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SECRECY IN GOVERNMENT:  
THE PUBLIC DEBATE IN CONGRESS DURING THE  
FORMATIVE YEARS OF THE AMERICAN REPUBLIC  
by  
NELSON S. DEARMONT

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This manuscript has been read and accepted for the Graduate Faculty in History in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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## Preface

Academicians and laymen alike usually assume that Americans were fully committed from the beginning to open government and tolerated secrecy only reluctantly and in exceptional circumstances. They presume the new nation's political leaders agreed to the doctrine that publicity is essential to republicanism. Necessarily on a rationalistic basis, because the historical records had not been examined closely with an eye toward attitudes about secrecy, scholars and modern commentators on contemporary affairs frequently conclude that distaste for monarchical forms precluded secrecy in government, and that popular suspicion of governmental power prevented politicians from relying upon the protection secrecy affords. In short, it is believed that American problems with governmental secrecy are preeminently modern.<sup>1</sup>

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<sup>1</sup>See e. g., Francis E. Rourke, Secrecy and Publicity: Dilemmas of Democracy (Baltimore: Johns Hopkins Press, 1961), p. 24; Edward A. Shils, The Torment of Secrecy: The Background and Consequences of American Security Policies (Glencoe, Ill.: Free Press, 1956), pp. 38-40; James R. Wiggins, Freedom or Secrecy (New York: Oxford Univ. Press, 1956), pp. 66-67; Carol M. Barker and Matthew H. Fox, Classified Files: The Yellowing Pages, a Report on Scholars' Access to Government Documents (New York: Twentieth Century Fund, 1972), pp. 1-2; Anthony Lewis's introduction to None of Your Business: Government Secrecy in America, eds., Norman Dorsen and Stephen Gillers (New York: Viking Press, 1974), pp. 3-24; Cf. Harold L. Nelson, ed., Freedom of the Press from Hamilton to the Warren Court (Indianapolis: Bobbs-Merrill, 1967), p. xlviii; and, for an exception to the prevailing view, see Arthur Schlesinger, Jr., "The Secrecy Dilemma," New York Times Magazine, February 6, 1972, p. 12, and his The Imperial Presidency (Boston: Houghton Mifflin, 1973), et passim.

The problems are grave enough in modern times, certainly, but this study of the ideas about secrecy expressed by the nation's early politicians indicates that the accepted historical viewpoint requires some modification. The belief that a measure of secrecy is necessary to effective government operations is not new. It permeated the presuppositions of the new nation's politicians, and it led to practices that have grown during the twentieth century into a continuous secretive process.

Some methods for the suppression of information are, of course, relatively new. Executive orders and congressional legislation for the seclusion of records, classification and declassification procedures, and departmental rules of access to records are entirely modern developments. As a matter of fact, much of the most entangled secrecy apparatus is a post-World War II phenomenon.<sup>2</sup> Tensions of the Cold War contributed heavily to its growth, but a few of the presently common functions of government, where secrecy is now regarded as essential, hardly existed in the first half of the nineteenth century.<sup>3</sup> As an illustration, today's extensive collection of personal data about individuals for tax purposes and the world-wide collection of foreign intelligence were tasks unknown at that time to American

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<sup>2</sup>Barker and Fox, Classified Files, pp. 1-24, esp. 11-12.

<sup>3</sup>For a suggestive essay on the degrees of secrecy generally thought to be necessary to various fields of government, see Schlesinger, "The Secrecy Dilemma."

governmental authorities. The complexities of the modern era, therefore, cannot be compared with earlier times, but the attitudes implicit in the concealment and manipulation of information have remote origins in the nation's history.

One must be cautious in examining the historical evidence, because "it is always dangerously and deceptively easy to trace on the basis of hindsight the beginning of what you know is going to occur."<sup>4</sup> Furthermore, since distant antecedents are so far removed from the present fact, they may carry a different meaning than one would suppose. The danger of misconstruing attitudes toward secrecy expressed in the Early National period is especially great now because of the country's current problems with pervasive subterfuge in government. With that caveat, however, it can be said that a knowledge of these attitudes has value for an understanding of our present dilemmas over secrecy. Habits of the mind have great staying power through changing conditions; consequently, they often represent historical data of the utmost relevance.

Bearing this point in mind, I have endeavored to explore the thoughts of working politicians on the subject of secrecy in government. The works of the nation's political theorists have been duly considered, but I have placed chief emphasis upon the middle level in politics -- the men

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<sup>4</sup>Charles and Katherine George, The Protestant Mind of the English Reformation, 1570-1640 (Princeton, N. J.: Princeton Univ. Press, 1961), p. 398.

in Congress, who otherwise had little time for or inclination towards extensive formal thinking. This dissertation is therefore not an exposition of high-level constitutional or judicial opinion, but rather an analysis of the operative views of functioning politicians which, in my opinion, more accurately reflected the widely accepted presuppositions of the age. Hence, to display those views I have often written quite closely to the debates as they unfolded in Congress -- a flawed approach in many contexts, but in this case legitimate, for these practical politicians were not systematic thinkers. Their most unquestioned beliefs often came out only in a mode of expression, sometimes virtually in a sigh or a grunt.

I have relied essentially upon public sources, printed material rather than manuscript collections, because ideas openly expressed and intended for wide consumption reveal the fundamental principles accepted by the society. The public debate as it took place in the national forum of Congress is thus the focus of interest.

The records of these debates in Congress were extensively published and widely read in the newspapers of the day. They influenced and at the same time reflected public opinion. What emerges from them is evidence of a broad agreement, with little dissent, in favor of the opinion that secrecy was at times a practical necessity for government, even republican government. A distinction was commonly made between internal and external affairs; domestic

policy and its formation should be open, but foreign relations, it was thought, must often be shrouded from view. In addition, the confidentiality of Executive discourse should be respected and the information collected by executive departments should be under the President's control.

During the Early National period, this consensus produced an historical progression towards fuller publicity of legislative proceedings. The same consensus, however, permitted the Executive to gain considerable practical discretion over the flow of information between his branch and Congress. Congress continued, however, as the "grand inquest of the nation," to claim its right to be informed. Presidents usually but not always acceded, and always asserted their right not to do so. A rough equilibrium existed in the period of this study, but it tilted toward the Presidency, as the advantage lay there, governed by an unquestioned belief in the necessary connection between secrecy and effective diplomacy.

## Acknowledgements

It is a pleasure to have an opportunity to thank those who helped me along the way with this dissertation. I owe more than can be adequately expressed to Professor E. James Ferguson, who not only directed this work from the beginning but also guided most of the second half of my interrupted academic training.

To the readers, Robert A. East, Arthur M. Schlesinger, Jr., Harold C. Syrett, and Hans L. Trefousse, my thanks for their thoughtful work and helpful suggestions. They all in various ways steered me away from errors of content and style.

I had the good fortune of completing a great deal of the research at the American History Room of the Forty-Second Street Research Branch of New York Public Library, the Graduate Center Library of the City University of New York, and the library of the New York Historical Society, where the librarians were expert and at all times cooperative.

I owe a special debt of gratitude to Irwin Smith, a friend and Shakespearean scholar, for his unceasing if not always rewarded efforts to encourage me to write clearly. Colleagues Frank A. Warren, Robert Horowitz, and John Catanzariti, when my work flagged, gave needed support; and Elizabeth M. Nuxoll and Arthur E. Scherr gave me the benefit of insights from their specialties, the Revolutionary and Federalist periods.

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## Chapter I

## Secrecy in Government: Constitutional Backgrounds

The Continental Congress

Formed from delegates elected by rebellious colonial legislatures and popular conventions, the Continental Congress began as an advisory body to the colony-states. It acted vigorously at the outset, but without constitutional authority until March 1781, when the Articles of Confederation were ratified by the states. The constitution that then gave Congress a legal basis gave it responsibilities, yet very little power, and basic sovereignty remained with the states. In keeping with the emphasis upon legislative supremacy that characterized the political constructions of the Revolution, the government under the Articles had no executive. The President of Congress was first and foremost a presiding officer.

Executive functions were at the beginning divided up among numerous special committees, and then later shifted to standing committees or boards composed of appointed officials as well as congressional representatives. Finally, near the close of the fighting with Great Britain, supporters of centralized authority brought about a reorganization of the administrative agencies by placing them in several single-headed departments.<sup>1</sup>

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<sup>1</sup>Edmund C. Burnett, The Continental Congress (1941; rpt. New York: Norton, 1964), pp. 34, 118-20, 489-93; The

During the process of rebellion and its evolution into war, the Continental Congress had recognized a need to conceal its proceedings. Soon after the First Congress assembled, it formulated a rule enjoining strictest secrecy: the doors were to be closed "during the time of business," and the members of Congress were to "consider themselves under the strongest obligation of honour, to keep the proceedings secret, until the majority shall direct them to be made public." In 1775 the Second Congress adopted the same rules as the First, including the rule of secrecy in unaltered form. Six months later, in November, the rule of secrecy was reinforced by an oath and penalties. Congress resolved

that every member of this Congress considers himself [bound] under the ties of virtue, honor and love of his Country not to divulge directly or indirectly any matter or thing agitated or debated in Congress before the same shall have been determined, without leave of the Congress; nor any matter or thing determined in Congress which a majority of the Congress shall order to be kept secret and that if any member shall violate this agreement he shall be expelled [from] this Congress and deemed an enemy to the liberties of America and liable to be treated as such and that every member signify his consent to this agreement by signing the same.<sup>2</sup>

Papers of Robert Morris, 1781-1784, eds., E. James Ferguson and John Catanzariti et al (Pittsburgh: Univ. of Pittsburg Press, 1973-), I, 3-4, n. 3.

