MEMORANDUM ON THE POWER OF CONGRESSIONAL COMMITTEES TO INVESTIGATE THE CENTRAL INTELLIGENCE AGENCY

The National Security Act of 1947, 50 U.S.C. 401, et seq., (popularly referred to as the "Armed Forces Unification Act") established the Central Intelligence Agency, and prescribed its duties and functions. Section 403 (d)(3) of the Act specifically provides that "...the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

The key words to this provision are "unauthorized disclosure". The only logical interpretation of these words is that a disclosure is "unauthorized" when it has not been authorized by the Director, as he, and he alone, is in a position to determine whether intelligence sources and methods are involved. This provision strengthens and expands the powers which executive departments and agencies have historically been deemed to possess under the constitutional doctrine of separation of powers, even in the absence of a specific statute conferring these powers.

Although the issue has never been tested in the Courts, the political history of the United States contains numerous instances where the President and executive heads of departments have refused to furnish information to Congressional committees for reasons of public interest. On each occasion where the President has supported the departmental head's refusal to divulge confidential information, the papers and information have been withheld. This uniform result stems from the fundamental proposition that governs the interrelation of the three great branches of the Federal Government; that no one of the three has the power to subject either of the other two to its unrestrained will. Weighed against this, of course, is our fundamental theory of checks and balances. Where Congressional requests have been denied or politely turned aside, the explanation of public interest has invariably been given. Former President William Howard Taft said on this subject:

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

The President and his departmental heads have in the past on occasion furnished classified information which the Congress sought. They have done so in a spirit of comity, not because of any effective

means to compel them to do so. It has become generally recognized that a subpoena duces tecum, issued by a Congressional committee to an executive head of department and calling for the production of testimony and records, need not be complied with if disclosure of contents would be detrimental to the public interest. As a practical matter, where the President has directed non-appearance, in response to the subpoena, the person summoned has so advised the committees or has appeared and claimed privilege.

Although Congress has by statute provided the organic legislation for certain executive departments and agencies and can by law change their duties, abolish them, or withhold their appropriations, it may not use legislative power to compel the heads of such departments or agencies to act contrary to what the President finds is in the public interest. The President is the judge of the interest involved and in the exercise of his discretion must be accountable to the country and his conscience. The executive branch of the Government is intended to assist him in the execution of his responsibilities.

There is annexed hereto as Appendix A. an historical summary of certain occasions where the legislative has sought confidential executive papers or information and has been refused.

Although there are no cases on the power of Congress to obtain classified information from the executive, there are many upholding the executive's right to withhold such information in suits by private parties. Appendix B. contains a summary of the more important of these cases.

In addition to the provision quoted above from the National Security Act of 1947, there are other statutory provisions relieving CIA of the reporting requirements imposed on other departments and agencies. Thus Section 7 of the Central Intelligence Act of 1949, 50 U.S.C. 403g specifically exempts the Agency from the requirement of furnishing personnel data for publication in the Official Register of the United States, and, in general, exempts the Agency from the provisions of all other federal "housekeeping" statutes requiring disclosure of organization, functions, and other personnel information. This Section reads as follows:

> "In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 102 (d)(3) of the National Security Act of 1947 (Public Law 253, Eightieth Congress, first session) that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2, chapter 795 of the Act of August 28, 1935 (49 Stat. 956,957; 5 U.S.C. 654), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers

of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under section 607, title VI, chapter 212 of the Act of June 30, 1945, as amended (5 U.S.C. 947 (b))."

To summarize, Congress has recognized the necessity of secrecy in the conduct of CIA's activities, has charged its Director with the responsibility of safeguarding such secrecy and has conferred upon him the necessary authority to do so. Even had Congress not taken such action, the Director would have the power, under the Constitution, to withhold any information which he considered to be an official secret of the executive branch.

8 May 1953

APPENDIX A

SUMMARY OF OCCASIONS WHEN THE LEGISLATIVE HAS SOUGHT TO COMPEL THE EXECUTIVE TO PRODUCE CONFIDENTIAL DOCUMENTS

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

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

The expedition of General St. Clair had been under the direction of the Secretary of War and the assertion of the House of Representatives of its rights to investigate was predicated upon its control of the expenditure of public monies. The Secretaries of War and Treasury apparently appeared in person before the committee. However, when President Washington himself was asked for the papers pertaining to the General St. Clair campaign, a cabinet meeting was called at which it was unanimously concluded that the President should communicate only such papers as the public good would permit and should refuse disclosure of those which would injure the public. All but Secretary of the Treasury Alexander Hamilton believed this doctrine applied as well to Heads of Departments who come under the President.

