by consigning them to the commanding officer at this post, subject to my order." Mathews promised to "use the most discreet management to prevent the U. States being committed and although I cannot vouch for the event, I think there would be but little danger."[186]

Monroe made no reply to this letter, which greatly concerned Mathews. Nonetheless, preparations for an assault continued. American citizens were lured to the province by promises of land bounties, and "volunteers" were enlisted from the regular troops at Point Peter, a United States post on the Georgia-Florida border.[187] On March 11, Mathews obtained arms from the local American commander,[188] and on March 12, with United States gunboats lying in reserve, the "patriot" rebellion began.[189]

The rebellion adhered to a consistent pattern. Rebels, backed up by American troops and boats, would assume control of an area. Then, acting as the "local authority," they would surrender control to the United States. Before the patriots seized Amelia Island, one article of the proposed terms of surrender by Spain was that the island would be ceded to the United States within twenty-four hours after capitulation.[190] By April, the patriots

186. Letter from General Mathews to Secretary of State Monroe (Aug. 3, 1811), *reproduced in* FLA. TERR. PAPERS.

187. The preparations for the invasion are described in Letter from General Mathews to Secretary of State Monroe (Oct. 14, 1811), *reproduced in* FLA. TERR. PAPERS; Letter from General Mathews to President Madison (April 16, 1812), *reproduced in* THE PAPERS OF JAMES MADISON, *supra* note 121, series 1, reel 13; *see* Letter from Jose Hibberson and Jose Arredondo to Don Justo Lopez, Spanish Commandant of Amelia Island (Mar. 17, 1812), *reprinted in* Senate Misc. Doc. No. 55, 36th Cong., 1st Sess. 72-74 (1860) (describing a peace negotiation with General Mathews).

188. Letter from General Mathews to Captain Hugh Campbell (Mar. 11, 1812), *reproduced in* LETTERS RECEIVED BY SECRETARY OF THE NAVY FROM CAPTAINS (National Archives microfilm, M-125, reel 13). Campbell reported Mathews' requests to Navy Secretary Hamilton on Mar. 21, stating that he at first refused to comply "but on his producing Instructions from the President . . . I did consent to go certain lengths . . . ."

189. *See* Letter from John McIntosh ("patriot" leader) to Representative George Troup of Georgia (Mar. 12, 1812), *reproduced in* FLA. TERR. PAPERS, describing the plan of invasion and stating: "The thing has been for some months in a position between General Mathews and myself, but I am afraid never would have been accomplished had not the General been governed by the Spirit of his Instructions and the declared wishes of his Country."

190. Letter from Col. Lodowick Ashley to Don Justo Lopez (Mar. 1, 1812), *reprinted in* Senate Misc. Doc. No. 55, *supra* note 187, at 66-67. Lopez, however, refused to surrender

and their American supporters had reached and laid seige to St. Augustine.[191]

Secretary Monroe was regularly informed of the progress of the rebellion. On March 21, Mathews proudly wrote Monroe of the cession from "the constituted authorities of East Florida" of the territory between the St. Mary's and St. John's Rivers. He predicted that the entire province would soon be "conquered."[192] On April 16, Mathews wrote President Madison declaring that "the commission with which I am trusted is now I flatter myself approaching to a close, and I fondly hope in such a manner as will be satisfactory to you & honorable & advantageous to our common country." Again he claimed that "the Constituted Authorities of East Florida" had ceded the province through their "commissioner."[193]

On April 4, 1812, Monroe broke his long silence by dismissing Mathews. "I am sorry to have to state," Monroe began in his "official" letter, "that the measures which you appear to have adopted for obtaining possession of Amelia Island and other parts of East Florida, are not authorized by the law of the United States . . . under which you have acted." It was never, Monroe wrote, "the policy of the law, or purpose of the Executive, to wrest the province forcibly from Spain."[194] In a private letter of the same day, Monroe expressed his pain at dismissing Mathews, "but as the govt. never contemplated taking possession of the country except by friendly arrangement with the Spanish governor, or others, or to prevent possession being taken by a foreign power, it has been impossible to act differently."[195]

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until he learned whether the United States supported the invasion. Letter from Don Justo Lopez to Major Laval (Mar. 16, 1812), *reprinted in id.* at 71 (inquiring whether the "United States are to be considered as principals or auxiliaries . . . in the present invasion of this province"). Major Laval, acting commander of American land forces, replied that he had "the greatest satisfaction in informing [Lopez] that the United States are neither principals or [*sic*] auxiliaries, and that [he was] not authorized to make any attack upon East Florida." Letter from Major Laval to Don Justo Lopez (Mar. 16, 1812), *reprinted in id.* at 72. Captain Campbell, commanding the United States naval forces off Amelia Island, subsequently informed Lopez, however, that, while his naval force was not intended to act in the name of the United States, he would act to support "a large proportion of your inhabitants who have thought proper to declare themselves independent . . . ." Letter from Captain Campbell to Don Justo Lopez (Mar. 17, 1812), *reprinted in id.* at 71.

191. Letter from General Mathews to Major Laval (Mar. 14, 1812) (copy), *reproduced in* MISC. LETTERS, *supra* note 173, M-179, reel 25 (enclosed with Mathews to Monroe, note 192 *infra*).

192. Letter from General Mathews to Secretary of State Monroe (Mar. 21, 1812), *reproduced in* FLA. TERR. PAPERS.

193. Letter from General Mathews to President Madison (Apr. 16, 1812), *reproduced in* THE PAPERS OF JAMES MADISON, *supra* note 121, series 1, reel 13.

194. Letter from Secretary of State Monroe to General Mathews (Apr. 4, 1812), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 572 (1832).

195. Letter from Secretary of State Monroe to General Mathews (Apr. 4, 1812), *reproduced in* FLA. TERR. PAPERS (draft). Monroe cited the Act of June 5, 1794, ch. 50, § 5, 1 Stat.

Mathews was crushed by his dismissal. He replied to Monroe in June that he had "no doubt" he could justify his conduct in East Florida to "an impartial public" if he exposed "confidential instructions and communications."[196] In July, 1812, Mathews headed north, reportedly "to blow them all up at Washington." But his case never reached the public. He died on September 1, 1812, in Augusta, Georgia.[197]

Meanwhile, Monroe requested David B. Mitchell, Governor of Georgia, to take charge of American affairs in East Florida. Though Mitchell was instructed to restore "that state of things in the province which existed before the late transactions," he was to withdraw only after an understanding had been reached with the Spanish authorities which would assure the safety of those who had cooperated with Mathews.[198] This qualification enabled Mitchell to maintain the occupation in the hope that Congress would approve a complete takeover.[199]

The House in fact passed a bill authorizing a takeover,[200] but the Senate refused to go along.[201] The House, by a narrow 58 to 51 vote, also adopted a resolution which requested that the President, "if, in his opinion, it be compatible with the public interest, . . . lay before the House, confidentially or otherwise, full information of all the proceedings" had pursuant to the act authorizing occupation of East Florida by arrangement with the local authority, "and also copies of all instructions there may have been issued by the Executive branch of this Government under the said act."[202] The President purported to comply on July 1 by sending several important letters.[203] Excluded from the transmittal, however, were Mathews' letters reporting his intentions and requesting arms and military support, letters to Monroe acknowledging American support for the revolution, Monroe's "private" letter to Mathews, and the revealing military instructions issued to officers in the field.[204] By withholding these materials, Madison was able

381, 384, in his private letter, pointing out that this law prohibited offenses against neutrals. *Id.* Professor Pratt, in his excellent work, suggests that Monroe's reference to this law might have been meant as a threat to keep Mathews silent. J. PRATT, THE EXPANSIONISTS OF 1812, at 113 n.104 (1957).

196. Letter from General Mathews to Secretary of State Monroe (June 22, 1812), *reproduced in* FLA. TERR. PAPERS.

197. *See* J. PRATT, *supra* note 195, at 115.

198. Letter from Secretary of State Monroe to Governor Mitchell (Apr. 10, 1812), *reprinted in* AMERICAN STATE PAPERS, 3 FOREIGN RELATIONS 572-73 (1832).

199. Monroe had reason to expect that Mitchell would construe his orders to avoid withdrawing American troops from East Florida, since, as Governor of Georgia, it had been Mitchell's avowed policy to take East Florida. J. PRATT, *supra* note 195, at 116-18.

200. 24 ANNALS OF CONG. 1684 (1812).

201. *Id.* at 1692.

202. *Id.* at 1686.

203. *Id.* at 1687-92.

204. Among the important items not transmitted to Congress were Letter from General Mathews to Secretary of State Smith (Feb. 25, 1811), Letters from General McKee to

to keep from Congress the full extent of the Administration's involvement.

Administration policy was relatively unaffected by the Senate's refusal to ratify the occupation of East Florida. Secretary of State Monroe laid plans for a military conquest, replacing Mitchell with General Thomas Pinckney and ordering 2,000 Tennessee militiamen under Andrew Jackson to join General Wilkinson in New Orleans.[205] By the end of January 1813, substantial numbers of American troops were poised for attack. Jackson wrote to the Secretary of War that his volunteers were "the choicest of our citizens, who go at the call of their country to execute the will of the government, who have no constitutional scruples . . . and . . . will rejoice at the opportunity of placing the American eagle on the ramparts of MOBILE, PENSACOLA, and FORT ST. AUGUSTINE . . . ." [206]

Meanwhile, the Senate appointed a committee to consider in confidence an occupation of Mobile and East Florida,[207] and a request for information was passed.[208] The information provided by the President disclosed that the government had no precise knowledge of any British movement toward East Florida, that the desire of the inhabitants of East Florida was to be under the protection of the United States, and that Spanish Minister Onis had no power to negotiate a cession. No official information regarding the Administration's military plans was submitted.[209] Once again, the Senate refused to authorize a takeover,[210] although it did approve the occupation of Mobile.[211] This development, combined with the peace negotiations with Britain, ultimately caused Madison to withdraw all American troops from the East Florida border.