<sup>2</sup>Journals of the Continental Congress, 1774-89, ed. Worthington C. Ford (Washington, D. C.: GPO, 1904-37), I, 26, and II, 55. Hereafter cited as JCC. Congress passed the rule on September 6, 1774. Edmund C. Burnett mistakenly asserts that the Second Congress strengthened it by adding the words "under the strongest obligation of honor." See Burnett, Continental Congress, p. 67. For the oath of secrecy, see JCC, III, Nov. 9, 1775, 342-43.

These limitations on the speech of individual congressmen were not reaffirmed following ratification of the Articles of Confederation in 1781; nevertheless, it seems evident that the state of mind the rules had endorsed remained unchanged, and that most of the delegates continued to feel personally bound to keep congressional secrets.<sup>3</sup>

In accordance with the rule of secrecy, regular congressional sessions had been closed to the public. The doors of Congress were opened only for ceremonial functions, first for the reception of Conrad Alexandre Gérard, minister of France, following the alliance with that country in 1778, and then for the reception of prominent outsiders, such as Peter John van Berkel, representative of the Netherlands, who presented himself to Congress at Princeton.<sup>4</sup> Otherwise the public was barred from observing the debates. Even after the end of the Revolutionary War this practice continued, although there was no longer any pressing need for secrecy. Possibly the delegates believed that their dual

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<sup>3</sup>The censure of David Howell of Rhode Island for revealing confidential foreign intelligence is evidence to this point. See Papers of James Madison, ed. William T. Hutchinson and William M. E. Rachal (Chicago: Univ. of Chicago Press, 1962-), V, 372-73, 419-21, cf. n. 10. A committee established to consider a new rule of secrecy reported December 23, 1782: "It has heretofore been thought expedient by a former Congress that each member on taking his seat should subscribe a Declaration binding him in the most solemn manner to keep the secrets committed to him as a Member of Congress, and your Committee are of opinion that a similar practice is at least as necessary at this time as in any former period." JCC, XXIII, 828-29.

<sup>4</sup>Burnett, Continental Congress, pp. 349, 588-89. JCC, XXV, October 31, 1783, 780f.

executive and legislative duties required private proceedings.<sup>5</sup>

Their course was buttressed by procedure within the state governments, which were not open. The fundamental laws of these political units of the confederation permitted legislative suppression of information. Of the fourteen revolutionary state constitutions written before 1787, only six prescribed publication of the journals. All gave the legislature effectively unrestricted options concerning disclosure.

The most radical constitution, that of Pennsylvania in 1776, provided for open door sessions as well as dissemination of the proceedings; nevertheless, its broadly worded exception kept the assembly in full control of the flow of information: "The doors of the house in which the representatives of the freemen of this state shall sit in general assembly, shall be and remain open for the admission of all persons who behave decently, except only when the welfare of this state may require the doors to be shut." The Vermont Constitutions of 1777 and 1786 followed Pennsylvania's word for word, and the aristocratically structured New York

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<sup>5</sup>Jared Sparks wrote in his journal, April 19, 1830: "It was necessary for the old Congress to sit with closed doors, because it was the executive as well as legislative body; names of persons and characters came perpetually before them; and such business was constantly on hand which would have been embarrassed if it had gone to the public before it was finished." Herbert B. Adams, Life and Writings of Jared Sparks, Comprising Selections from His Journals and Correspondence (Boston: Houghton, Mifflin, 1893), I, 560.

revolutionary constitution's Article XV was of the same import, if somewhat differently worded. The constitutions of North Carolina and New Hampshire, written in 1784, provided for publication of the journals except when secrecy was required, but stated nothing about admission to assembly sessions. The other state constitutions written prior to the federal Constitution made no mention of procedure for legislative journals or public galleries.<sup>6</sup>

The Continental Congress printed its journals for the benefit of the state legislators. Originally published on an irregular basis, the journals in time appeared systematically, and this policy was formally prescribed by the Articles. However, by their nature, the journals could not provide the public with as thorough an understanding of legislative developments as could the debates. In addition, since Congress retained full discretion over what was recorded for publication, much that dealt with international agreements and military matters remained in the manuscripts of the secret journals.<sup>7</sup>

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<sup>6</sup>The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, ed. Francis N. Thorpe, 7 vols. (Washington, D. C.: GPO, 1909), passim.

<sup>7</sup>See William Floyd to George Clinton, May 14, 1779, Letters of Members of the Continental Congress, ed. Edmund C. Burnett (1921-1936; rpt. Gloucester, Mass.: Peter Smith, 1963), IV, 211. Art. IX, para. 7 of the Articles of Confederation: "The Congress of the United States . . . shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy. . . ."

Factional and sectional squabbles led members of Congress to distrust each other's zeal in keeping strict secrecy, and embarrassing information leaks developed through newspaper and pamphlet controversy.<sup>8</sup> Some officers of Congress found the blanket injunction against the communication of congressional secrets an obstructive nuisance, while at the same time a multitude of rumors and half-truths circulated. As John Jay wrote to George Washington, "There is as much Intrigue in this State House as in the Vatican but as little Secrecy as in a boarding school. It mortifies me on this occasion to reflect that the Rules of Congress on the subject of Secrecy which are far too general and perhaps for that Reason more frequently violated, restrain one from saying twenty things to you which have ceased to be private."<sup>9</sup> On an earlier occasion, Washington had complained of not receiving official news about the rumored adherence of Spain to the Franco-American alliance, though it had been talked of freely. Even President Henry Laurens thought that open doors, on a selective basis, might in the long run be the most effective procedure. Like others, he found total secrecy had its

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<sup>8</sup>See, e.g., James Lovell to Samuel Adams, August 10, 1779, and Lovell to James Warren, August 13, 1779, in Letters of Continental Congress (Burnett), IV, 307-9, 312. James Madison to Edmund Randolph, October 8, 1782, Papers of James Madison (Hutchinson and Rachal), V, 187. For Thomas Paine's notorious revelation of confidential matters, see Burnett, Continental Congress, p. 367; also see pp. 435-36.

<sup>9</sup>April 26, 1779, Letters of Continental Congress (Burnett), IV, 177.

negative side.<sup>10</sup>

Divided loyalties between state and "Continent" were fundamental to imperfect security. Some delegates always resolved the conflict between authorities in favor of their local governments. The North Carolina delegates, for example, told their governor in 1779 that, sworn to secrecy as they were, "should decisions be made, deeply affecting the happiness and safety of our Country, we shall feel ourselves under obligations, stronger than any other, of laying the whole of the affairs before the State." Vexed by principles among other congressmen similar to the North Carolinians', Madison complained to Edmund Randolph that several delegates, especially those from Rhode Island, were not keeping confidential foreign intelligence secret.<sup>11</sup>

A notable violation of secrecy developed from resistance to the impost of 1781, a proposed five percent congressional duty on imports. The impost was basic to the nationalistic goal of establishing the sovereignty of Congress. It was opposed by those who abhorred its centralizing potential. Precisely this fear prodded David Howell, one of the Rhode Islanders, into a particularly gross breach of

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<sup>10</sup>Washington to John Jay, March 1, 1779, and Laurens to William Livingston, April 19, 1779, in Letters of Continental Congress (Burnett), IV, 87, 163. See also John Jay to Washington, March 3, 1779, ibid., p. 87.

<sup>11</sup>John Penn, Thomas Burke, and William Sharpe to Richard Caswell July 15, 1779, Letters of Continental Congress (Burnett), IV, 319. Madison to Edmund Randolph, October 8, 1782, Papers of James Madison (Hutchinson and Rachal), V, 187.

confidence that made a lasting impression on the members of Congress. His action especially shocked those who were anxious to strengthen the central government and the union of the states.<sup>12</sup>

In order to weaken possible support for the impost, Howell wrote John Carter a letter intended for publication in the Providence Gazette. In it he reported that foreign loans were rapidly being subscribed as a result of the Confederation's excellent credit, and that a commercial treaty had been proposed with Sweden. Though distorted by his own pen, Howell's information came from the confidential correspondence of the Secretary for Foreign Affairs.<sup>13</sup> His disclosures opened Howell to the censure of Congress. Defending himself, Howell protested that Congress was violating the Article's guarantee of free speech, and that "a system of despotism" would be the tendency of a precedent "detering the minority from writing freely to their constituents such things as they have a right to know."<sup>14</sup> Howell's alter ego

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<sup>12</sup>Elias Boudinot, while admitting he had always considered David Howell to be a man of integrity, wrote John Lowell on March 19, 1783, "Let his Integrity be ever so great, he has been the means of giving these United States a shock, she will feel for years to come, and which indeed I think threatens our Union more than all the Arms of G. B." Letters of Continental Congress (Burnett), VII, 92.

<sup>13</sup>JCC, XXIII, 814; Letters of Continental Congress (Burnett), VI, 509. Madison's notes on debates, December 6 and 18, 1782, Papers of James Madison (Hutchinson and Rachal), V, 372-73, 419-20. For a brief summary of the Howell case, see Burnett, Continental Congress, pp. 533-34.