In 1796, President Washington was presented with a House resolution requesting that the House be shown a copy of the instructions to the U. S. Minister who negotiated the peace treaty with Great Britain together with related documents and correspondence. The House was insisting upon examination of these papers as a condition precedent to appropriating funds to implement the treaty.

Washington addressed a message to the House in which he discussed the requisites of secrecy in international intercourse and expressed the feeling that admission of the House of Representatives into the treaty making process would create dangerous precedence. He concluded the address by a categoric refusal to divulge the information requested.

In January 1807, during Jefferson's administration, Representative Randolph introduced the following resolution:

> "Resolved, That, the President of the United States be, and he hereby is, requested to lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any

illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same." 16 Annals of Congress (1806-1807), p. 336.

This resolution was overwhelmingly passed at a time when the Burr conspiracy was stirring the country. Jefferson's message to the Senate and House provided a summary of recent events and then with respect to the accumulation of data in his hands stated: "...In this state of the evidence, delivered sometimes, too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question." Richardson, Messages and Papers of the Presidents, Vol. I, p. 412, dated January 22, 1807.

On three different occasions President Andrew Jackson successfully resisted attempts by the House and Senate to extract information and papers of the Executive considered to be confidential. The first of these was a request for a copy of a paper which had been published and allegedly read by the Executive to the Heads of the Departments. The second was a request for information in connection with the investigation by the Senate respecting frauds in the sale of public lands. The third was a request in connection with a House resolution to investigate the condition of the Executive Department concerning their integrity and efficiency.

In 1842 during John Tyler's administration, the principle was established that all papers and documents relating to applications for office are of a confidential nature, and an appeal to a President to make such records public should be refused. Tyler abjectly denied a request to communicate to the House the names of such members of the 26th and 27th Congresses as had applied for office, and for what offices, and whether in person or by writing or through friends.

President Tyler was successful on a later occasion in withholding confidential information from the House in connection with an inquiry into reports relative to the affairs of the Cherokee Indians and frauds alleged to have been practiced upon them. In a message to the House dated January 31, 1843, he stated:

"...The injunction of the Constitution that the President 'shall take care that the laws be faithfully executed' necessarily confers an authority, commensurate with the obligation imposed, to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective, these inquiries must often be confidential. They may result in the collection of truth or of

falsehood; or they may be incomplete, and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be promulgated, or in respect to the character of the information obtained, would deprive him at one of the means of performing one of the most salutary duties of his office. An inquiry might be arrested at its first stage, and the officers whose conduct demanded investigation may be enabled to elude or defeat it. To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive." Hinds, Precedents of the House of Representatives, Volumn 3, p. 181 (1907)

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

Polk replied to the request:

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

This action illustrates the principle that what a past President has done, whether or not by law he was entitled to keep it confidential, a subsequent President will not reveal. President Polk felt obliged to maintain secrecy because of the dangers of precedence despite strong public feeling then existing against secrecy of any kind in the administration of the government, especially in matters of public expenditures. Polk was able to point to a law that had enabled his predecessors in office, in the public interest, to keep expenditures of a certain kind secret in nature. Congress, of course, could have repealed the law had it chosen to do so.

President James Buchanan on March 28, 1860 was compelled to protest an attempt by the House of Representatives to investigate whether any means of influence had been brought to bear upon the Congress for or against the passage of any law relating to the rights of any state or territory.

In April 1876, President Grant fought a hostile House inquiry into the discharge of his purely Executive office acts and duties. Grant recognized the constitutional authority given the House of Representatives to require of the Executive information necessary for legislation or impeachment. The inquiry involved was not for legislative purposes, and if for impeachment, Grant objected that it was an attempt to deny him the basic right not to be a witness against himself. It became evident that the House request was a political move to embarrass the President by reason of his having spent some hot months at Long Branch.