3. *The Seminole War, 1818.* Andrew Jackson had to wait six years before getting his opportunity to attack East Florida and Pensacola. On November 30, 1817, an American ship was ambushed by Seminole Indians acting in retaliation for the destruction of one of their villages. Thirty-four

Secretary of State Smith (Apr. 10, 17, 24, 1811), Letters from General McKee to Secretary of State Monroe (May 11, June 2, 26, 1811), Letters from General McKee to Secretary of State Monroe (Jan. 1, 8, 12, Mar. 11, Apr. 15, 1812), Letters from General Mathews to Secretary of State Monroe (Mar. 14, 21, 28, Apr. 16, 1812), Letter from J.M. Troup to Secretary of State Monroe (Mar. 12, 1812), Letter from Secretary of State Monroe to General Mathews (Apr. 4, 1812), all *reproduced in* FLA. TERR. PAPERS; Letter from Secretary of State Monroe to General Mathews (June 29, 1811), *reproduced in* DOMESTIC LETTERS, *supra* note 161, M-40, reel 14.

205. *See* J. PRATT, *supra* note 195, at 211, 216-21.

206. 1 J. PARTON, LIFE OF ANDREW JACKSON 372 (1861).

207. 25 ANNALS OF CONG. 124 (1812).

208. *Id.* at 126.

209. Madison's report was ordered to be printed, but for the private use of the senators only. The sixteen letters the President sent are found in 9 STATE PAPERS AND PUBLICK DOCUMENTS 154-98 (T. Wait ed. 1819).

210. 25 ANNALS OF CONG. 127-28, 130 (1812).

211. *Id.* at 132-33.

soldiers and seven women were either killed or captured. [212]

Even before learning of the November 30th attack,[213] however, newly appointed Secretary of War John C. Calhoun instructed General Edmund Gaines, the commanding officer at Fort Scott in Georgia, to reduce the Indians by force.[214] More significantly, Gaines was to consider himself "at liberty to march across the Florida line and to attack them within its limits . . . [u]nless, they should shelter themselves under a Spanish post. In the last event, you will immediately notify this Department."[215] Calhoun sent a copy of these instructions to Andrew Jackson, then in Tennessee.[216] Although Congress was in session at the time, it was neither consulted nor informed.

On December 26, after he had learned of the Seminole attack, Calhoun ordered Jackson to assume command at Fort Scott.[217] He authorized Jackson to "adopt the necessary measures [against the Indians] to terminate a conflict which it has ever been the desire of the President, from considerations of humanity, to avoid, but which is now made necessary by their

212. Letter from General Edmund Gaines to Secretary of War George Graham (Dec. 2, 1817), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 687 (1832). The Seminole village was destroyed on November 21, 1817, after its purportedly hostile inhabitants had refused to surrender to troops dispatched by Major General Gaines. Four warriors and an Indian woman were killed in the skirmish. Letter from General Gaines to General Andrew Jackson (Nov. 21, 1817), *reprinted in id.* at 685.

213. Calhoun indicated that he did not receive Gaines' December 2 notification of the November 30 attack until December 26. Letter from Secretary of War John Calhoun to General Gaines (Dec. 26, 1817), *reprinted in id.* at 689. As George Dangerfield has suggested, the massacre could have been proffered as a justification for American intervention in Florida since it "show[ed] what little control Spain exercised over the Seminoles within her borders; but already, on December 16, before the news could have reached Washington, Gaines had been sent orders to cross the Spanish line if necessary and hunt the Seminoles down . . . ." G. DANGERFIELD, THE AWAKENING OF AMERICAN NATIONALISM 45 (1965).

214. Letter from Secretary of War Calhoun to General Gaines (Dec. 16, 1817), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 689 (1832).

215. *Id.* Acting Secretary of War George Graham had even earlier authorized the general to "exercise a sound discretion as to the propriety of crossing the line for the purpose of attacking them . . . ." Letter from Secretary of War Graham to General Gaines (Dec. 9, 1817), *reprinted in id.* at 688. Graham's instruction was unclear, however, as it requested Gaines to "conform to the instructions" in the former's previous letters of October 30 and December 2. *Id.* The earlier letters provided, respectively, that Gaines was not to "make an attack . . . within the limits of Florida" until he received instructions from the War Department and, moreover, that it was considered "impolitic, in the opinion of the President, to move a force at this time, into the Spanish possessions, for the mere purpose of chastising the Seminoles . . . ." Letter from Secretary of War Graham to General Gaines (Oct. 30, 1817), *reprinted in id.* at 685; Letter from Secretary of War Graham to General Gaines (Dec. 2, 1817), *reprinted in id.* at 687.

216. Letter from Secretary of War Calhoun to General Jackson (Dec. 17, 1817), *summarized in* 2 THE PAPERS OF JOHN C. CALHOUN 24 (W. Hemphill ed. 1963).

217. Letter from Secretary of War Calhoun to General Jackson (Dec. 26, 1817), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 690 (1832).

settled hostilities."[218] Calhoun did not repeat his earlier warning to Gaines not to attack any Spanish posts.[219]

President Monroe sent Jackson personal encouragement in the same mail with Calhoun's instructions. "This is not a time for you to think of repose," he wrote. "Great interests are at issue, and until our course is carried through triumphantly, [and] every species of danger to which it is exposed is settled on the most solid foundation, you ought not to withdraw your active support from it."[220]

On January 6, 1818, after receiving his copy of Calhoun's instructions to Gaines of December 16, but before receiving the December 26 order to assume command, Jackson wrote "confidentially" to Monroe proposing a plan for conquering the Floridas.[221] He suggested that the United States seize and hold all of East Florida "as an indemnity for the outrages of Spain upon the property of our Citizens . . . ."[222] He assured the President that "this could be done, without implicating the Government; let it be signified to me through any channel, (say Mr. J. Rhea) that the possession of the Floridas would be desirable to the United States, and in sixty days it will be accomplished."[223]

Five days after writing his confidential note, Jackson received Calhoun's instructions of December 26, ordering him to assume control of the Florida expedition, and Monroe's accompanying letter.[224] After promptly calling for volunteers in Tennessee and Kentucky, he marched across the Florida border.[225] Within three months Jackson had seized several forts and had conquered Pensacola, all of which were garrisoned by Spanish troops.[226]

On June 2, Jackson explained to Calhoun that "[t]he Immutable principles . . . of self defence justified the occupancy of the Floridas and the

218. *Id.*

219. *See id.* Many authorities assume or state that the December 26 orders incorporated by reference the earlier instructions to Gaines. For example, Cresson writes that Jackson was given command on December 26 "subject to the restrictions already imposed upon Gaines." W. CRESSON, JAMES MONROE 304 (1946). Although one might reasonably conclude that the restriction was intended, it was not expressly imposed. For further discussion of this matter, see notes 236-39 *infra* and accompanying text.

220. Letter from President Monroe to General Jackson (Dec. 28, 1817), in Thomas F. Madigan Collection, New York Public Library (same punctuation does not appear in original).

221. Letter from General Jackson to President Monroe (Jan. 6, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 345.

222. *Id.* at 346.

223. *Id.* The reference is to John Rhea, United States Representative from Tennessee, 1803-1815, 1817-1823. *Id.* at 335 n.1.

224. 1 J. BASSETT, THE LIFE OF ANDREW JACKSON 250 (1911).

225. *Id.* at 250-52.

226. *Id.* at 252-54, 260-64; G. DANGERFIELD, *supra* note 213, at 47-51.

same principles will warrant the American Government in holding it until such time as spain [*sic*] can guarantee by an adequate military force the maintaining her authority, within the colony."[227] But in a "private" letter to Monroe, Jackson went on to promise that an additional force "would insure Ft St Augustine add another Regt. and one Frigate and I will insure you Cuba in a few days."[228] These were hardly "defensive" proposals. In fact, neither letter mentioned finding any hostile Indians at Pensacola, though Jackson did enclose some depositions attesting that the Spanish Governor had aided the Indians.[229]

That Jackson's confidential letter of January 6, 1818, which offered to take the Floridas on his own responsibility,[230] definitely reached the President is implicit in each man's version of the matter. Years later, Jackson claimed Monroe secretly authorized conquering the Spanish posts in a message sent through Tennessee Congressman John Rhea.[231] Monroe de-

227. Letter from General Jackson to Secretary of War Calhoun (June 2, 1818), *reprinted in* AMERICAN STATE PAPERS, 4 FOREIGN RELATIONS 602, 603 (1834) *and* 2 JACKSON CORRESPONDENCE 379, 381 (punctuation and spelling taken from latter source).

228. Letter from General Jackson to President Monroe (June 2, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 376, 378.

229. In his June 2 letter to Calhoun, Jackson indicated that he had appended "documents substantiating the charges in part against the conduct of the Spanish Governor having knowingly and willingly admitted the Savages, avowedly hostile to the U. States within the Town of Pensacola." Letter from General Jackson to Secretary of War Calhoun (June 2, 1818), *reprinted in* AMERICAN STATE PAPERS, 4 FOREIGN RELATIONS 602 (1834) *and* 2 JACKSON CORRESPONDENCE 379 (punctuation and spelling taken from latter source).