<sup>14</sup>JCC, XXIII, 814-16. Hutchinson and Rachal, eds., Papers of James Madison, V, 420, n. 4.

from Rhode Island, Jonathan Arnold, said the proceedings against Howell were an invasion of the "liberties of the State and its rights" as well as those of the Rhode Island delegate. As for himself, Arnold wrote Governor Greene of Rhode Island, he would not be held to silence by a mere majority when he felt it necessary to inform his constituents of matters interesting to the state.<sup>15</sup>

Congressional delegates who wanted to crush state particularism tried to expose Howell to ridicule, but Congress could do little more than appoint a committee to examine the old secrecy rule and perhaps recommend new procedure. The committee never reported an addition to the rules, but the delegates ordered that matters directed to be secret should be so noted on the journals. They also stated that all communications between Congress and the foreign ministers of the United States as well as all intelligence about military matters were to be considered secret by their nature.<sup>16</sup> After this affirmation of congressional under-

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<sup>15</sup>December 18, 1782, and January 8, 1783, in Letters of Continental Congress, VI, 566, VII, 8. Thomas Burke, an arch states-righter, in a letter to the North Carolina Assembly, August 1779, had taken substantially the same position. Burke wrote, "I hold myself not at liberty to declare anything which I have been enjoined to keep Secret, unless I perceive its tendency to be injurious to my Constituents; or, unless I am particularly required by the assembly to lay such matters before them without reserve, yet in Such Cases I consider the obligation I am under to my Constituents, superior to any which can be laid on me by Congress." Ibid., IV, 369.

<sup>16</sup>JCC, XXIII, 818, 821-22, 828-29. Madison's notes on debates, December 18, 1782, Papers of James Madison (Hutchinson and Rachal), V, 419-21.

standing of the limits to publicity, the President of Congress wrote Governor William Greene of Rhode Island that: "The necessity of preventing partial and unconnected extracts from the letters of our confidential Servants at foreign Courts, from becoming public, is too obvious to require me to enforce the opinion of Congress on that head."<sup>17</sup>

As will be discussed later, the sort of security leak represented by Howell's indiscretion and Congress's general inability to keep foreign matters within doors encouraged the Founding Fathers to include only the Senate as a partner with the Executive in treaty-making.

With the end of armed conflict and with peace assured, there were a few persons who thought all secrecy could be abandoned. These people believed secret committees and hidden legislative processes to be incompatible with republican government. Just six days after Congress ratified the peace treaty, and a month before the bulk of the army disbanded, Samuel Adams exclaimed, "We are now at Peace, God be thanked, with all the world. ... Let the Debates in Congress be open and the whole of their transactions published weekly -- this will tend to speedy rectifying Mistakes and preserving mutual Confidence between the

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<sup>17</sup>January 16, 1783, Letters of Continental Congress (Burnett), VII, 16.

People & their Representatives."<sup>18</sup> In his mind, only wartime conditions could justify concealed legislative proceedings, for secrecy isolated the representative from his constituents. At the same time as Adams wrote down his thoughts, James Wilson, in order to prevent congressional insularity and insure popular control of the members, moved that the doors of Congress be regularly opened. Open sessions would be the usual procedure unless the House, through formal steps, directed otherwise. The preamble to Wilson's resolution expressed his reasons: ". . . it is of importance in every free country, that the conduct and sentiment of those to whom the direction of public affairs is committed, should be publicly known." The action was seconded by Alexander Hamilton. Among Wilson's and Hamilton's motives was a decided wish to crowd the galleries with Philadelphia creditors, an attempt perhaps to exploit and broaden the discontent recently manifested by the officers at Newburgh. Nevertheless, the principle of the resolution was consistent with Wilson's democratic nationalism.<sup>19</sup>

Wilson's effort to open the daily congressional proceedings to public view was supported by few of the

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<sup>18</sup>To Arthur Lee, April 21, 1783, in Writings of Samuel Adams, ed. H. A. Cushing (1904-8; rpt. New York: Octagon Books, 1968), IV, 281-82.

<sup>19</sup>JCC, XXIV, 313-15. For a discussion of Wilson's democratic nationalism, see editor's introduction, The Works of James Wilson, ed., Robert G. McCloskey (Cambridge, Mass.: Harvard Univ. Press, 1967), I.

delegates, and throughout the life of the Old Congress the debates remained largely unrecorded. Long-standing modes of legislative procedure and habits born of colonial practice, in which assemblies and governors stood at arms' length, were undoubtedly difficult to alter, even though political circumstances had changed. Legislators still carried a Long-Parliament cast of mind, outmoded by the new framework of government. However, this framework was soon reexamined at Philadelphia, and the nation's leaders had a renewed opportunity to consider the function of public information in a republic. Paradoxically, the reexamination itself took place in an atmosphere of exacting secrecy.

### Secrecy at

#### The Constitutional Convention

The Constitutional Convention operated in absolute seclusion. In the opinion of modern scholars, this decision was vital to the achievement of the gathering at Philadelphia. Most contemporaries, though not able at the time to see fully the implications of the rule of secrecy, thought it a practical necessity. Like later historians, they argued that the delegates' well concealed debates made discussion easier and less self-conscious. They made it possible for the Founders to give full play to their imaginations, to change their minds, and to accept compromises. As Alexander Hamilton remarked, "Our situation is peculiar -- it leaves us Room to dream as we think proper." A variety of views could be examined and an eventual consensus

achieved more successfully than if the meeting had been open. In an atmosphere of seclusion, the Founders concluded, compromise was recognized solely as statesmanship, not weakness, as it often appeared to the eyes of the average person. In all probability, according to a recent student of the Convention, if the debates had been public, a rigidity of mind would have developed and the Constitution would not have been written at all.<sup>20</sup>

Expecting that the Convention would be closed to outside view, George Mason wrote his son, "This I think myself a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might in their first shape appear if submitted to the public eye."<sup>21</sup> It was his colleague from South Carolina, Pierce Butler, who introduced the initial resolution to enjoin secrecy upon the delegates. On May 29, 1787, the Convention adopted a rule to prevent "licentious publications." It was worded to ensure the sort of private deliberations Mason and others felt necessary. It permitted only members to examine the journal, copies of the entries being forbidden. Nothing

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<sup>20</sup>Clinton Rossiter, 1787: The Grand Convention (New York: Macmillan, 1966), pp. 167-69, 181, 203. Hamilton is quoted in John C. Miller, Alexander Hamilton, Portrait in Paradox (New York: Harper, 1959), p. 160.

<sup>21</sup>Records of the Constitutional Convention of 1787, ed. Max Farrand, rev. ed. (1937; rpt. New Haven: Yale Univ. Press, 1966), III, 28, 32. Hereafter cited Records (Farrand).

of what was spoken during a session could be published or communicated anywhere abroad without permission of the Convention.<sup>22</sup> By procedural rule the delegates had removed themselves from the public view.

Most of the delegates believed this isolation would prevent public misconceptions from ill-formed ideas and expressions and secure independence from local pressure.<sup>23</sup> Jared Sparks decided many years later, from a conversation about the Convention with James Madison, that "had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument."<sup>24</sup> It is revealing that, when the constitution making process almost came to a bitter halt over the crucial problems of representation, the small-stater William Paterson proposed an end to secrecy and an appeal to local constituencies.<sup>25</sup> In any case, with virtually all the members satisfied by the command for silence out-of-doors,

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<sup>22</sup>Records (Farrand), I, 9, 13, 15, 17. The rule of secrecy is conveniently outlined in Rossiter, 1787: The Grand Convention, p. 167.

<sup>23</sup>See, e.g., James Madison to Thomas Jefferson, June 6, 1787; Nathan Dane to Rufus King, June 19, 1787; Alexander Martin to Richard Caswell, July 27, 1787; Records (Farrand), III, 35, 48, 67.

<sup>24</sup>In Adams, Jared Sparks, I, 560-61.

<sup>25</sup>Records (Farrand), II, 18; Rossiter, 1787: The Grand Convention, p. 194.

secrecy was remarkably well maintained until the Constitution, in final form, was published.

A mere handful of persons, within and outside the State House, disagreed with the propriety of the closed sessions. Thomas Jefferson from France wrote to John Adams in disapproval, although he was comforted by his trust in the "demigods." He said he was sorry the Federal Convention began its "deliberations by so abominable a precedent as that of tying up the Tongues of their members. Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions."<sup>26</sup> In opposing the Constitution after it was drafted, Luther Martin of Maryland was severely critical of the Convention's rule of secrecy. "So far did this rule extend," he said in an address to his state legislature, "that we were thereby prevented from corresponding with gentlemen in the different States upon the subjects under our discussion. ..." He regretted this because all "the wisdom, integrity, and virtue of this State, or of the others," was not centered in Philadelphia behind the closed doors of the State House. A letter by Martin for newspaper publication struck a conspiratorial note, too. That the proceedings had been confidential "for the most dangerous purposes" was its theme. The same charge was repeated elsewhere by Antifederalist

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<sup>26</sup>The Papers of Thomas Jefferson, ed. Julian P. Boyd (Princeton: Princeton Univ. Press, 1950-), XII, 69; also in Records (Farrand), III, 76.

opponents of ratification, one of whom wrote that the veiled actions of an aristocratic majority offended the people.<sup>27</sup> George Clinton in his Cato letters to the New-York Journal and Weekly Register alluded unfavorably to the Federal Convention's secrecy, and Robert Yates, as "Sidney," echoed his chief's suspicion of conspiratorial design.<sup>28</sup>

Newspapers, however, had very little to say about secret proceedings either during or after the Convention. It would seem likely that the printers in particular would have written something about their exclusion from so important and newsworthy an event. Their commentary, nevertheless, was slight and indirect. Thomas Greenleaf's paper promised "to procure the debates and resolutions of the Convention for the inspection of the public as soon as any of them transpire," but newspapers quickly realized none would be forthcoming.<sup>29</sup> Apparently the atmosphere of national crisis overwhelmed thoughts about the Federal Convention's removal of its deliberations from public view.

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<sup>27</sup>Records (Farrand), III, 173-74. "Letters of Luther Martin," in Essays on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788, ed. Paul L. Ford (1892; rpt. New York: Burt Franklin, 1970), p. 355.