During the first administration of Grover Cleveland the great debate on "Relations Between the Senate and Executive Departments" took place. The debate arose out of Cleveland's dismissal from office of approximately 650 persons in the Executive branch. Cleveland disclaimed any intent to withhold official papers, but he denied that papers and documents inherently private or confidential, addressed to the President or a Head of a Department, having reference to an act entirely Executive, were changed in their nature and became official when placed for convenience in custody of public departments. Concerning such papers the President felt that he could with entire propriety destroy them or take them into his own personal custody. Cleveland won his victory. His action established a precedent for setting apart for the first time private papers in the Executive Departments from public documents. The President was the one who established the character of the papers.

President Theodore Roosevelt proved successful in his resistance to a Senate resolution calling for the production of all documents in connection with federal anti-trust actions. Roosevelt refused to disclose the reasons why particular actions had not been taken. The Senate was equally thwarted in its attempt to get its information from two heads of departments. Subsequently there was introduced the following resolution in the Senate.

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

Out of the lively debate that ensued the following points seem to be established:

1. That there was no law which compelled heads of departments to give information and papers to Congress.

2. That if a head of a department refused to obey a subpoena of either of the Houses of Congress, there was no effective punishment which Congress could mete out.

The resolution never came to a vote.

President Coolidge in 1924 was compelled to thwart a Senatorial attempt to vent a personal grievance on the Secretary of the Treasury by ostensibly obtaining information from him upon which to recommend reforms in the law and in the administration of the Internal Revenue. Mr. Coolidge in a special message to the Senate dated April 11, 1924 stated it was recognized both by law and custom that there was certain confidential information which it would be detrimental to the public service to reveal.

In June of 1930 the Senate Foreign Relations Committee sought from the Secretary of State confidential telegrams and letters leading up to the London conference and treaty. Secretary Stimson provided such information as he could which evidently fell short of satisfying the committee. A resolution of the committee to the effect that it regarded all facts which entered into the antecedent and negotiations of any treaty as relevant and pertinent when question of ratification was involved. A message from President Hoover to the Senate on July 11, 1930 culminated this lengthy bitter debate. In this he pointed out the number of informal statements and reports given our government in confidence. To publish such statements and reports would be a breach of trust of which the Executive should not be guilty. The debate wound up in the adoption of a face-saving resolution by Senator Morris.

The administration of Franklin D. Roosevelt affords numerous instances of legislative attempts to obtain confidential executive papers. The first of these occurred in May of 1935. The President successfully avoided a precedent of sending to the Congress the text of remarks made at a bi-weekly press conference.

In April of 1941, Attorney General Jackson was requested by the Chairman of the House Committee on Naval Affairs to furnish all Federal Bureau of Investigation reports since June 1939, together with "all future reports, memoranda, and correspondence, of the Federal Bureau of Investigation, or the Department of Justice, in connection with investigations made by the Department of Justice arising out of strikes, subversive activities in connection with labor disputes or labor disturbances of any kind in industrial establishments which have Naval contracts, either as prime contractors or subcontractors.

Attorney General Jackson's opinion, printed in 40 Op. A. G. 45 (April 30, 1941), stated in part:

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

"Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

"Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants--sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard this keeping of faith with confidential informants as an indispensable condition of future efficiency." 40 Op. A. G. 45, 46, 47.

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"This discretion in the executive branch (to withhold confidential information) has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." (40 Op. A. G. 45, 49)

Accordingly Jackson refused to divulge the requested information.

On January 20, 1944 at the Hearing before the Select Committee to Investigate the FCC, the Director of the Federal Bureau of Investigation called upon to testify, was sustained by the Committee Chairman in his claim of privilege not to testify as to certain mat-

ters on which the President had directed him to remain silent. The Chairman suggested to the Committee Counsel that he interrogate Mr. Hoover on other matters. As to these, Mr. Hoover still refused to testify; the Chairman then pointedly ordered Mr. Hoover to answer questions put to him by the Counsel. Again Mr. Hoover obdurately refused. The record of the hearings is silent as to any action taken by the committee following Mr. Hoover's refusal.

This same special Committee on another occasion sought the production of records and testimony from the various Heads of Departments and Directors of Agencies. On each occasion the President or his cabinet members or Heads of Departments exercised their own discretion concerning the propriety of furnishing testimony and papers. Where there was refusal, the Committee thought it wise not to press the issue.