230. See notes 221-23 *supra* and accompanying text.

231. In 1831 Jackson first publicly disclosed his version of the Rhea matter—an account which, if true, would exonerate Jackson for his seizure of the Floridas in 1818 on the grounds of presidential authorization. Jackson declared that, in response to his January 6, 1818 letter to Monroe requesting the President to authorize seizure of the Floridas "through any channel, (say Mr. J. Rhea)," see text accompanying note 223 *supra*, he had actually received a letter from congressman Rhea conveying such authorization in February 1818 while marching toward Florida. Jackson claimed he burned Rhea's letter in April 1819 after being informed by Rhea that Monroe and Calhoun wanted it destroyed. 1 J. BASSETT, *supra* note 224, at 245-47; W. CRESSON, *supra* note 219, at 304-05; Stenberg, *Jackson's "Rhea Letter" Hoax*, 2 J.S. HIST. 480, 482-87 (1936).

When in 1831 Jackson finally proffered this explanation of the Rhea matter, he chose Rhea himself as his mouthpiece. Stenberg, *supra* at 482. On June 3, 1831 Rhea wrote a letter to Monroe corroborating Jackson's version of what had transpired. Letter from Representative John Rhea to President Monroe (June 3, 1831), *reprinted in* 4 JACKSON CORRESPONDENCE 288 n.1 (first draft). Although Jackson disclosed his account of the Rhea matter in 1831, it is unclear whether Jackson fabricated the explanation during the period 1830-31 or at some earlier time, possibly 1827. *See* Stenberg, *supra* at 491-96. At any rate, Jackson did not attempt to vindicate himself publicly until Calhoun began to circulate a pamphlet early in 1831, the effect of which was to implicate Jackson. J.CALHOUN. CORRESPONDENCE BETWEEN GEN. ANDREW JACKSON AND JOHN C. CALHOUN, PRESIDENT AND VICE-PRESIDENT OF THE U. STATES, ON THE SUBJECT OF THE COURSE OF THE LATTER, IN THE DELIBERATIONS OF THE CABINET OF MR. MONROE, ON THE OCCURRENCES IN THE SEMINOLE WAR (1831); *see* 1 T. BENTON, THIRTY YEARS' VIEW 167-69 (1854). In the fall of 1831 or spring of 1832 Jackson responded to Calhoun's pamphlet with his "Exposition against Calhoun," but, as he was

nied this story, asserting in a letter to Calhoun: "I well remember that when I received the letter from Genl. Jackson . . . on the 5th day of Jany. [*sic*] 1818, I was sick in bed, and could not read it."[232] According to Monroe, he gave the letter to Calhoun, who returned it stating that it required Monroe's personal attention, but without disclosing its contents to the President.[233] Having already made all the arrangements for the Seminole campaign, Monroe claimed that he laid the letter aside and forgot it.[234]

Although considerable research has cast doubt on Jackson's claim that Monroe sent a message through Rhea,[235] Monroe's story is at least equally suspect. Monroe's failure to reply to Jackson's proposal could reasonably have been interpreted as approval for Jackson to go ahead on his own responsibility.[236] Arguably, Monroe and Calhoun expected Jackson to understand that he would be bound by the earlier instruction to Gaines to refrain from attacking Spanish posts.[237] But Jackson's letter of January 6 was his response—and objection—to the order to Gaines.[238] After writing it,

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dissuaded from publishing the defense, it was first printed—posthumously—in 1852. Stenberg, *supra* at 485-87. For the text of Jackson's exposition, see 1 T. BENTON, *supra* at 169-80 (publishing substantial part of Jackson's final draft), and 4 JACKSON CORRESPONDENCE 228-36 (preliminary draft, incorrectly dated "February, 1831" by editor).

232. Letter from President Monroe to Secretary of War Calhoun (May 19, 1830), *reprinted in* 7 MONROE WRITINGS 209.

233. *Id.*

234. *Id. See also* Deposition of James Monroe (June 19, 1831), *reprinted in id.* at 234-36 (denying truth of Rhea's June 3, 1831 letter to Monroe corroborating Jackson's version of Rhea matter).

235. *See, e.g.*, W. CRESSON, *supra* note 219, at 304-06 (concluding that Monroe "never had any dealings with John Rhea"); Stenberg, *supra* note 231, at 486 (describing as a "slanderous fabrication" Rhea's June 3, 1831 letter to Monroe written to corroborate Jackson's contention that Rhea, acting with proper authorization, had instructed Jackson to acquire possession of the Floridas).

Professor Bassett has suggested that Jackson may have been confused by a cryptic message from Rhea dated January 12, 1818, a note which related to another matter. That letter was "a message from Monroe through Rhea, and Jackson's mind . . . may have forgotten the real nature of the message and assumed that it related to his hint about Florida." 2 JACKSON CORRESPONDENCE xii; *see id.* at 348 n.1; 1 J. BASSETT, *supra* note 224, at 249 n.1. Bassett's proposed explanation has been criticized, though, as an "ingenious effort to shield Jackson from an open exposure of his dishonesty and insidious intriguing . . . ." Stenberg, *supra* at 488.

236. Jackson himself used this argument in 1831 in his "Exposition against Calhoun." He noted that more than seven months had passed after he wrote his confidential letter of January 6, 1818 without his receiving any

> intimation that the wishes of the government had changed, or that less was expected of me, if the occasion should prove favorable, than the occupation of the whole of Florida. On the contrary, either by their direct approval of my measures, or their silence, the President and Mr. Calhoun gave me reason to suppose that I was to be sustained, and that the Floridas after being occupied were to be held for the benefit of the United States.

1 T. BENTON, *supra* note 231, at 172.

237. See note 219 *supra*. For Calhoun's instruction to Gaines, see note 214 *supra* and accompanying text.

238. For a partial text of Jackson's letter of January 6, 1818, see notes 221-23 *supra* and accompanying text.

Jackson received Calhoun's instructions of December 26 that he adopt the "necessary measures" to end the uprising, along with Monroe's private letter urging him to put to rest "every species of danger."[239] Had Monroe truly wished Jackson to refrain from attacking the posts, a further instruction would have been sensible, if not indispensable.

Monroe's claim that he laid Jackson's January 6 letter aside without taking any action is undercut by a letter he wrote on January 30, 1818, specifically asking Calhoun to order Jackson "not to attack any post occupied by Spanish troops, because of the possibility, that it might bring the allied powers on us."[240] By that time, Calhoun had received letters from Jackson dated January 12 and 13,[241] so Monroe's instruction to Calhoun was probably a response to Jackson's proposal of January 6. In spite of the President's order, Calhoun sent Jackson no instruction to desist. Possibly this was because, as Monroe later contended, Calhoun had told the President that the matter was one requiring his personal attention.[242] A letter from Calhoun would normally have been subject to legislative call, thus revealing Jackson's highly controversial suggestion. In any event, Monroe apparently changed his mind, since Calhoun sent Jackson a letter on February 6 that could only have served to encourage Jackson to go ahead with his plan.[243] He wrote to acquaint Jackson

> with the entire approbation of the President of all the measures which you have adopted to terminate the rupture with the Indians. The honor of our arms, as well as the interest of our country requires, that it should be as speedily terminated as practicable; and the confidence reposed in your skill and promptitude assures us that peace will be restored on such conditions as will make it honorable and permanent.[244]

Monroe's January 30 letter also shows that the President was not yet incapacitated by illness as of that date. The diary of John Quincy Adams, in fact, records substantial activity between Monroe and the Cabinet until the entry for February 23, which recites for the first time that the President was

239. For a partial text of Calhoun's December 26, 1817 orders to Jackson and Monroe's accompanying letter, see notes 217-20 *supra* and accompanying text.

240. Letter from President Monroe to Secretary of War Calhoun (Jan. 30, 1818), *reprinted in* 2 THE PAPERS OF JOHN C. CALHOUN, *supra* note 216, at 104.

241. *See* Letter from Secretary of War Calhoun to General Jackson (Jan. 29, 1818), *reprinted in part in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 697 (1832). In addition to acknowledging Jackson's "letters of the 12th and 13th instant," Calhoun wrote the General that he approved the "measures you have taken to bring an efficient force into the field . . . ." *Id.*

Contemporaneously written dispatches from Florida were reaching Calhoun in from 12 to 16 days. *See* LETTERS SENT BY SECRETARY OF WAR REGARDING MILITARY AFFAIRS (National Archive microfilm, series M-6).

242. See text accompanying note 233 *supra*.

243. Letter from Secretary of War Calhoun to General Jackson (Feb. 6, 1818), *reprinted in part in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 697 (1832).

244. *Id.*

too ill to function normally.[245] Even if Jackson's letter of January 6 had suffered unusual delays, it should have reached Monroe well before he became ill, contrary to his later claim.[246]

On March 25, 1818, as Jackson was marching into Florida, Monroe sent a special message to Congress which included the orders he had issued to General Jackson. Monroe characterized these orders as instructions "not to enter Florida, unless it be in pursuit of the enemy, and in that case to respect the Spanish authority wherever it is maintained . . . ."[247] While Monroe included in full the December 16 letter to Gaines that prohibited attacking the Indians "under a Spanish post,"[248] he sent Congress only an extract of the December 26 instructions to Jackson, deleting the injunction that Jackson "adopt the necessary measures to terminate" the conflict.[249] Excluded completely from the transmittal were Monroe's simultaneously executed letter of personal encouragement, Jackson's letter of January 6 proposing a conquest, and Calhoun's letter of February 6 approving Jackson's measures and expressing confidence that the General would quickly terminate the war.[250]

Monroe's March 25 message was received late in the session.[251] The House Committee on Foreign Relations had already unanimously rejected a proposition to authorize the President to take possession of the Floridas.[252] Jackson's proposal, and the Administration's reaction to it, would therefore

245. *See* 4 MEMOIRS OF JOHN QUINCY ADAMS 33-35 (C. Adams ed. 1875) (describing activity between Monroe and his Cabinet during the period January 1-February 23, 1818).