<sup>28</sup>See Charles Page Smith, James Wilson, Founding Father, 1742-1798 (Chapel Hill: Univ. of North Carolina Press, 1956), p. 266. Essays on the Constitution (Ford), pp. 252, 297-98.

<sup>29</sup>New-York Journal, and Weekly Register, June 7, 1787. See, e.g., Boston Gazette, June 18, 1787; (New York) Independent Journal, June 27, 1787; (Hartford) Connecticut Courant, July 2, 1787.

The chief concern seemed to be for a rapid solution to the nation's problems. "When indeed we consider the critical situation of the country," an editor wrote, "the anxiety with which every good citizen regards this dernier resort, and the decisive effect it must have upon the peace and prosperity of America, though every thing should certainly be given to prudence and deliberation, not a moment can be spared to useless forms or unprofitable controversy."<sup>30</sup>

With such an attitude prevalent, worry about lack of information from Philadelphia certainly would be minor. While the Convention was in session, Eastern papers merely showed vague bewilderment, curiosity, and hopes for clarity.

Such circumspection and secrecy mark the proceedings of the Federal Convention, that the members find it difficult to acquire the habit of communication even among themselves, and are so cautious in defeating the curiosity of the public, that all debate is suspended upon the entrance of their own inferior officers. Though we readily admit, the propriety of excluding an indiscriminate attendance upon the discussions of this deliberative council, it is hoped that the privacy of their transactions will be an additional motive for dispatch, as the anxiety of the people must be necessarily increased, by every appearance of mystery in conducting this important business.<sup>31</sup>

Except for the very few, and these few for the most part at odds with the political developments the Constitution represented, people cared little about the Convention's seclusion. It was too common a mode of operation to raise

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<sup>30</sup>New-York Packet, June 5, 1787; Boston Gazette, June 11, 1787.

<sup>31</sup>(New York) Daily Advertiser, June 6, 1787; New-York Journal, June 7, 1787; Boston Gazette, June 11, 1787; New-York Packet, June 15, 1787.

questions. As the Convention toiled on into the summer, the Boston Gazette ran a long, elaborate essay "On Secrecy." Unconnected in any obvious way with the statesmanlike activities in Philadelphia, its publication yet seems not to be wholly by chance. Throughout most of its length, the author examined secretiveness as an aspect of personal character. The ability to keep secrets was regarded as an important virtue. No effort was made to relate this "virtue" to political practice or governmental forms, but the piece is interesting in its certainty that secrecy was essential to social institutions, and that the want of secrecy would inevitably be dangerous. "Secrecy is equally essential in the cabinet and counting-house; in the administration of an empire, and the conduct of a family."<sup>32</sup>

### The Federal Constitution

Only a handful of people doubted that governments must have secrets, even in association with the legislative process. The Constitution was consciously shaped to care for this need, and, it was hoped, provide sufficient safeguards to prohibit abuses.<sup>33</sup> As the Founders sat within the State House in Philadelphia, protected from unwanted

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<sup>32</sup>Boston Gazette, July 16, 1787. It is interesting that the author regarded the ability to keep confidence to be a masculine characteristic.

<sup>33</sup>See, e.g., James Madison's reply to George Mason's anxiety about governmental secrecy, expressed in the Virginia State ratifying convention, Debates in the Several State Conventions on the Adoption of the Federal Constitution, ed. Jonathan Elliot, 2nd ed. (Philadelphia: J. B. Lippincott, 1861), III, 408-9. Hereafter cited Debates (Elliot).

observation, they considered the matter of balance between governmental privacy and publicity. As finally drafted, Article I, Section 5, Paragraph 3 contained all that explicitly pertained to governmental secrecy in the Constitution. As in so many other areas of the document, the paragraph was laconic; the members of the Convention left much to later decision. They had moved toward publicity but conceded little to it in the end.

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered in the Journal."<sup>34</sup> The qualifying phrases gave Congress full discretion over what was published in the journals.

It is true that such an outcome had not gone uncontested in the Convention. Some delegates had thought the wording too general, believing that either no congressional discretion over the journals should be permitted, or that the House should be denied the power to edit its proceedings, or, at least, that activities subject to exemption from the

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<sup>34</sup>Some thirty-seven years after the writing of the Constitution, John Strode Barbour of Virginia, addressing the House of Representatives, construed these words as securing the peoples' right to know beyond the question of a doubt. (U. S. Congress) Register of Debates in Congress, 1825-1837 (Washington, D. C.: Gales and Seaton, 1825-37), 18th Cong., 2nd sess., February 7, 1825, 493-94. Hereafter cited as Register of Debates.

journals should be specified. Because of the divergent opinions, considerable disagreement had broken out over the clause, and later on several dissenters used its phraseology as an objection to ratification.

Indeed, the Committee of Detail originally reported the paragraph without mention of congressional control over the content of the journals. The language stipulated only that the journals were to be published from time to time by both houses when acting in their legislative capacity.<sup>35</sup> This implied full disclosure, but several days later, when the Committee of the Whole came to consider the paragraph, Madison and Rutledge attempted to alter the wording. They proposed that Senators have explicit authority to judge what would appear in their journals. They did not include the House in this stipulation. The delegates at first rejected their amendment, as well as another motion to give both houses specified discretionary powers over the publication of matters relating to treaties and military affairs. Oliver Ellsworth thought that the entire provision about the journals' publication might be discarded, as the branches of the legislature could be trusted to publish their own proceedings without constitutional prescription. James Wilson, on the other hand, defended the clause reported by his Committee of Detail. "The people have a right to know what their Agents are doing or have done," he said, "and it

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<sup>35</sup>Records (Farrand), II, 180.

should not be in the option of the Legislature to conceal their proceedings." His point of view did not prevail, however. The qualifying phrase giving each house full discretion over material to be kept confidential was passed in a close vote, six to four, with one state's delegation divided.<sup>36</sup>

A month later, as the Convention considered the final touches imparted by its Committee of Style, Elbridge Gerry and George Mason made a last effort to eliminate the lower house's discretionary powers. As they would have reworded the clause about publication of the journals, only the Senate would retain control over matters printed. Just three delegations, Pennsylvania, Maryland, and North Carolina, supported the motion, because the majority of the delegates accepted the argument that "cases might arise where secrecy might be necessary in both Houses." "Measures preparatory to a declaration of war in which the House of Representatives was to concur," was the example given.<sup>37</sup> This hypothetical instance became a reality years later, as the nation approached war with England in 1812.<sup>38</sup>

Gerry and Mason continued to worry about the

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<sup>36</sup>Ibid., pp. 259-60.

<sup>37</sup>Ibid., P. 613.

<sup>38</sup>The debates over the embargoes proposed by two Republican administrations were nonpublic, indicating incidentally how surely the Jeffersonian leaders recognized these trade restrictions as war measures.

national legislature's discretionary control over its journals. Rufus King noted that Gerry listed this among his numerous objections to the Constitution, and Mason spoke at length about it in the Virginia ratifying convention.<sup>39</sup> After repeating the wording of the fifth section of the First Article, Mason said, "This enables them to keep the negotiations about treaties secret. Under this veil they may conceal any thing and every thing. Why not insert words that would exclude ambiguity and danger?" Mason cited the phrasing of the Articles of Confederation as properly specific: "Congress shall publish the journal of their proceedings monthly, except such parts thereof, relating to treaties, alliances, or military operations, as, in their judgment, require secrecy." Under the Constitution, he observed, the two houses of Congress might "conceal what they please."<sup>40</sup> James Madison countered Mason by observing that no specific enumeration could be devised sufficient to cover all cases when secrecy might be needed. Therefore, a list would be at once dangerously restrictive of legislative practice and dangerously ineffective against abuse. Preferably, countervailing authorities should be relied upon. The separation of powers, as well as federal system of divided sovereignty, Madison thought, provided the safest protection against a misuse of powers to secrete legislative

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<sup>39</sup>Records (Farrand), II, 635; Debates (Elliot), III, 404.

<sup>40</sup>Debates (Elliot), III, 404.

actions. As a practical matter moreover, he remarked, "There never was any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community."<sup>41</sup>

The discussion at Philadelphia of the wording of Paragraph 3, section 5, of Article I revealed the tacit expectation that a tightly knit Senate would be a repository of governmental secrets. Even those who hoped in some way to open up legislative proceedings by severely restricting legislative discretion regarding publicity, set the Senate apart from their proposals.<sup>42</sup> Everyone expected the Senate to be at times the nation's law-making conclave. It would be a body of carefully selected men who represented the country's wisdom and good judgment and who would deliberate confidentially without regard for special interests. Because the Senate was a small group of men, in contrast with the larger House, the generally held opinion was that it could be safely entrusted with confidential matters when necessary. Unquestionably these ideas induced the decision to divide the legislature's function in treaty-making.

The conduct of foreign affairs was regarded as a sphere in which secrecy was most legitimate and necessary, and, partially for this reason, it was also traditionally

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<sup>41</sup>Ibid., 408-409.

<sup>42</sup>See above, p. 21.

the national leader's field of special attention and expertise. Nevertheless, two American customs clashed with the principle that the Executive should predominate in the area of foreign relations. Prevalent distrust of executive power was one; decade-long legislative control of foreign relations was the other.<sup>43</sup> Yet, without doubt, most of the Framers wished to reassert executive control. The President had the qualities considered essential to successful foreign negotiations. He possessed the information as well as confidence of informants, was always in session, could act decisively and quickly, and he could if necessary act in secret.<sup>44</sup> For reasons of expediency, however, they were unable to discard legislative checks completely. The members of the Convention included the Senate in the treaty-making role, splitting the function of Congress in this field. The primary value of this arrangement was to preserve a modicum of representative oversight while at the same time maintain secrecy.