In the autumn of 1945 when the tragedy of Pearl Harbor was the object of legislative scrutiny the Joint Congressional Committee attempted to elicit from subpoenaed witnesses information regarding the Cryptanalytic Unit. The President did everything possible to assist the investigation recognizing the public desire for full and complete disclosure. A minority of the committee believed that the President was imposing restraints on those whom he allowed to appear. To an extent this was true because the President quite evidently assumed responsibility of guiding and directing the Heads of the Departments concerning the oral testimony and written material which they were to furnish the Committee. In so doing, Mr. Truman was exercising historically precedented executive prerogative.

In 1948 the House of Representatives passed House Joint Resolution 342 directing all executive departments and agencies of the Federal Government to make available to any and all committees of the House of Representatives, and the Senate, any information which might be deemed necessary to enable them to properly perform the duties delegated to them by the Congress. This resolution never came to a vote in the Senate.

APPENDIX B

SUMMARY OF CERTAIN CASES INVOLVING

DIPLOMATIC, STATE AND MILITARY SECRETS

Marbury v. Madison. In the leading case of Marbury v. Madison, 1 Cranch 137 (1803), the plaintiff, William Marbury, was seeking by mandamus to compel Secretary of State James Madison to issue his commission as one of John Adams' "midnight judges." Although the appointment had been made just prior to the assumption of the Presidency by Jefferson the commission had not been issued by John Marshall, Madison's predecessor as Secretary of State during the Adams' administration. Marshall, in the meantime, had become Chief Justice of the United States and sat on the case. The Attorney General was summoned for questioning and objected to answering one question as to the disposition of the commission, attributing his refusal to his obligation to the executive. The Court stated:

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." I Cranch 137, 164.

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 1 Cranch 137, 170.

The court decided that if intrusion into cabinet records was not involved, if the matter respected papers of public record and to a copy of which the law gave a right on payment of a small amount, and if the subject in issue was not one over which the executive can be considered as exercising control, a citizen may, as to such a paper, assert the right given him by an act of Congress. The court could issue a mandamus directing performance of a ministerial duty not depending on administrative discretion but on particular acts of Congress and the general principles of law.

As to the action prayed for, the court held that the Secretary of State was subject to the writ of mandamus but denied the writ on the ground that the provision of the act of Congress giving the original jurisdiction under which the suit had been brought was unconstitutional.

The trial of Thomas Cooper for seditious libel in the Circuit Court of Pennsylvania in 1800 produced a request for a subpoena to issue directed against the President of the United States, John Adams, who was the person allegedly libelled. The court refused to issue the subpoena and preemptorily informed the defendant that if he undertook to publish a false libel against the President without having proper evidence before him to justify his assertion, he would do so at his risk. This appears to be the first recorded instance of an effort to compel a President of the United States to produce a document at a court trial.

In the famous trial of Aaron Burr in 1807, President Jefferson was directed by a subpoena duces tecum to produce a certain letter alleged to contain information helpful to the defense. Judge Marshall allowed the subpoena stating that the President was not exempt per se from process, although he was free to keep from disclosure such as he deemed confidential. Marshall evidently overlooked the Chase opinion in the Cooper case. The Burr trial produced for the first time judicial consideration of the problem of official records being subjected to public disclosure. Marshall's ruling has not been followed by subsequent court decisions nor adhered to by the Presidents themselves. Marshall indicated that he believed the power of the court fell short of direct compulsion of the President to produce.

Jefferson refused to acknowledge the subpoena, denying the right of the judicial branch to order him as President to do anything. The letter requested was given by Jefferson to the Attorney General with instructions to keep out of court so much as the U. S. Attorney deemed confidential. Jefferson subsequently stated his fundamental legal position as follows:

> "He, of course, (the President) from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in request of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed." Letter of June 17, 1807 to U. S. Attorney Hay, Thomas Jefferson Writings, (Ford), Volumn 9, Page 57.

Jefferson was prepared to resist by force if necessary an attempt to obtain the papers which Burr sought. Quite fortunately the issue was not pressed either as to the President himself or to the Secretaries of War and Navy, who also were directed personally to attend.

Totten, Adm'r v. U.S. The case of Totten, Administrator v. U. S., 92 U.S. 105 (1875), involved an action for payment for services alleged to have been rendered by one William A. Lloyd under a contract with President Lincoln. The services included travel behind the Confederate lines for the purpose of ascertaining the number and disposition of Confederate troops and the plans of Confederate fortifications. Lloyd accomplished his mission with considerable success and made full reports of his findings to the Union authorities. The Court of Claims found that the services were rendered as alleged and that Lloyd was only reimbursed for his expenses. The Supreme Court in denying recovery on the contract stated at page 106:

> "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employee and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. The condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."