246. See text accompanying note 232 *supra*.

247. 32 ANNALS OF CONG. 1473 (1818) (message of President Monroe to House of Representatives).

248. *Compare* Letter from Secretary of War Calhoun to General Gaines (Dec. 16, 1817), *in* Communications from the President of the United States Transmitting Information Respecting the War with the Seminoles (Mar. 25, 1818), *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 154, 162 (1834) (text of Calhoun's letter which Monroe provided to Senate), *with* Letter from Secretary of War Calhoun to General Gaines (Dec. 16, 1817), *reprinted in* 2 THE PAPERS OF JOHN C. CALHOUN, *supra* note 216, at 20 (text of Calhoun's letter as it appeared in War Department files).

249. *Compare* Letter from Secretary of War Calhoun to General Jackson (Dec.26, 1817), *in* Communications from the President of the United States Transmitting Information Respecting the War with the Seminoles (Mar. 25, 1818) *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 154,162 (1834) (excerpt of Calhoun's letter that Monroe provided Senate), *with* Letter from Secretary of War Calhoun to General Jackson (Dec. 26, 1817), *reprinted in* 2 JACKSON CORRESPONDENCE 341, 342 (full text of Calhoun's letter).

250. *See* Communications from the President of the United States Transmitting Information Respecting the War with the Seminoles (Mar. 25, 1818) *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 154-62 (1834). For partial texts of the excluded letters of Monroe, Jackson and Calhoun, see, respectively, the text accompanying notes 220, 223 & 244 *supra*.

251. The first session of the Fifteenth Congress adjourned on April 20, 1818. *See* 32 ANNALS OF CONG. 1782 (1818).

252. *See* 33 *id.* at 930 (1819) (remarks of Rep. Tyler).

have caused considerable controversy. But after receiving Monroe's limited disclosures, Congress adjourned without further action.

The Administration acted with remarkable laxity as news of Jackson's campaign began reaching Washington. After full Cabinet consideration, Monroe decided to support Jackson on the theory that his conduct was justified by circumstances in the field, particularly the behavior of Spanish officers.[253] Nevertheless, Monroe was determined to insist that he had not authorized an occupation of Spanish forts[254] and to announce his intention to surrender them.[255] "[C]ases may occur," he wrote Jackson, where the commanding general could seize foreign posts "acting on his own responsibility."[256] If the executive refused to surrender the posts, he added, "it would amount to a declaration of war, to which it is incompetent."[257]

One difficulty Monroe faced with his theory for avoiding responsibility and concomitantly exonerating Jackson was the paucity of evidence which would indicate that the conduct of the Spanish officers was so improper as to have justified Jackson's assaults. Monroe wrote Jackson that he was depending on the General to support the charge against the officers of Spain. "You must aid in procuring the documents necessary for this purpose. Those which you sent by Mr. Hambly were prepared in too much haste, and do not I am satisfied, do justice to the cause."[258] He asked Jackson to give the "grounds on which we rest . . . all the support in your power."[259] Some passages in Jackson's previous letters were "liable to the imputation that you took the Spanish posts . . . as a measure of expediency, and not on account of the misconduct of the Spanish officers . . . . If you think proper to authorize the Secretary or myself to correct those passages," Monroe volunteered, "it will be done with care, though, should you have copies, as I presume you have, you had better do it yourself."[260]

Jackson claimed that his activities had been fully authorized and he therefore refused to take the blame for what had occurred.[261] In particular, he referred to Calhoun's orders of December 26, authorizing him to "adopt the necessary measures to terminate" the conflict.[262] These orders, he

253. Letter from President Monroe to General Jackson (July 19, 1818), *reprinted in* 6 MONROE WRITINGS 54, 56-60.

254. *Id.* at 56-57.

255. *Id.* at 57.

256. *Id.* at 56.

257. *Id.* at 57.

258. *Id.*

259. *Id.* at 58.

260. *Id.* at 59-60.

261. Letter from General Jackson to President Monroe (Aug. 19, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 389.

262. *Id.* at 390. For the relevant text of Calhoun's orders of December 26, 1817, see text accompanying note 218 *supra*.

contended, superseded the orders earlier sent to Gaines.[263]

Monroe's statement that Jackson had acted on his own responsibility[264] seems particularly to have affected Jackson. [265] He had, after all, promised Monroe, in his letter of January 6, to conquer the Floridas without implicating the government. [266] Even if Monroe had actually sent word through Rhea that Jackson should go ahead, or if Jackson had reasonably construed Monroe's silence as approval, the General was nonetheless reneging on his promise to Monroe by asserting that his actions were authorized. This may explain why he said, in a confidential letter of August 19:

> The assumption of responsibility will never be shrunk from, when the public interest can be thereby promoted. I have passed through difficulties and exposures for the honor and benefit of my country, and whenever still, for this purpose, it shall become necessary to assume a further liability, no scruple will be urged or felt. But when it shall be required of me to do so, and the result shall be danger and injury to that country, the inducement will be lost and my consent will be wanting.[267]

Jackson seems to have been suggesting that, had Monroe been prepared to retain the seized area, he would have assumed responsibility, but not with that inducement lost.

Monroe replied on October 20 that he "was sorry to find that you understood your instructions relative to operations in Florida differently from what we intended."[268] He was satisfied, in any event, that Jackson had "good reason" for his conduct,[269] and said that he had never intended to expose Jackson to "*a responsibility . . . [Jackson] did not contemplate.*"[270] Monroe suggested that Jackson state his position in a letter to the Department of War.[271] "This will be answered, so as to explain ours, in a friendly manner by Mr. Calhoun, who has very just and liberal sentiments on the subject. This will be necessary in the case of a call for papers by Congress, as may be."[272] According to Monroe, this procedure would enable both Jackson and himself to "stand on the ground of honor, each

263. Letter from General Jackson to President Monroe (Aug. 19, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 389-90.

264. Letter from President Monroe to General Jackson (July 19, 1818), *reprinted in* 6 MONROE WRITINGS 54-55.

265. *See* Letter from General Jackson to President Monroe (Aug. 19, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 389.

266. See text accompanying note 223 *supra*.

267. Letter from General Jackson to President Monroe (Aug. 19, 1818), *reprinted in* 2 JACKSON CORRESPONDENCE 389.

268. Letter from President Monroe to General Jackson (Oct. 20, 1818), *reprinted in* 6 MONROE WRITINGS 74.

269. *Id.*

270. *Id.* at 75 (emphasis added).

271. *Id.*

272. *Id.*

doing justice to the other. . . ."[273]

Jackson refused Monroe's invitation to make a record for Congress since, as far as he knew, nothing in the War Department files could be used to demonstrate that he had exceeded his authority.[274] Only Monroe's private letters to Jackson written after the Seminole campaign indicated a difference between Monroe and Jackson, and, according to Jackson, none of these could be made "the basis of an official communication to the secretary of war."[275] Jackson offered, however, to respond to an official letter if Monroe were to direct Secretary Calhoun to write one.[276] Monroe declined this offer, writing on December 21 that an official letter from Jackson would be "unnecessary."[277] His only intent in suggesting one, he said, was to protect Jackson.[278]

Congress reconvened on November 16, 1818.[279] In a message delivered to Congress the following day, Monroe claimed that the invasion of Florida had been an act of self-defense, additionally justified by Spain's failure to meet its treaty obligation to restrain the Indians in Florida from hostile acts against the United States.[280] Jackson's orders, the President said, were carefully drawn so as "not to encroach on the rights of Spain."[281] While executing his instructions, "facts were disclosed respecting the conduct of the officers of Spain, in authority there, in encouraging the war, furnishing munitions of war, and other supplies" to the Indians, so that Jackson "was convinced that he should fail in his object . . . if he did not deprive those savages of the resource on which they had calculated . . . ."[282] Jackson's reasons were "duly appreciated," but the posts had to be returned to Spain.[283] Restitution of the posts would preserve peaceful relations; "[t]o a change of them the power of the Executive is deemed

273. *Id.*

274. Letter from General Jackson to President Monroe (Nov. 15, 1818), *reprinted in part in* 2 JACKSON CORRESPONDENCE 398-99 n.2. Jackson's belief that there were no inculpatory documents in the possession of the War Department was apparently correct, as Monroe subsequently wrote the General that there was "nothing in the Department to indicate a difference of opinion between you and the Executive, respecting the import of your instructions . . . ." Letter from President Monroe to General Jackson (Dec. 21, 1818), *reprinted in* 6 MONROE WRITINGS 85-86.

275. Letter from General Jackson to President Monroe (Nov. 15, 1818), *reprinted in part in* 2 JACKSON CORRESPONDENCE 398-99 n.2.

276. *Id.*

277. Letter from President Monroe to General Jackson (Dec. 21, 1818), *reprinted in* 6 MONROE WRITINGS 85.

278. *Id.* at 85-86.

279. 33 ANNALS OF CONG. 9 (1818).

280. *Id.* at 13-14.

281. *Id.* at 14.

282. *Id.*

283. *Id.*

incompetent. It is vested in Congress only."[284]

The Senate requested more information on November 30, 1818,[285] and also on December 17, at which time it specifically requested correspondence with Spain relating to the war, Jackson's orders, and other specified correspondence with Jackson "or such parts thereof, as may be communicated with a view to public safety."[286] The President responded at various points by providing numerous documents to both the Senate and the House.[287] The letter of December 26 bearing instructions to Jackson, edited for the March 25 transmittal, was given to the Senate in full.[288] In addition, Calhoun's February 6 letter of approbation, excluded entirely in the March 25 transmittal, was produced in excerpted form. [289] Monroe withheld, however, some

284. *Id.* at 15.