The Committee of Detail began by giving the Senate exclusive power to make treaties. This must have been a bow to previous Continental practice as well as small state

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<sup>43</sup>See Holbert N. Carroll, The House of Representatives and Foreign Affairs (Pittsburgh: Univ. of Pittsburgh Press, 1958), pp. 3-4. Mr. Carroll believes that legislative control of foreign relations was a firmly established tradition by the time of the Philadelphia Convention.

<sup>44</sup>See, e. g., Nos. 64, 70, and 71, The Federalist, ed. Jacob E. Cooke (New York: Meridian Books, 1961), pp. 432-38, 471-86.

sentiments, because all the recorded comments, including those of Mercer and Mason in concert with Wilson and Madison, were opposed.<sup>45</sup> As a result, the section was referred to the committee on postponed business. Reporting for the committee two weeks later, David Brearley proposed:

The President, by and with the advice and consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors, and other public Ministers, Judges of the Supreme Court, and all other Officers of the U--- S---, whose appointments are not otherwise herein provided for. But no Treaty shall be made without the consent of two thirds of the members present.<sup>46</sup>

This was a bold departure from the Committee of Detail's resolution, and ultimately, in tighter wording, the accepted solution. The idea may originally have been Nathaniel Gorham's, but it was the structure clearly envisaged by most of the delegates.<sup>47</sup> One delegate, nevertheless, tried to include the House. James Wilson moved an addition of the words "and House of Representatives" after "Senate." The circumstances of secrecy surrounding negotiations of treaties could be the only drawback, he said, but this was far outweighed by the necessity of obtaining complete legislative sanction. However, Roger Sherman replied that "the

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<sup>45</sup>Records (Farrand), II, 183, 297-98, 389, 392-93.

<sup>46</sup>Ibid., pp. 498-99.

<sup>47</sup>See ibid., p. 41, for Gorham's preliminary approach to the subject. The provision for nomination and confirmation of judges written into the Massachusetts Constitution appears to have provided a model.

necessity of secrecy forbade a reference of them to the whole Legislature." The delegates agreed, and Wilson's motion was lost, ten states to one.<sup>48</sup>

Notwithstanding the unity of the Convention on the subject, the exclusion of the House from the treaty-making process became an issue during the struggle over ratification. George Clinton, for example, thought it was a major flaw in the Constitution. In the New-York Journal he wrote: "Complete acts of legislation, which are to become the supreme law of the land, ought to be the united act of all the branches of government; but there is one of the most important duties may [sic] be managed by the Senate and executive alone, and to have all the force of the law paramount without the aid of interference of the House of Representatives; that is the power of making treaties."<sup>49</sup> However, the certainty that the lower chamber's handling of confidential news would be sievelike, worked against Clinton's argument. General Pinckney asked the South Carolinians, "Can secrecy be expected in sixty-five members? The idea is absurd."

Antifederalists in the North Carolina ratifying convention, like George Clinton in New York, thought the

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<sup>48</sup>Ibid., p. 538. The paradoxical neglect of James Wilson and the historic misassessment of his ideas are pointed up by his consistent efforts, in the Old Congress and in Philadelphia, to insure popular participation in the government by minimizing hidden processes. For a corrective discussion of Wilson's neglect, see McCloskey, ed. Works of James Wilson, I, 6-7, et passim.

<sup>49</sup>Essays on the Constitution (Ford), p. 274.

House ought to have a say in making treaties as well as passing them into law; but William Davie, who had labored intensely at the Philadelphia Convention, said, "The power of making Treaties has, in all countries and Governments been placed in the Executive Departments. This has not only been grounded on the necessity and reason arising from that degree of secrecy, design, and dispatch, which are always necessary in negotiations between nations, but to prevent their being impeded, or carried into effect, by the violence, animosity and heat of parties, which too often infect numerous bodies. Both of these reasons preponderated in the foundation of this part of the system."<sup>50</sup>

Secrecy was not the sole reason for combining just one house, the Senate, with the Executive in foreign affairs, but it was the most important and most fundamental. "Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, secrecy, and dispatch; are incompatible with the genius of a body so variable and so numerous" as the House of Representatives. This was a regular theme of the Federalist.<sup>51</sup> Jay, in one of his contributions to the Federalist, alluded to Senators' wisdom and national view, yet he also said, "It seldom happens in the negotiation of treaties, of

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<sup>50</sup>Debates (Elliot), IV, 280-81; III, 112.

<sup>51</sup>No. 75, Federalist (Cooke), p. 507, italics in the original.

whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite." Jay foresaw the use of confidential agents, who would trust the President, but not members of the House, to disguise their identity. Reason, human frailties, and his own experience persuaded Jay to conclude that the Convention had been wise to check the President's powers in foreign negotiation with nothing beyond the Senate's advice and consent.<sup>52</sup>

When Republicans questioned the extent of the Representatives' exclusion from the treaty-making process during the partisan fight over the Jay Treaty, Hamilton wrote President Washington that the "absolute necessity of secrecy not only in the conduct of foreign negotiation but at certain conjunctures, as to the very articles of a treaty, is a natural reason why a part, and that the least numerous part, of the legislative body was united with the Executive in the making of treaties in exclusion of the other and the most numerous."<sup>53</sup> Hamilton's reasoning, nine years after the Convention, was fully in harmony with the views and understanding of the Founders.

With the completion of the second paragraph of Section 2, Article II, the members of the Convention

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<sup>52</sup>No. 64, ibid., pp. 434, 435-36.

<sup>53</sup>Draft of Message for Washington to Congress, March 29, 1796, Works of Alexander Hamilton: Comprising His Correspondence, and His Political and Official Writings, Exclusive of the Federalist, Civil, and Military, ed., John C. Hamilton (New York: John F. Trow, 1850-51), 568.

concluded their thoughts about the public's right to know. The branches of Congress were to distribute their legislative journals, the President was to report from time to time, otherwise the establishment of open government had been left to practice and pragmatic choice.

Theoretical Writings about Secrecy: The Founders and Lesser Lights

Although the primary focus of this dissertation is upon the opinions of working politicians, something must be said about the era's abstract political theory in so far as it touched upon secrecy in government. Unfortunately, no special framework of ideas that might counter pragmatic reasons for secrecy appear to have existed in the theoretical treatises published during the country's infancy. The philosopher-statesmen of the new nation wrote almost nothing about secrecy in government. Even though they concentrated heavily upon illegitimate power, and they conceived of institutions to obviate its dangers, they did not reflect upon the subtle relation between information withheld from the public and officially coerced convictions. As the Federal convention's debates and the essays of the Federalist show, the notion that governmental secrecy was improper was hardly considered. When it was, it was rejected, and the means to achieve secrecy were supported and secured. It was expected that the Executive would take control of areas where confidentiality might be demanded. In part, this was a reaction

to the inefficiency of the committees of the Continental Congress. In part, the expectation stemmed from the assurance that legislative assemblies could not keep secrets. Where single men rather than groups of men are involved, the young Alexander Hamilton wrote, "there is always more decision, more dispatch, more secrecy, more responsibility."<sup>54</sup>

In old age John Adams recalled that he had detested the use of secret journals in the Continental Congress and that at its outset he had opposed committing resolutions to them. He admitted he stood quite alone in his thinking, and, however accurate his recollection, opposition to governmental secrecy did not appear in his subsequent formal writings.<sup>54a</sup>

Adams believed that representative government -- a complicated piece of machinery to Adams's mind, as to most of his enlightened, intellectual peers -- could only be corrupted through the elective process. As Adams conceived it, a republic's 'corruption' meant its transformation into either anarchy or despotism, the morality of the voting

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<sup>54</sup>From an unsigned letter dealing with Continental financial problems, which is attributed to Alexander Hamilton and dated, Morristown, N. J., December 1779 to March 1780. The addressee is also unknown, although he may have been Robert Morris, John Sullivan, or Philip Schuyler. See The Papers of Alexander Hamilton, eds., Harold C. Syrett and Jacob E. Cooke (New York: Columbia Univ. Press, 1961-), II, 234-51, esp. 246.

<sup>54a</sup>John Adams to Mrs. John Quincy Adams, March 3, 1820, Adams Papers, Letters Received and Other Loose Papers, microfilm, reel 449, MHi.

populace being the crucial factor. A vicious electorate would be preoccupied with selfish, factional objects, thus assuring the republic's disintegration into one of its corrupted forms. A virtuous electorate, on the other hand, would stress national goals and honor thereby insuring the republic's internal stability.

With this view Adams might have gone on to weigh the impact of secrecy, but he decided to avoid the snares entailed in pinpointing precautions. Instead he depended heavily on his elaborate system of checks and balances to oppose corruption.<sup>55</sup> Indirectly, by implication, he condoned secrecy. In his Thoughts on Government Adams wrote, "A representative assembly, although extremely well qualified, and absolutely necessary as a branch of the legislative, is unfit to exercise the executive power, for want of two essential properties, secrecy and dispatch."<sup>56</sup> He was attacking the idea of combining the separate primary func-

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<sup>55</sup>For some of John Adams's specific statements to these points, see Adams to Jefferson, December 6, 1787, April 6, 1796, November 15, 1813, and May 19, 1821, in The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams, ed. Lester J. Cappon (Chapel Hill: Univ. of North Carolina Press, 1959), I, 213-14, 261; II, 401, 573. For Adams's overall philosophy, see John R. Howe, Jr., The Changing Political Thought of John Adams (Princeton, N. J.: Princeton Univ. Press, 1966); and for a brief overview of the other philosopher-statesmen as well as Adams, see Charles A. Barker, American Convictions: Cycles of Public Thought, 1600-1850 (Philadelphia: Lippincott, 1970), pp. 290-327.