The court went on to say that secrecy was a condition of the agreement and that the disclosure of the information necessary to the maintenance of the action defeated recovery. The opinion continued at page 107:

> "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."

De Arnaud v. U.S. In the later action of De Arnaud v. United States, 151 U.S. 483 (1894), presenting the question of whether "secret services" were to be distinguished from a "military expert services", the Supreme Court had occasion to consider an appeal from a Court of Claims judgment dismissing a complaint in which $100,000 was sought for services rendered by De Arnaud as a "military expert" employed for "special and important duties" by General Fremont for and in behalf of the Union Army. De Arnaud was a Russian, resident in the United States, with prior experience as a Lieutenant of Engineers in the Russian Army. In 1861, Fremont had employed him to pass through the enemy lines, observe the order of battle, and report back. His mission resulted in the saving of Paducah, Kentucky. He was paid $600.00 for his services on a receipt marked "for special services rendered to the U. S. Government in travelling through the rebel parts of Kentucky, Tennessee. . .which led to successful results." His claim was supported by certificates from Generals Grant and Fremont. President Lincoln ordered the claim paid if just and equitable. The Secretary of War paid De Arnaud $2000 which was received under protest although the receipt acknowledged payment in full. Subsequently, De Arnaud instituted an action in the Court of Claims.

The Supreme Court could recognize no distinction between "the secret services" rendered in the Totten Case and the "military expert services" which De Arnaud claimed to have rendered. The receipt which De Arnaud signed was considered to operate as a bar to any further demand. At page 490 of the opinion, the court stated: "Accounting officers have no jurisdiction to open up a settlement made by the War Department from secret service funds and determine unliquidated damages."

Opinion of Atty. Gen. Speed. In 1865, Attorney General James Speed advised President with regard to the Secretary of Navy's liability to respond to individual or state requests for the production of exemplified copies of military courts-martial records:

> "Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and the subordinates are, in general, treated as 'privileged communication.' The President of the U. S., the heads of the great departments of the Government, and the Governors of the several states, it has been decided, are not bound to produce papers or disclose information communicated to them when, in their own judgment, the disclosure would, on public considerations, be expedient. These are familiar rules written down by every authority on the law of evidence." 11 Op. A. G. 137, 142 (1865).

U.S. v. Curtiss-Wright. In the case of the U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304 (1936), the Supreme Court was called upon to determine the constitutionality and legality of an indictment charging violation of a joint resolution of Congress, and a Presidential proclamation issued pursuant thereto, which forbade the shipment of arms or ammunition to foreign nations engaged in armed conflict in the Chaco. The case arose on a demurrer to the indictment and in part challenged as an improper delegation of power the unrestricted scope of executive action without adequate standards imposed by the Congress. In speaking of the exclusive province of the executive in the area of intercourse with foreign nations, the Court said at pages 319 and 320:

> "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."...
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> "It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty--a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:
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> '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. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.' 1 Messages and Papers of the Presidents, p. 194"

Chicago & Southern v. Waterman SS. A more recent case has come down from the Supreme Court on the problem of the exclusive domain of the executive. The case of Chicago and Southern Air Lines v. Waterman Steamship Corporation, 333 U. S. 103 (1948), arose on an appeal from a denial by the Civil Aeronautics Board of a certificate of convenience and necessity for an international air route to Waterman and the award of the same to Chicago & Southern. The award could be made only with the express approval of the President.

On this question, the court said:

"The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. Coleman v. Miller, 307 US 433, 454; United States v. Curtiss-Wright Corporation, 299 US 204, 319-321; Oetjen v. Central Leather Co., 246 US 297, 302. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department. 333 US 103, 111, 112."

It might be noted that the Waterman case was a 5-4 decision. Notwithstanding, it still is good law today. "The issue...involves a challenge to the conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." Johnson v. Eisentrager, 339 US 763 (1950), at page 789, citing both the Curtiss-Wright and Waterman cases. "It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 US 580, 588, 589, (1952), again citing the Curtiss-Wright and Waterman cases. See also United States v. Reynolds, 73 S. Ct. 528 (1953)