285. *Id.* at 31. The motion provided: "That the President of the United States be requested to lay before the Senate, copies of the several documents and papers referred to in his [November 17] Message to Congress . . . ." *Id.*

286. *Id.* at 74.

287. On December 3, 1818, Monroe made available to the Senate such of the documents referred to in his November 17 message to Congress "as have been prepared since that period." *Id.* at 35 (message from Monroe to the Senate). In response to the Senate's subsequently passed resolution of December 17 requesting additional records, Monroe complied on December 28 by transmitting "a report from the Secretary of State, with the papers and documents accompanying it." *Id.* at 85 (message from Monroe to the Senate).

It should be noted that, even before he was requested to produce records pertaining to the Seminole War, Monroe had stated that "all the documents relating to this occurrence will be laid before Congress . . . ." *Id.* at 14 (Monroe's Nov. 17 message to Congress). The President apparently had not, however, transmitted any of the records to Congress until after he had received the legislative requests for the production of documents. In a message to the Senate accompanying the transmittal of records on December 3, Monroe attributed the delay to the length of time necessary to prepare the documents. *Id.* at 35-36 (message from Monroe to the Senate). Voluminous documentation ultimately was sent. Message Transmitting Documents Relating to the War with the Seminole Indians, and to the Trial and Execution of Arbuthnot and Ambrister (Nov. 17, 1818), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 681 (1832).

288. *Compare* Letter from Secretary of War Calhoun to General Jackson (Dec. 26,1817), *in* Message Transmitting Documents Relating to the War with the Seminole Indians, and to the Trial and Execution of Arbuthnot and Ambrister (Nov. 17, 1818), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 681-90 (1832) (full text of Calhoun's letter transmitted to Congress by Monroe on Nov. 17, 1818), *with* Letter from Secretary of War Calhoun to General Jackson (Dec. 26,1817), *in* Communications from the President of the United States Transmitting Information Respecting the War with the Seminoles (March 25, 1818), *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 154, 162 (1834) (excerpt of Calhoun's letter transmitted to Senate by Monroe on Mar. 25, 1818). See text accompanying notes 217-19 *supra*.

289. *Compare* Letter from Secretary of War Calhoun to General Jackson (Feb. 6, 1818), *in* Message Transmitting Documents Relating to the War with the Seminole Indians, and to the Trial and Execution of Arbuthnot and Ambrister (Nov. 17, 1818), *reprinted in* AMERICAN STATE PAPERS, 1 MILITARY AFFAIRS 681, 697 (1832) (excerpt of Calhoun's Feb. 6, 1818 letter transmitted to Congress by Monroe on Nov. 17, 1818), *with* Communications from the President of the United States Transmitting Information Respecting the War with the Seminoles (March 25, 1818), *reprinted in* AMERICAN STATE PAPERS, 2 INDIAN AFFAIRS 154 (1834) (omitting Calhoun's Feb. 6, 1818 letter from documents transmitted to Senate by Monroe on March 25, 1818). See text accompanying notes 243-44 *supra*.

of the material he had failed to turn over during the previous session,[290] as well as the subsequent correspondence between Jackson and himself concerning the legality of the former's conduct.[291] At no time did Monroe intimate that the information sent was incomplete.[292] Although extensive investigations were conducted by both the House and Senate concerning Jackson's conduct, Jackson and Monroe were vindicated in that no official action was taken against them.[293] Congress was undoubtedly reluctant to criticize the Executive in the midst of negotiations then under way with Spain for the cession of the Floridas.[294] Monroe's explanation for the seizure

290. Monroe's March 25 transmittal excluded both his December 26 letter of personal encouragement that accompanied Jackson's orders and Jackson's January 6 message proposing a conquest of the Floridas. See text accompanying notes 249-50 *supra*. Neither of these letters was among the documents made available to Congress on November 17, 1818. *See* Message Transmitting Documents Relating to the War with the Seminole Indians, and to the Trial and Execution of Arbuthnot and Ambrister (Nov. 17, 1818), *reprinted in* AMERICAN STATE PAPERS, I MILITARY AFFAIRS 681 (1832).

291. Monroe's letters to Jackson dated July 19, October 20, and December 21, all concerning whether the General had exceeded his authority during the Florida campaign, were withheld from the November 17 transmittal of documents, as were Jackson's replies of August 19 and November 15. *See id.* For a discussion of this correspondence, see notes 253-78 *supra* and accompanying text.

292. Not only did the President fail to inform Congress that the proffered information was incomplete, but he affirmatively misled the legislators by his concomitant assurance that they would be provided with "all the documents" relating to the Seminole War. 33 ANNALS OF CONG. 14 (1818) (message from President Monroe to Congress delivered on Nov. 17, 1818).

A motion requesting the President to submit copies of any "instructions" given the American Minister to Spain was introduced in the House on December 14. *Id.* at 392-93. The motion was amended to read "correspondence," however, so as to avoid any appearance of interfering with the Senate's power over treaties. *Id.* at 393. The next day the motion passed, having been cast in more general terms by an amendment requesting from the President "such further correspondence and proceedings in relation to our affairs with Spain, as in his opinion it shall not be inconsistent with the public interest to divulge." *Id.* at 408. The President complied with the request on December 28. *Id.* at 430-31 (message from Monroe to the House). The House tabled a motion requesting the administration to produce correspondence with Great Britain pertaining to certain aspects of the Seminole War. *Id.* at 398.

293. On December 18, 1818 the Senate established a select committee to "inquire relative to the advance of the United States troops into West Florida . . . and, particularly, [as to] what circumstances existed, to authorize or justify the Commanding General in taking possession of those [Spanish] posts." *Id.* at 76. The committee's lengthy report was received by the Senate on February 24. *See id.* at 256-68. The Senate did not, however, take any further action prior to its adjournment on March 3. *See id.* at 288.

The House Committee on Military Affairs delivered its report on the Seminole War to the full House on January 12, 1819. *Id.* at 515-18. The committee specifically recommended that the House disapprove certain of Jackson's actions during the Florida campaign. *Id.* at 518. The committee report was referred to a Committee of the Whole, *id.* at 530, which subsequently conducted protracted debates. See *id.* at 583-97, 600-755, 764-87, 797-922, 925-1073, 1077-1101, 1103-38. Finally, on February 8, the Committee of the Whole rejected the recommendation of the Military Affairs Committee to disapprove certain of Jackson's actions, as well as two other resolutions unfavorable to the General. *Id.* at 1132-33. Thereafter "the House concurred with the Committee of the Whole in rejecting the resolution of censure reported by the Military Committee." *Id.* at 1135-36.

294. Writing contemporaneously, John Quincy Adams observed that it was "a remarkable

of the posts could have been entirely undermined, however, if all relevant information had been given to Congress, and it certainly would have been if Congress had known that Monroe had proposed, in confidential correspondence, that Jackson amend and prepare letters in anticipation of a congressional call for documents.

V. CONCLUSION

Early American history tempts one to conclude that, while the cast of characters has changed, practices concerning information have remained essentially the same since the Framers governed this nation. There is considerable truth to this observation, but the point can be greatly overstated, evoking unwarranted cynicism. Early presidential conduct does tend to undermine the argument that the President has no constitutional power to withhold information from Congress. We should not, however, assess the conduct of the first presidents on the basis of present expectations which are derived from inadequate scholarship and a strong desire to find fault with recent leaders.

Furthermore, though the nation's early history undercuts the argument that presidents lack discretion to withhold information, it provides no support whatever for the claim, recently made with monotonous regularity, that a presidential assertion of privilege is unreviewable by Congress. Discretionary power is not to be equated with arbitrary or absolute power. In our constitutional system discretion usually means judgment "guided by sound legal principles," producing decisions made "according to the rules of reason and justice . . . ."[295]

None of the Framers claimed that the President's power to withhold material was absolute. Washington apparently felt obliged to comply with

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circumstance" that the Senate "unanimously advised and consented to the ratification of the treaty with Spain" on the same day one of its committees "made a report severely censuring General Jackson for the transactions of his campaign in Florida which have been among the most immediate and prominent causes that produced that treaty." 4 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 245, at 277-78.

295. These quotes from Chief Justice Marshall and Lord Halsbury appear in Friendly, *Judicial Control of Discretionary Administrative Action*, 23 J. LEGAL ED. 63, 64 (1970). The distinction between "a discretion to withhold," as Jefferson described it, and absolute discretion is all important, yet not carefully enough drawn. *See, e.g.* Dorsen & Shattuck 8, 11, 13.

Chief Justice Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that the Constitution invested the President "with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Id.* at 165-66. Marshall's point, however, was only that the courts had no power to control such discretion, because its exercise involved no individual rights. *Id.* at 170. He was referring to explicitly conferred powers, such as the authority to appoint certain executive officers. He was, therefore, making no judgment on the extent of the President's accountability to Congress, including its authority to reject appointments, to refuse to fund programs, and to impeach.

any demand for information that was part of an impeachment investigation; and when his personal integrity was challenged by a former cabinet member, Edmund Randolph, he granted Randolph complete access to all the pertinent information in his control.[296] None of the Framers, moreover, denied Congress' authority to utilize its powers in order to bring pressure upon the Executive to supply information. When the early presidents secretly withheld material, they did so in order to avoid being asked for it, not because they felt Congress had no power to make an effective request. Their secret conduct suggests that they regarded Congress as empowered to disagree with and override their judgments. Recent presidents, by contrast, have sought to inflate executive secrecy into a practice that is constitutionally immune from legislative surveillance.