<sup>56</sup>Works of John Adams, ed. Charles F. Adams (Boston: Little, Brown, 1850-1856), IV, 196.

tions of government in one branch, but revealed the important place that secrecy held in his thinking. It was a fundamental attribute of the Executive. Washington, Hamilton, and Jay thought in the same manner, and all were concerned with enhancing the powers of the presidency.

The ideas on secrecy of the two great Democratic-Republicans seem more ambiguous, but it is a thesis of this dissertation that they ended at the same position as most other American politicians: supporting the Executive's discretionary powers over information. As will be shown, the most that can be said for Thomas Jefferson is that he spoke eloquently on one side of the issue and acted adroitly on the other side. Although most of the time he spoke out in favor of a well informed citizenry, Jefferson wholly agreed with the principle that Congress must grant the President final and independent choice about the disposition of material from his departments.

James Madison, whose administration was less open than he perhaps would have preferred it, also expressed himself forcefully in apparent favor of full disclosure: "A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a Tragedy; or perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."<sup>57</sup>

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<sup>57</sup>Madison to W. T. Barry, August 4, 1822, in Letters and Other Writings of James Madison, Fourth

But he was speaking about education and a generalized capacity to exercise good judgment. He did not carry this thought further into the murky area of subterfuge or its effect upon the sovereignty of the governed.

Madison's famous rumination about what the possibilities might be if men were angels or if angels governed men could have prefaced a study of the problem, but it supported instead the concept of governmental checks by separated powers. "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."

For the authors of the Federalist this was the most important lesson taught by history.<sup>58</sup> The restraining factor within the bureaucracy and legislature was to be the jealous watchfulness of each governmental branch over its field of authority. Ironically, this innovative check against abuse rapidly became a constitutional rationale for executive privilege.

Madison neglected to deal with secrecy because his attention was drawn away from this side of the civil-

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President of the United States, Congressional edition (Philadelphia: J. B. Lippincott, 1865), III, 276.

<sup>58</sup>No. 51, The Federalist (Cooke), p. 349. For a discussion of this outlook, see Peter Gay, The Enlightenment: An Interpretation, Vol. II, The Science of Freedom (New York: Knopf, 1969), p. 565.

liberties coin. He worried instead about silenced ideas, not about hidden facts. He was not especially concerned with news per se or with the right to know. Like most of his contemporaries, he had no doubt that there would be ample information upon which to form opinions. For him as well as for them, it was coerced convictions that loomed as the greatest threat to virtuous government. Therefore, the early American political theorists were anxious to protect freedom of opinion and its expression. Theirs was a profoundly Enlightenment preoccupation with the free play of ideas. This preoccupation pervaded the era's writing, it figured prominently in Jefferson's and Madison's thoughts, but it can be seen most clearly in the work of a lesser Republican yet a greater ideologue, Tunis Wortman.

A leading Jeffersonian politician, Wortman wrote the period's only comprehensive work on the people's need to know about their government's activities.<sup>59</sup> His Treatise Concerning Political Enquiry, and the Liberty of the Press (New York: George Forman, 1800) effused the spirit of liberality. Wortman's ideas about freedom of opinion and expression fell well within the pattern of thought between Bentham and Mill and were far advanced beyond the average

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<sup>59</sup>There is little biographical information on Tunis Wortman. On his importance as a politician, see Eugene P. Link, Democratic-Republican Societies, 1790-1800 (New York: Columbia Univ. Press, 1942), p. 115; Leonard Levy, Legacy of Suppression (Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1960), p. 283.

within the Anglo-American liberal tradition. Rationalistic in approach, his book examined in a deductive way the arguments for and against the restraint of the press, concluding with firm support for virtually absolute freedom. Unlike all other works of literate ideologues of the time, it dealt directly with the question of secrecy in government. On this matter, however, Wortman backed off from an absolutist stand. Although he wished to minimize its use, he succumbed to the practical necessity of some secrecy in government. He admitted that "there are certain measures which cannot be made public without evident disadvantage, and exposure to the hazard of defeat." But, he said, as soon as the enterprise was successfully completed, it was the duty of the government to throw open the propriety of its conduct to public investigation.<sup>60</sup>

Having accepted a circumscribed amount of official secrecy as a practical matter, Wortman addressed himself to the important and perceptive worry that transactions enveloped in secrecy would open the government to misrepresentation. He answered that the truth would come out in the end when secrecy was lifted, and in the meantime the government would be secure in "its general reputation of integrity and veracity."<sup>61</sup> Wortman was a serious thinker, so this easy dismissal of a real and vexatious concern betrays some of

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<sup>60</sup>Tunis Wortman, Treatise Concerning Political Enquiry, pp. 177-78.

<sup>61</sup>Ibid., pp. 178-79.

the limitations of Enlightenment faith. As a rule, the eighteenth-century ideologues, such as Tunis Wortman, were not well equipped to explore the unsettling depths of human malevolence. Wortman was certain that truth must triumph in an unfettered exchange of ideas. Secrecy in government, though he deserves credit for considering it, was of minor importance to him. He assumed that government was basically an exercise in solving moral problems. Good government rested upon sound ethical knowledge which, being the product of rational common sense, was available to all. Therefore, concealed bits of information would be a relatively insignificant deterrent to the formation of public opinion. Common judgment was really all that was necessary. The primary concern then for Wortman and his colleagues was to prevent coercion, not secrecy; to insure a free exchange of ideas, not to promote publicity.

With the exception of Wortman, the men who stood in the advance of the Revolution's libertarian movement said nothing about secrecy in government. For example, not a word about concealed policy and procedure appeared in George Sidney Camp's pioneering exposition on the American democratic experience.<sup>62</sup> Nor was secrecy treated in works

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<sup>62</sup>Democracy (New York: Harper & Bros., 1841). Camp's book has been called the "first formal treatise on democracy as a theory of American government." See Merrill D. Peterson, The Jefferson Image in the American Mind (New York: Oxford Univ. Press, 1960), p. 73. For a discussion of the place in American political thought of Camp's work, see Barker, American Convictions, pp. 430-32.

specifically dealing with freedom of the press.<sup>63</sup> They often skirted the subject, moved close to it intellectually, but, most probably for the reasons just mentioned, they never took hold of it. The only definable group of persons to exhibit a continued worry about secrecy were a number of Jeffersonian conservatives from the South, and their reasons for doing so were not liberal-democratic.

Advocates of what they took to be the real republican tradition, Southern conservatives were inordinately fearful of active, centralized government. As slaveholders they also had a practical reason to fear governmental power.<sup>64</sup> Accordingly they wanted to keep the government

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<sup>63</sup>See Anonymous, Candid Considerations on Libels . . . With Observations on the Liberty of the Press. By a Friend to Harmony (Boston: E. Freeman and L. Andrews, 1789); [George Hay], An Essay on the Liberty of the Press, Respectfully Inscribed to the Republican Printers Throughout the United States. By Hortensius (Philadelphia: Aurora, 1799); James Sullivan, A Dissertation Upon the Constitutional Freedom of the Press in the United States of America (Boston: David Carlisle, 1801); John Thomson, An Enquiry, Concerning the Liberty, and Licentiousness of the Press, and the Uncontrollable Nature of the Human Mind (New York: Johnson and Stryker, 1801).

<sup>64</sup>This is evident from congressional discussions as early as 1790. E. g., see the debates over Quaker anti-slavery memorials, (U. S. Congress) Debates and Proceedings in the Congress of the United States, 1789-1824 (Washington, D. C.: Gales and Seaton, 1834-56), 1st Cong., 2nd sess., March 16 and 17, 1790, esp. 1503; also see David Stuart to George Washington, March 15, 1790, Library of Congress, Presidential Papers, George Washington Papers, ser. no. 4, reel 99. John Randolph was especially assiduous in emphasizing the threat to his Southern colleagues. For an example of his views, see ch X, n. 21. The Debates and Proceedings in the Congress are hereafter cited as Annals of Congress.

under close surveillance. From what has been said about secrecy, it is evident that it was accepted as a weapon of the state against foreign states, but it is a reasonable surmise that these Old Republicans could also envisage it as a weapon to be used against them. They, at least, were prominent among those defending congressional reporters and supporting full publication of the debates. Although members of the Republican party, they often believed Jefferson and Madison had been overly covert in method. As John Randolph's stepbrother said when James Monroe entered the Department of State in 1811, he expected there would be "fewer criminal suppressions of facts than heretofore on the subject of foreign affairs."<sup>65</sup> By this time, as shall be discussed in a succeeding chapter, many of these southern Jeffersonians had joined the Federalists in opposition to Republican administrations; and one of the focal points of their criticism was their suspicion of less than candid policy and processes.

The Old Republicans were doctrinaire agrarians -- proto-aristocratic in style -- who were, it seems, congenitally alienated from their own party. They acted in politics as outsiders; and, in fact, it is a theme developed from the period covered by this study that only those on the outside, that is, those out of power, made secrecy an issue.

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<sup>65</sup>Henry St. George Tucker, quoted in Norman K. Risjord, Old Republicans: Southern Conservatism in the Age of Jefferson (New York: Columbia Univ. Press, 1965), p. 119.

The behavior of the Old Republicans conformed with this theme. Consistently powerless to influence the nation's development, according to their own lights, they consistently worried about secrecy in government.