Another important difference between the conduct of early and contemporary presidents concerns the number of persons they have claimed to control. Early presidents felt they could control the flow of information from their very highest officers,[297] but never claimed discretion to control the testimony of all executive branch personnel. Some recent presidents, however, have claimed the power to prevent any person in the executive branch from providing information to Congress.[298] This is an enormously significant difference, both conceptually and in practical consequence. A privilege covering only those officers closest to the President suggests an intention to protect the deliberative processes of government at the highest level. When the privilege is extended to all executive personnel, no purpose is suggested other than the limitless one of keeping Congress from discovering anything the President might deem undesirable to reveal. Furthermore, even if early presidents had claimed discretion to control the flow of information from all executive personnel to Congress, their power would only have extended to a few offices and a small number of people, performing the most basic functions of government. Now, such a claim has the potential of giving the President control over millions of employees, working in hundreds of different programs, and performing important functions in all aspects of national and international life.

296. 5 ANNALS OF CONG. 760 (1796) (message from President Washington to the House of Representatives, March 30, 1796, in response to its request for information as regards the Jay Treaty); *see* A. SOFAER 93 (the Edmund Randolph matter).

297. For example, when the House originally requested information on St. Clair's defeat, the request was addressed to the Secretary of War. Washington's Cabinet agreed that, since the President controlled all department heads, the House should be asked to address the President instead. The resolution was changed accordingly. See text accompanying notes 27-31 *supra*; A. SOFAER 79-80. At one point during Madison's presidency he instructed the Secretary of the Treasury to answer all questions posed by the congressional committee investigating the fall of Washington City during the War of 1812, suggesting that he felt he could have ordered otherwise. *Id.* at 253.

298. *See Hearing on Executive Privilege, supra* note 13, at 428-38, 441 (testimony of Assistant Attorney General Rehnquist).

The behavior of early legislators also provides little support for the claim that the President has unreviewable discretion to withhold information. Legislators such as Madison and Gallatin—leading Jeffersonian Republicans—expressly recognized that the President had discretion to refuse information. But their statements were almost invariably coupled with the understanding, often expressed, that the President would give reasons for withholding material, which the legislature could then review.[299] Rarely did even a single legislator of that period assert that presidential discretion over information was unreviewable.[300] On several occasions, in fact, Congress used its powers over appointments, appropriations and treaties to force the presidents involved to supply more information or suffer rejection of their proposals.[301]

Finally, while the federal courts recognized an evidentiary privilege at an early date, they claimed and applied the power to review its exercise. Both the Supreme Court and later Chief Justice Marshall acting as a trial judge sought to avoid direct confrontations with the executive branch by

299. For example, Madison said, after President Washington withheld Jay Treaty material, that he was "ready to admit that the Executive had a right, *under a due responsibility*, . . . to withhold information, *when of a nature that did not permit a disclosure of it at the time*." 5 ANNALS OF CONG. 773 (1796) (emphasis added). During the call for the XYZ dispatches, see notes 68-78 *supra* and accompanying text, Gallatin said that "if . . . he [the President] is convinced it will be highly injurious to the public welfare, or endanger the safety of our Commissioners, or prevent the happy issue of our negotiation, to communicate the information, he will either give it, or state his reasons for withholding it to the House." 8 *id.* at 1371 (1798). Federalist Robert Harper also thought that in this case "the whole [of the information] ought to be called for; and if the President should think it proper to retain a part, he would doubtless give sufficient reasons to the House for doing so." *Id.* at 1369. These examples, of course, are not meant to imply that presidents were viewed as powerless to disagree with the legislature's judgment of their actions.

300. Some Representatives claimed, for example, that Washington's refusal to supply information concerning the Jay Treaty was final and that discussion of any legislative response would be inappropriate. *See, e.g.*, 5 *id.* at 762 (1796) (remarks of Rep. Thatcher); *id.* at 763 (remarks of Rep. Sedgwick); *id.* at 763-64 (remarks of Rep. Sitgreaves). The House voted overwhelmingly, nonetheless, to approve two resolutions rejecting certain of Washington's contentions. *Id.* at 782-83. Other instances in which apparent claims of absolute discretion were made may be found in A. SOFAER 177 n., 245, 246. None can be given much weight.

301. The most notable instances in which either the House or Senate demonstrated its power to force information from the President occurred during the attempts to adopt and enforce the embargo under Jefferson, *see* A. SOFAER 186-87; in response to Madison's appointments of Gallatin and Russell as ministers (in this instance the Senate committees did not extract the desired information, but the Senate did reject Madison's nominations), *see id.* at 240-42; and when the Senate learned that John Quincy Adams planned to send ministers to the Panama Congress, *see id.* at 262. The fact that legislators repeatedly contended that Congress would use whatever power it possessed to block treaties or other lawful executive actions does not necessarily mean the legislators acted constitutionally by exercising those powers. Some degree of self-restraint was widely regarded by legislators as constitutionally required, though the matter was one that necessarily lay within the legislature's discretion. *See, e.g.*, 5 ANNALS OF CONG. 758-59 (1796) (remarks of Rep. Harper); *id.* at 1108 (remarks of Rep. Findley).

proceeding deferentially.[302] Yet both asserted that the courts must ultimately determine the scope of any privilege to withhold material sought by proper judicial process.

Early American history therefore shows that executive privilege is neither myth nor absolute license. The claim that the President has unlimited power to withhold material sought by Congress or the courts is as untenable as the assertion that he has no power to do so. Practice indicates that the division of authority between the branches is somewhere between these extremes, and is worked out anew in each instance of controversy.

The history we have examined imparts an even more important lesson. It is that constitutional claims of the executive, legislature and courts concerning information have less practical importance than might appear from the degree of attention they receive. Such claims become crucial only during a formal confrontation between two branches, a relatively rare occurrence. By focusing on the merits of constitutional claims asserted by each branch respecting information, as most existing literature tends to do, one addresses only a small part of the problem of information control as it has been observed in practice.

The legislative practices of early American history that had by far the greatest impact on the control of information were Congress' frequent refusals to request necessary documents and other material, and its willingness to support policies without the intelligence essential to judge their wisdom. When early sessions of Congress did pass information requests, moreover, they were almost invariably qualified to permit the President to withhold material in his discretion. In those few instances where legislators seemed intent on obtaining information, their motivation often appears to have been primarily partisan, their aim to harrass and embarrass the executive.

The most important executive branch practice during the nation's early years was to keep from Congress even the fact that information had been withheld. This was done for a variety of reasons, some genuinely based on protecting national interests, others designed to protect the administration from criticism or to prevent legislative interference with executive initiatives. The practice seldom left Congress ignorant of executive aims. Congress seems to have had ample evidence, for example, of Jefferson's system of dual correspondence,[303] of Madison's down-playing of French neutrality violations,[304] and of Monroe's objectives and machinations in the Floridas.[305] But executive secrecy enabled the President to proceed without

302. See notes 97-101 *supra* and accompanying text.
303. See text accompanying notes 83-85 *supra*.
304. See text accompanying notes 118-26 *supra*.
305. See text accompanying notes 220-94 *supra*.

having to submit detailed justification, and it enabled Congress to avoid responsibility for the President's initiatives.

Constitutional doctrine was unquestionably a significant aspect of the judiciary's early role concerning information. But the judicial role was itself insignificant. The courts became involved only in cases between the government and private persons, never in a dispute over information between Congress and the President. Further, while a principle of judicial supervision was established, it was tempered by practical as well as theoretical limits, and its application constituted no meaningful part of the process of conducting foreign or military affairs.

This predominantly political and practical pattern which dominated information control in the nation's early years has remained essentially unchanged. Congress has alternated in recent years between being too deferential and being irresponsible or partisan.[306] Presidents continue to avoid letting Congress know that information has been withheld, and they have operated unilaterally in foreign and military affairs.[307] The courts are more frequently involved in deciding disputes over information, but until recently the disputes have never involved an outright conflict between the legislative and executive branches of government.[308] Furthermore, the courts continue to apply deferential and limited rules for disclosure.[309]

306. The best discussion of congressional irresponsibility is still Telford Taylor's *Grand Inquest*, *supra* note 26. Examples of deference are numerous. *See, e.g.*, D. EISENHOWER, MANDATE FOR CHANGE, 1953-1956, at 218, 303-04 (1963). Even the deference accorded so non-political a figure as Eisenhower, however, was the result of a complex mix, one of the principal elements of which was the President's successful wooing of the bipartisan support needed for his legislative programs. *Id.* at 192-95, 436, 547; *see* S. ADAMS, FIRSTHAND REPORT, THE STORY OF THE EISENHOWER ADMINISTRATION 9 (1961).

307. *See generally* A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973); CONGRESSIONAL CONFERENCE ON THE PENTAGON PAPERS, *supra* note 2, at 62-64; STAFF OF HOUSE COMM. ON ARMED SERVICES, 92D CONG., 1ST SESS., UNITED STATES-VIETNAM RELATIONS 1945-1967, A STUDY PREPARED BY THE DEPARTMENT OF DEFENSE (Comm. Print 1971) (12 vols.).

308. The federal district and circuit courts in the District of Columbia have recently found jurisdiction to pass upon the enforcement of committee subpoenas addressed to President Nixon. In both cases, however, enforcement was denied because of an inadequate showing of need or a refusal to promise confidentiality. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974). Most recently, the same court of appeals found jurisdiction in a suit to enforce a committee subpoena issued to obtain wiretap information from the American Telephone and Telegraph Co., even though the Attorney General had intervened to prevent enforcement. The court remanded, however, suggesting that the legislative and executive branches attempt to settle the dispute. United States v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976).

309. In suits to obtain information from the executive, other than those brought under the Freedom of Information Act, the moving party must show sufficient need. Even if great need is shown, the equities in the executive's favor may be deemed to overcome the applicant's case for disclosure. The executive is given the benefit of generous presumptions, and sensitive materials are usually examined *in camera*, thereby preventing a full opportunity for the moving party to participate in evaluating the executive's claim. Finally, not even an *in camera* hearing is assured, where the executive makes some showing that the material's confidentiality is

These observations provide useful guidance in evaluating proposals to alter the present allocation of power. First, they show that one should not expect Congress consistently to utilize its powers over appropriations, appointments and other matters to compel production of information. The legislature has "learned" several times in American history that presidents can abuse excessive power. But what one Congress learns, another forgets; experience has proven the need for supplementary measures.[310] Nor is Congress likely to redress the present power imbalance by holding executive officers in contempt. Congress has largely abandoned its power to hold persons summarily in contempt, relying instead on a statutory substitute, which, like other criminal statutes, is enforceable only by executive action.[311] The summary contempt power is in any event subject to abuse, and its application seems particularly inappropriate to punish officers complying with orders of the President.[312]

Second, statutory reforms may well encourage a regular flow of information and discourage invocations of privilege. But statutes requiring executive officers to submit information have existed since 1789, and they are unlikely to result in fundamental or lasting adjustments in legislative or executive behavior. In addition, most statutes requiring information—and a surprising number exist[313]—have been construed by various presidents to

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particularly important. *See* United States v. Reynolds, 345 U.S. 1, 9 (1953); Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1408, 1416 (1974).

310. *See* Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. LEGIS. 621, 642-61 (1973).

311. Contempt of Congress Act, 2 U.S.C. § 192 (1970):

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor . . . .

By this enactment, the major responsibility for determining contempt was theoretically shifted from the Congress to the courts. The actual transition, however, did not occur until Congress abandoned its summary power to punish for contempt in 1945. C. BECK, CONTEMPT OF CONGRESS 5-7, 247-48 (App. C-2) (1959). *See generally* E. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 302-03 (1928).

312. *See generally* R. GOLDFARB, THE CONTEMPT POWER 42-45, 199-279, 289-90 (1963).

313. Numerous statutes requiring information concerning expenditures were consolidated in 5 U.S.C. § 2954 (1970), which provides:

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

The General Accounting Office, which is required to submit reports to Congress "from time to time," 31 U.S.C. § 60 (1970), has the following grant of statutory power:

> All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them, and the Comptroller General, or any of his assistants or employees,

apply only to information they feel it is proper to submit.[314] Congress has proved no more insistent than usual in demanding compliance with these statutes.[315]

The information practices observed in early American history, and largely followed today, also demonstrate the risks and limited utility of relying on the courts to bring about adjustments in the power of the legislative and executive branches. Numerous arguments have recently been advanced for some regular form of judicial review of information disputes, many deserving of more detailed consideration than is appropriate here.[316] Even assuming, however, that jurisdictional barriers to such suits can be overcome,[317] history shows that they could involve the courts in highly

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> when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

Id. § 54.

314. Consider the discussion of 5 U.S.C. § 2954 (1970) in U.S. DEP'T OF JUSTICE, IS A CONGRESSIONAL COMMITTEE ENTITLED TO DEMAND AND RECEIVE INFORMATION AND PAPERS FROM THE PRESIDENT AND THE HEADS OF DEPARTMENTS WHICH THEY DEEM CONFIDENTIAL IN THE PUBLIC INTEREST?, *reprinted in* SUBCOMM. ON CONST. RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM CONGRESS 63-146 (Comm. Print 1958), which takes the position that the earlier version of the statute does not change the law with respect to the heads of departments to keep from public view matters which in their judgment should remain confidential.

Similarly, when the Comptroller General, acting under authority of 31 U.S.C. § 54 (1970) (see note 313 *supra*), requested from the Secretary of the Air Force a report on the Air Force ballistics program, access was refused. *See Availability of Information from Federal Departments and Agencies, Hearings Before the Special Subcomm. on Gov't Information of the House Comm. on Gov't Operations*, 85th Cong., 2d Sess., pt. 16, at 3568, 3578-81 (1958). *See also* the recent exchange of letters between FBI Director Clarence M. Kelley and Comptroller General Elmer B. Staats concerning access to files in connection with the GAO's wiretapping survey, *reprinted in* 122 CONG. REC. H5102-03 (daily ed. June 1, 1976). *See generally* Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044, 1111-18 (1965).

315. When President Nixon invoked executive privilege in 1971 to deny the Senate Committee on Foreign Relations access to Department of Defense military assistance five-year plans, the Committee added the following language to the foreign aid bill of 1972, 22 U.S.C. §2680(b) (Supp. III 1973):

> The Department of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these committees. Any Federal department, agency or independent establishment shall furnish any information requested by either such committee relating to any such activity or responsibility.

The statute failed to prevent the President from invoking executive privilege to protect USIA Country Planning Memoranda only five weeks later, and without adverse consequence. *See* Note, *supra* note 310, at 643, 654-60.

316. *See generally* Cox, *supra* note 309, at 1422-35; Dorsen & Shattuck; Note, *supra* note 310, at 661-71.

317. The jurisdictional arguments vary in complexity. Standing and subject-matter jurisdiction can probably be overcome by statute, but may otherwise present insurmountable difficulties. *See* Senate Standing Order 77, S. Doc. No. 93-1, 93d Cong., 1st Sess. 104 (1973) (authorizing any Senate committee to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if "necessary to the adequate performance of the powers vested

charged conflicts over matters of great political complexity. *United States v. Nixon* is an alluring but deceptive analogy. The case stemmed from a motion for discovery in a criminal proceeding, and therefore did not involve Congress. While it could have led to a confrontation between the Court and President Nixon, the latter was at that point so beleaguered and politically weak, and his contentions so sweeping, that the Court could safely hold that he had relinquished his control over the Special Prosecutor and order production of the materials in dispute. A suit to obtain Gouverneur Morris' correspondence from President Washington, for example,[318] or information concerning the Decree of St. Cloud from President Madison, [319] or secret plans concerning the Floridas from President Monroe,[320] would have presented far less tractable problems. The Court would have been forced to decide such questions as which branch is the more deserving of its assistance, whether Congress would in fact assure confidentiality, and whether Congress was engaged in an effort to embarrass or obstruct a president rather than in some endeavor felt to be more constructive.[321]

Whatever the merits of involving the courts in settling information disputes, moreover, that device will contribute little to dealing with the practices that have led to the present allocation of power over information—legislative irresponsibility, executive secrecy, and judicial deference to executive assertions. If Congress is unwilling to pass and insist upon requests for necessary information, it is likely to be equally unwilling to ask

in it . . ."). The case or controversy requirement is likely to be satisfied where a House of Congress seeks information denied it by the President. The court might, however, refuse to pass on such controversies because they would be deemed to present non-justiciable "political questions." *See generally* Cox, *supra* note 309, at 1422-35; Note, *The Justiciability of Confrontation: Executive Secrecy and the Political Question Doctrine,* 16 ARIZ. L. REV. 140 (1974). Professor Henkin's recent illuminating examination suggests a reappraisal of that doctrine. His analysis would still require courts to determine whether the questions presented in such cases are committed to other branches, and whether an order requiring disclosure is appropriate in any such case, given Congress' vast powers and other equitable considerations. Henkin, *Is There a "Political Question" Doctrine?,* 85 YALE L.J. 597 (1976).

318. See notes 35-40 *supra* and accompanying text.

319. See notes 127-52 *supra* and accompanying text.

320. See notes 212-94 *supra* and accompanying text.

321. Judge Leventhal has made these dangers clear in an analysis that is worth reading in full:

> To decide this case on the merits, we would be called on to balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information in the request letters, the likelihood of a leak of the information in the Subcommittee's hands, and the seriousness of the harm to national security from such a release. The question arises whether judicial intervention is inappropriate, for lack of ascertainable standards, and in recognition of the consideration that a better balance would result in the constitutional sense, however imperfect it might be, if it were struck by political struggle and compromise than by a judicial ruling.

United States v. American Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976). Also useful is the thoughtful analysis in Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model,* 43 U. CHI. L. REV. 463 (1976).

the courts to enforce a subpoena for the same material. Suits for information would be filed, but only rarely could an outright confrontation occur of such persistence as to allow for meaningful judicial involvement. Experience indicates that such suits would be most likely, absent more fundamental changes in legislative procedures and behavior, where a legislative majority is intent on harrassing or embarrassing a minority-party president. In addition, the prospect of judicial review will not necessarily lead presidents to behave differently. Presidents intent on keeping material secret from Congress, in order to conduct foreign affairs with considerable independence, may become even more secretive and evasive if knowledge of plans or intentions might lead to lawsuits to obtain material.

Finally, experience indicates that, while the Supreme Court would probably reject an executive claim of absolute discretion, it might well establish principles and practices for reviewing executive claims that would institutionalize too great a degree of secrecy. The federal courts have been too prepared to accept executive claims based on national security needs.[322] Congress could, theoretically, use its powers to press for information regardless of the Court's refusal to require production; however, once Congress has sought judicial determination of an executive privilege dispute, it will become difficult for it to overcome or evade decisions adverse to its claims. To the extent that Congress succeeds in avoiding or ignoring judicial decisions in favor of executive secrecy, it may well be at the expense, not only of executive power, but also of the credibility of judicial orders in separation-of-powers litigation.

Effective reform in the control of information must be premised on the realization that present-day information practices are deeply ingrained. To accept the long-standing nature of the problems of legislative inadequacy, executive secrecy and judicial deference is at least a first step toward

322. In United States v. Nixon, 418 U.S. 683 (1973), the Court stated that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law . . . ." *Id.* at 713. The President, therefore, was required to submit the subpoenaed tapes of relevant discussions for *in camera* inspection. The Court added language, however, indicating that more than "a presumptive privilege" might be accorded a claim of privilege on the ground of military or diplomatic secrets. "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilites." *Id.* at 710. The Court went on to imply that not even *in camera* scrutiny should be afforded such claims where

> [i]t may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged . . . . [T]he court should not jeopardize the security which the privilege is meant to protect by . . . examination of the evidence, even by the judge alone, in chambers.