## Chapter II

## The Disclosure of Legislative Proceedings

Former Secretary of State Dean Rusk was asked during a television interview in 1971 how he would reconcile the government's recurrent wish for privacy with the people's right to know about the government's policies and actions. Mr. Rusk replied that in a democratic society the public did indeed have a right to know, "but the public also has a right to have its public business transacted in a responsible fashion, and the problem is where do you draw the line. ..." <sup>1</sup> The supposed conflict between good government and open government alluded to by Rusk has ever posed a conundrum for democratic politicians. It certainly troubled the nation's earliest leaders. The Constitution had required the publication of the legislative journals, but remained otherwise silent on Congressional organization and procedure. Both branches of Congress were to determine their own rules, and this meant determine whether or not their debates could be reported.

Since the journals by themselves were too basically uninformative to be of real help, printed debates were fundamental to public knowledge. Only by reading the congressional debates could people form reasonable judgments about

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<sup>1</sup>New York Times, July 14, 1971, p. 35.

their representatives' motives and actions; therefore, as it was recognized at the time, completely open government, broadly publicized in policy and action, required newspaper coverage of the legislature's day to day activities.

At the outset the two branches of Congress took divergent steps: The Senate operated in secrecy, and the lower house in public view. Except for a single session, the Senate remained completely closed to outsiders until December 1795. The House, on the other hand, unofficially admitted reporters to the floor at the beginning of the First Congress in New York. A student of congressional reporting says this decision advanced the American federal legislature far ahead of British practice.<sup>2</sup> Contemporaries, it should be noted, held a similar opinion.<sup>3</sup> Yet only in some ways is this true; in other ways the assertion is misleading. By 1772 Parliament's right to prohibit reporting of the debates was all but abandoned. By 1778 the Speaker, in harmony with the prevailing sentiment of the Commons, relaxed the standing order which prohibited entry of strangers into the galleries. Thereafter, although the order remained on the books until mid-nineteenth century, it was

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<sup>2</sup>Elizabeth G. McPherson, "The History of Reporting the Debates and Proceedings of Congress" (Ph. D. Diss., Univ. of North Carolina, 1940), p. 19.

<sup>3</sup>See, e.g., "Yankee II," (Boston) Columbian Centinel, April 20, 1796; Elbridge Gerry's speech, Annals of Congress, 1st Cong., 1st sess., September 26, 1789, 918. Also John Strode Barbour's speech, Register of Debates, 18th Cong., 2nd sess., February 7, 1825, 493-94.

seldom employed and virtually inoperative. Thus, from the end of the 1770's, reporting of the debates became the accepted rule, and then newspaper competition brought about an additional fullness and speed of publication. Accuracy improved with better conditions for reporters; after 1783 they could take notes, and in 1824 they were exempted from removal when the gallery was ordered to be cleared.<sup>4</sup> As the nineteenth century unfolded, the number of skilled professional reporters increased rapidly. By the century's third decade, therefore, newspaper descriptions of Parliament's debates were accurate as well as quite complete, a development roughly parallel to that in the United States.<sup>5</sup>

Still and all, in the United States the decision to permit reporters on the floor of the House of Representatives was an important precedent, especially since preceding American practice and attitudes worked against the step. No newspaper reporters attended the sessions of colonial

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<sup>4</sup>See A. Aspinall, "The Reporting and Publishing of the House of Commons' Debates, 1771-1834," in Essays Presented to Sir Lewis Namier, ed. Richard Pares and A. J. P. Taylor (London: Macmillan, 1956), pp. 227-30; P. D. G. Thomas, The House of Commons in the Eighteenth Century (Oxford: Clarendon Press, 1971), pp. 141-46, and his "The Beginning of Parliamentary Reporting in Newspapers, 1768-1774," English Historical Review, LXXIV (October 1959), 623-36.

<sup>5</sup>Between 1781 and 1834 the public galleries of Commons were closed during sessions twenty-one times. Eight of these occasions were in 1810 and nine had occurred before that year, so after 1810 the standing order was rarely used. See Thomas, House of Commons, p. 147, n. 3. By comparison, the public and reporters were often excluded from the American House of Representatives in the period ending with the War of 1812. See Ch. VIII below.

legislatures. As an exercise of privilege and as a precaution against royal authority in the form of Governor and Council, the legislatures kept their formal discussions confidential. The assemblies jealously defended the doctrine "that we shall allow nobody but ourselves to be Judges of our debates": for in this, as in so many other areas, they followed what they conceived were Parliament's principles and procedures.<sup>6</sup> However, the particular principle of autonomous debates, rooted as it was in a seventeenth-century parliamentary view, was anachronistic by the time of the Philadelphia Convention, and not as applicable to the

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<sup>6</sup>Quoted in Jack P. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776 (Chapel Hill: Univ. of North Carolina Press, 1963), p. 213. I have drawn my generalizations concerning the colonial period from Greene, and from Mary P. Clarke, "Parliamentary Privilege in the American Colonies," in Essays in Colonial History Presented to Charles McLean Andrews by His Students (1931; rpt. Freeport, N. Y.: Books for Libraries Press, 1966); Florence Cook, "Procedure in the North Carolina Colonial Assembly, 1731-1770," North Carolina Historical Review, VIII (July 1931), 258-83; John P. Corry, "Procedure in the Commons House of the Assembly in Georgia," Georgia Historical Quarterly, XIII (June 1929), 110-27; Lucille Griffith, The Virginia House of Burgesses, 1750-1774, rev. ed. (Birmingham: Univ. of Alabama Press, 1970); Sister Joan de Lourdes Leonard, "The Organization and Procedure of the Pennsylvania Assembly, 1682-1776," Pennsylvania Magazine of History and Biography, LXXII (July & October 1948), 215-39, 376-412; Elmer I. Miller, The Legislature of the Province of Virginia, Its Internal Development (New York: Columbia Univ. Press, 1907); Thomas F. Moran, "The Rise and Development of the Bicameral System in America," Johns Hopkins Univ. Studies in Historical and Political Science, ser. 13 (1895); S. M. Pargellis, "The Procedure of the Virginia House of Burgesses," William & Mary Quarterly, 2nd ser., VII (April & July 1927), 73-86, 143-57; Elihu S. Riley, A History of the General Assembly of Maryland, 1635-1904 (Baltimore: Nunn & Co., 1905); Chester R. Young, "The Evolution of the Pennsylvania Assembly, 1682-1784," Pennsylvania History, XXXV (April 1968), 147-68.

new government as to the circumstances of the Old Congress. Yet there too, as has been said, the debates were closed to the public. Some radicals of the Revolutionary period spoke of the expectation of strictly responsible government and of regularly exercised popular consent.<sup>7</sup> Nonetheless, little other than deductions from abstract republican doctrine could have stimulated the new lower house of the national legislature's decision to admit reporters, for practice certainly had been against it. Their choice was a break with the past, and as such was easily reversible. What would be the custom in regard to reporters had to be worked out over the House's early years.

#### Reporting the Lower House Debates, 1789-1796

The tacit acceptance of shorthand reporters came under attack a few months after the initial formation of Congress. Shortly before the close of the first session, September 21, 1789, Aedanus Burke of South Carolina introduced a resolution censuring Congressional newspapermen for inaccurate reporting:

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<sup>7</sup>E. g., a Pennsylvanian theorized in 1776: "For the future, as all debates will undoubtedly be held in public, the consideration of warlike matters being best managed by Committees, the body of the people will soon become acquainted with the true characters of the delegates, and will continue or withdraw their confidence accordingly." Demophilus, The Genuine Principles of the Ancient Saxon or English Constitution (Philadelphia, 1776), p. 20; also sections 13-15 of the Pennsylvania Constitution of 1776. See Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: Univ. of North Carolina Press, 1969), p. 232.

The several persons who have published the debates of this House, in the Congressional Register, and in the newspapers of this city, have misrepresented these debates in the most glaring deviation from truth; often distorting the arguments of the members from the true meaning; imputing to some gentlemen arguments contradictory and foreign to the subject, and which were never advanced; to other, remarks and observations never made; and, in a great many instances, mutilating, and not unfrequently suppressing whole arguments upon subjects of the greatest moment; thus throwing over the whole proceedings a thick veil of misrepresentation and error; which being done within the House, at the very foot of the Speaker's chair, gives a sanction and authenticity to those publications, that reflects upon the House a ridicule and absurdity highly injurious to its privileges and dignity.

Burke concluded these introductory comments with a motion that the House should no longer sanction misrepresented debates in the newspapers.<sup>8</sup> The wording was vague, but, whether or not Burke had such intentions, the tendency of his resolution was unmistakable. It was directed against Francis Childs, John Fenno, and Thomas Lloyd, the three

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<sup>8</sup>Annals of Congress, 1st Cong., 1st sess., September 26, 1789, 917. From the first meeting of Congress the debates in the House of Representatives were printed in the newspapers. At the close of the session they were collected in Thomas Lloyd's Congressional Register. There were other short-lived publications that compiled the debates, but only intermittently. Not until 1825, with the publication of Gales and Seaton's Register of Debates, were the speeches compiled and printed annually on a constant basis. Prior to that year interested persons depended upon their newspapers. In 1834, Gales and Seaton began the publication of the Annals of Congress which, from varied printed sources and after 1800 from the files of the National Intelligencer, brought the debates forward from the First Congress. When this undertaking was completed in 1856, a continuous although imperfect account of the congressional debates existed in bound print. See McPherson, "History of Reporting," p. 48; Richard Hildreth, The History of the United States, 2nd ed. rev. (New York, 1880-82), V, 410-11; and the editors' preface to the Register of Debates, 18th Cong. 2nd sess.

shorthand reporters then on the floor, and it threatened their removal to the galleries where they could not hear nearly as well.<sup>9</sup> The opponents of Burke's resolution suspected it would also be a preliminary step to removal of reporters from the House itself.<sup>10</sup> To counter this possibility, they admitted that inaccuracies were legion, but inaccuracies, they said, were not a sufficient reason for preventing the debates' publication. John Page of Virginia said "he would rather submit to all the inconveniences of ridicule than sacrifice what he thought a valuable publication of useful and interesting information to his constituents."<sup>11</sup> Elbridge Gerry, who tended to agree with Burke, expressed fear of a partisan press, and of political parties in general. Apparently, he felt that the reporting had been one-sided, and that, as a former Antifederalist, his speeches had been neglected in favor of the new majority. The congressional reporters, he warned, might become captives in the hands of a faction, and by distortion produce "a malignant and mischievous tendency upon the public voice of America." He suggested an official stenographer of the House as the best solution.<sup>12</sup> Although Burke decided to

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<sup>9</sup>See New-York Journal, and Weekly Register, September 24, 1789.