Id. at 711 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)). *See generally Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1207-31 (1972).

recognizing the difficulty of dealing with these problems. If we were faced simply with the need to reassert some clear constitutional principle—adhered to by the Framers but recently ignored—then perhaps the courts could provide the necessary remedy. There is, however, no clear constitutional principle the judiciary can invoke to remedy institutional inadequacies concerning information. The courts may well play a useful role, but the great challenge to be confronted is to devise more fundamental changes. These changes should involve not only the manner in which Congress seeks information, but also the manner in which it functions in the areas of foreign and military affairs, so that it might not so easily evade its responsibilities.

The precise shape of meaningful reform requires far more detailed consideration and analysis than is possible in this essentially historical examination. Some guiding principles do emerge, however, from the appraisal of past and present practice. Changes in legislative procedures should be aimed at combatting the reticence and insufficient involvement of the legislature in policy planning. Congress recently took such a step by establishing its own highly professional mechanism for analyzing and establishing spending priorities independently of the executive.[323] That mechanism encourages the accumulation of information necessary to make the judgments that Congress is, for the first time, forcing itself to make. Similar adjustments can and should be made in the development of foreign and military policy.[324] The policy-making and reviewing bodies that Congress

323. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301 *et seq.* (Supp. IV 1974). Recent discussion of this Act suggests that, while budgetary conflicts between the President and Congress will continue in both the political and judicial arenas, the Act will provide a mechanism for formalizing resolution. *See* Mills & Munselle, *Unimpoundment: Politics and the Courts in the Release of Impounded Funds*, 24 EMORY L.J. 313, 335-42 (1975). Other discussions have related to the highly sophisticated concepts embodied in the Act. *See, e.g.*, Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679 (1976).

324. Extensive consideration is now being given to such adjustments. *See, e.g.*, *Symposium—Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 747 (1975). Professor Henkin has most recently suggested the sorts of adjustments that may be necessary:

> I do not believe that we are compelled to choose between Congress' constitutional right (or duty) to know and the President's duty (or right) to withhold. Congress has to be seen as part of the foreign policy process, with the same right and need to know as major Executive officials. But the need of Congress to know does not necessarily mean that 500 members of Congress must know, when only some authorized committee or subcommittee really needs to know. The need to know some things does not necessarily mean a need to know everything. The need to know substantive matters does not necessarily mean a need to know delicate or titillating details that may jeopardize confidentiality within the Executive Branch or in diplomatic relations. And, as the Constitutional Fathers, and Congresses, and the American people have understood ever since we became a nation, the need to know does not necessarily mean the need to make public, when public knowledge is not in the public interest. If Congress organizes itself and disciplines itself to be content with what it needs to know and to maintain necessary confidentiality about it, the claim of executive privilege to withhold from Congress will not prevail.

Henkin, *The Constitution and Foreign Affairs*, in Essays on the Constitution of the United States, Bicentennial Lecture Series, Utah State University (1976) (to be published).

could establish in these areas would seem likely to develop special incentives for obtaining information, including a willingness to handle sensitive material with care. These deliberative bodies should be given the power and resources to collect information from sources other than the executive branch—in short, the means to compete more forcefully for the information essential to participation in formulating government policy.[325]

Changes in executive branch practices should be aimed at holding secrecy and evasiveness to a minimum. The deliberative process needs to be protected, but the executive branch should not be permitted to stifle minority opinion within itself when Congress is called upon to approve particular policies. Existing statutes protect the right of certain executive officials to convey their opinions to Congress, even if at variance with presidential policy.[326] This healthy practice has worked well and could be expanded to include most officials, excepting only the President's closest advisors. Another much-needed step is to make more credible and effective the sanctions against giving Congress false information or willfully delaying compliance with its information requests. Executive officers should routinely be sworn before being allowed to testify or to submit information. Congress should, moreover, create within the Department of Justice an office specifically responsible for investigating cases of possible perjury or obstructionism referred by the legislature. Though such an officer would be appointed by the President and subject to the Attorney General's direction, direct accountability to Congress (including Senate review in the appointment process) would tend to lessen the individual's susceptibility to partisan or other improper pressures. If this measure failed to achieve the necessary degree of compliance, Congress could return to enforcing its power of contempt through some fair and orderly mechanism free of executive control, such as a special prosecutor.[327] To make legislative requests effective, executive branch personnel must be convinced that they may be punished

325. Additional authority could also (or alternatively) be conferred on the General Accounting Office to collect needed information. For a thorough and thoughtful consideration of this possibility, see Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C.L. REV. 1279, 1350-65 (1973).

326. 10 U.S.C. §141(e) (1970) (Joint Chiefs of Staff permitted to voice personal views on national defense to congressional committees); 22 U.S.C. §2680(b) (Supp. III 1973) (certain foreign affairs officials permitted to express individual views upon request of House and Senate committees on foreign affairs).

327. S. 495, 94th Cong., 2d Sess. (1976), the proposed Watergate Reorganization and Reform Act of 1976, would have established an office of Congressional Legal Counsel to represent the interests of Congress in certain types of litigation; its counsel, appointed jointly by the chief officers of the Senate and House, would have been empowered to bring civil actions to enforce congressional subpoenas and to cooperate with any criminal proceeding for contempt of Congress. A mechanism was included providing for employment of a temporary special prosecutor whenever the Attorney General or President had a conflict of interest with respect to a particular investigation or prosecution. *See also* H.R. 15634, 94th Cong., 2d Sess. (1976).

severely for allowing their allegiance to a president to lead them to violate the higher duties to which they are sworn.

Finally, a substantial judicial role could also be contemplated in securing a reallocation of power over information. Initially, however, Congress should avoid calling upon the courts to issue purportedly definitive determinations of the legislature's power to obtain information from the executive.[328] The effects of the recent amendments to the Freedom of Information Act are as yet unknown. Suits by individuals (including members of Congress) are now supposed to trigger judicial review of materials claimed to be exempt in the interest of national defense or foreign policy, to insure that they were "in fact properly classified pursuant to such Executive order."[329] In addition, the FOIA could be amended once more, if necessary, to enable individuals to sue the Office of the President, as an agency of government, for all information in its control, except the material specifically exempted by the Act.[330] The applicable rules would undoubtedly be construed to

328. Several bills that would authorize suits in the federal courts have been introduced in both the House and Senate in recent years. Most are in the form of amendments to the Freedom of Information Act, 5 U.S.C. § 552 (1970). *See, e.g.*, H.R. 4938, H.R. 7221, and H.R. 9448, 93d Cong., 1st Sess. (1973). A bill introduced by Senator Edward Kennedy during the same session, S. 2073, is discussed in Dorsen & Shattuck 34-35. The most comprehensive (and apparently most recent) effort is S.2170, 94th Cong., 1st Sess. (1975), introduced by Senator Muskie and several others. It would have amended Title III of the Legislative Reorganization Act of 1970, 84 Stat. 1140 (codified in scattered sections of 2, 5, 8, 31, 40 U.S.C.), by providing (1) that all agency heads are required to keep committees with jurisdiction over their activities "fully and currently informed"; (2) that each agency head will provide all information requested by two-fifths of a committee relating to any matter in the committee's jurisdiction; (3) that a claim of privilege must be asserted within 20 days of the date of the subpoena or within 10 days of an oral request, by the President, "formally and expressly" instructing the officer to refuse the material, and setting forth "the ground on which it is based"; (4) that the committee or either House could then commence a civil action in the United States District Court for the District of Columbia to enforce the subpoena; (5) that the court shall have original jurisdiction of such actions "without regard to the sum or value of the matter in controversy," with power to issue a "mandatory injunction or other order as may be appropriate"; (6) that appeals may be taken; (7) that both Houses must take steps to protect information requiring protection against disclosure, and must investigate and prosecute breaches of confidentiality; (8) that the bill would not require production of any material "if such furnishing or production is prohibited by an Act of Congress"; and (9) that nothing in the bill shall be construed as "in any way impairing the effectiveness or availability of any other procedure whereby Congress may obtain information needed to enable it to exercise a legislative function under the Constitution." The exemption for material required to be kept confidential by an Act of Congress is discussed in Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 COLUM. L. REV. 1029 (1976).

329. 5 U.S.C.A. § 552(b)(1) (West Supp. 1976).

330. The change could be accomplished by redefining "agency" in the act to include the Office of the President. *See, e.g.*, H.R. 9448, 93d Cong., 1st Sess. (1973); H.R. 12471, 93d Cong., 2d Sess. (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 RECORD OF A.B.N.Y.C. 177, 202-03 (1974). A bill authorizing members of Congress to sue in their official capacities is another measure that, if adopted, would submit to the courts the power to define Congress' authority. *See* S. 2170, 94th Cong., 1st Sess. (1975) (discussed at note 328 *supra*).

accommodate the need for confidential communications among the President and his cabinet officers or advisors.[331] But the courts should be empowered at least to require the executive to claim it is withholding material for some legitimate reason. If, despite these reforms, the courts are still too ready to accept executive assertions of the need for secrecy, they will only have demonstrated anew the importance of changing the nature of Congress' policy-formulating activities, rather than entrusting to the courts the problem of defining the limits of the congressional power to inquire.

331. On the extent to which "advice" ought to be protected by a privilege, an excellent starting point for analysis is the contrasting treatments in Dorsen & Shattuck 29-33 and Baldwin, *supra* note 13, at 19-22.