<sup>10</sup>Annals of Congress, 1st Cong., 1st sess., September 26, 1789, 918-19.

<sup>11</sup>Annals, 917-18, 919.

<sup>12</sup>Annals, 918.

withdraw his motion after giving notice that he would reintroduce it if the reporting failed to become more accurate, Gerry's thoughts continued to hold the members' attention. Some approved of his proposal, while others pointed out its vulnerability to objections similar to his own: an authorized reporter could be the captive of a faction too. Most members believed it would be best to stay with the House's informal arrangement. They evidently hoped that the offending reporters would be intimidated into using more care in summarizing the speeches on the floor.<sup>13</sup>

The issue raised by Burke, however, remained unresolved, and it evidently frightened the reporters because in the next session they took seats in the gallery rather than behind the Speaker's chair. This state of affairs disturbed John Page, Jefferson's close friend, who consistently defended the reporters during his service in four congresses. Page asked the House if the stenographers could not return to their old seats. The controversy of the previous session, he guessed, had caused the reporters to conclude that the members were opposed to their sitting within the bar. Of course, the exact opposite was the case, he said, since the reports of the debates had brought great satisfaction to the members' constituents and much applause from abroad. The current exile of the newspapermen to galleries, especially since the public had been excluded

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<sup>13</sup>Annals, 919-20.

twice just two days earlier, might give credence to skeptical insinuations from foreign enemies of the American style of government.<sup>14</sup>

Page concluded his remarks by demanding readmittance of the writers on an informal basis, without submission of a resolution. He was correct in his surmise that many congressmen, otherwise sympathetic with his position, wished to avoid any semblance of officially sanctioning the publications. Alexander White of Virginia "wished ... the business might go on, but silently, as it had heretofore done, without express approbation of the House."<sup>15</sup> This was apparently the majority view. The reporters returned to their old seats without formal sanction, while a future southern Federalist, William Loughton Smith, closed the discussion by praising the shorthand writers' work and its effect.<sup>16</sup>

Contrary feelings would not stay down, however. In Philadelphia, during the Second Congress, Gerry again brought up the problem of inaccuracies in the published debates, only this time he shifted his emphasis so as to stress the importance of publicity for self-government. Gerry said he had always favored "a free and candid publication of the debates," but in order to achieve it, stenographers must be

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<sup>14</sup>Annals, 1st Cong., 2nd sess., January 15, 1790, 1059.

<sup>15</sup>Annals, 1060.

<sup>16</sup>Annals, 1061.

House appointed to take down the speeches on a regular basis in an unbiased way. In putting forth his resolution to this effect, he revealed an old republican's apprehension of corrupt influences. He was certain the employers had forced their reporters to present the debates inaccurately.<sup>17</sup> In the end, although Gerry's motion received some verbal support from other congressmen, it was committed and no action was taken on it during the remainder of the session or in the following one.

The subject did not arise again until March 1795, the last session of the Third Congress, and by this time party politics influenced the tone of discussion though not the divisions. The House had received a petition from a Philadelphia printer for support as official publisher of Congressional laws and debates. The petition was referred to William Loughton Smith, Theodore Sedgwick, a Massachusetts Federalist, and John Page for their consideration. They did not report until the day preceding an adjournment, and their recommendation was then accepted after a short discussion. The House resolved that the Secretary of State should examine the qualifications of skilled stenographers for the purpose of recommending those fit to record the speeches for publication. From these names the House would

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<sup>17</sup>Annals, 2nd Cong., 1st sess., April 20, 1792, 563-66. Gerry claimed to know a man who would swear under oath that certain employers had forced a reporter to publish the debates inaccurately. Gerry believed this to be the work of a "corrupt faction."

appoint one or more as officers for such purpose.<sup>18</sup> The committee's chairman said that the members' evident discontent with inaccurately printed speeches influenced their proposal. Most probably the violence of the party press, setting the stage for conflict over the Jay Treaty, was an important contributing element. As an Adams Federalist asserted in support of the resolution, "The newspapers contained a torrent of abuse and misrepresentation as to what passed in the House."<sup>19</sup>

Nevertheless, the House took no final action before it adjourned, and almost a year later a new congress debated the same proposal: the appointment of an official of the House to report debates. Again, in 1796 as had been the case in 1795, the controversy shifted around points of view having little to do with questions of open legislative process. Principles concerning the public's relation to law-making were only peripherally involved in the argument; the central issue was whether or not it was desirable to have an authorized version of the debates, not whether there should be published debates at all. Still, the various opinions reveal to some extent the more basic presuppositions about publicity.

Ultimately the recommendation for the appointment of an official reporter was rejected, and the idea was not

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<sup>18</sup>Annals, 3rd Cong., 2nd sess., February 21 and March 2, 1795, 1242, 1280-81.

<sup>19</sup>Annals, March 2, 1795, 1280-81.

seriously considered again until after the Civil War. Working against it was a prevalent faith in the self-regulating power of competition, a strong bias towards governmental frugality, and perhaps the newspaper printers themselves. Representatives argued that the expense of an official stenographic staff would be an unjustified drain on public funds. One congressman said the cost would be a much worse injury than inaccurate reporting.<sup>20</sup> The development of two political parties aroused another objection to the plan. The Federalist wheel-horse, Theodore Sedgwick, having reminded himself of his party's temporary minority status in the previous House and of its current narrowly held ascendancy, was easily able to imagine the dangers of majority control of the official record. An appointed stenographer, he said, "might be rendered the most powerful engine of an unprincipled majority, to overcome and to prostrate and destroy a virtuous minority. For no character was so established as to withstand for any length of time constant misrepresentation supported by authority of the House of Representatives."<sup>21</sup> Much as in England, most of the members had greater confidence in the daily press than in an authorized official.<sup>22</sup>

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<sup>20</sup>See the speeches of John Swanwick, James Hillhouse, and Ezekiel Gilbert, Annals, 4th Cong., 1st sess., January 29, 1796, 274, 278-80.

<sup>21</sup>Annals, 276-77.

<sup>22</sup>For the English view, see Aspinall, "Reporting and Publishing," p. 228.

Although there is little surviving evidence, the daily press probably lobbied against the idea of an official stenographer.<sup>23</sup> It seems evident that a belief in the self-regulating aspects of competitive enterprise on the one hand, and an anticipation of the business opportunities furnished by competition on the other, provided ample motivation for opposition to a salaried House reporter. John Swanwick's remarks on the floor articulated just such an interest; printer William Cobbett's ridicule of the proposal may have reflected such an interest. Cobbett, in his summary of the day in the House, dwelled on the committee's report. "Perhaps there was never a resolution proposed, at once so apparently trifling and so pregnant with mischief." Cobbett raised the specter of a corrupt stenographer under the control of an oppressive legislative majority. In all, he managed to defend the principle of independent newspaper reporting while taking pot shots both at Republican congressmen and his colleagues of the press.<sup>24</sup>

The minority supporting the proposal for an official shorthand reporter stressed the fact that the public was not receiving accurate accounts of the debate. Inaccuracy was obscuring, not enhancing the nation's view,

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<sup>23</sup>Elizabeth G. McPherson believes that this occurred, but she offers very little evidence to support the point; see her "History of Reporting," p. 26.

<sup>24</sup>William Cobbett, Porcupine's Works (London, 1801), III, 261-67. For Swanwick, see Annals, 4th Cong., 1st sess., January 29, 1796, 274, 279.

they said. The aim was not only to obtain a reporter acceptable to the members, but also to keep the public better informed.<sup>25</sup> Robert Goodloe Harper, Federalist leader from South Carolina, said that if the committee's report, or a similar one advocating an official reporter, was not adopted, he would propose that the House end all reporting, and the doors be shut. The debates as they were then published, he believed, held the lower house up to derision. In this regard, he especially singled out J. T. Callender's Political Register.<sup>26</sup> William Lyman, a Jeffersonian from Massachusetts, said that the reporters should be at least removed to the gallery if the resolution did not pass.<sup>27</sup>

Before the committee on the press was dismissed, its chairman, William Loughton Smith, defended the idea of open debate upon principles distinctly Federalist. The House of Representatives was correct in breaking with the British example by facilitating publicity of the debates, he said.<sup>28</sup> The people ought to have learned the reasons

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<sup>25</sup>Annals, 275, 277, 281.

<sup>26</sup>Annals, 277. Callender's work had been published the previous summer, June 1795. It covered Congress from November 3, 1794, to January 13, 1795. Reports of the sessions through to March 3, 1795, were never published.

<sup>27</sup>Annals, 280; cf. Cobbett, Porcupine's Works, III, 263-64.

<sup>28</sup>Smith's statement shows Americans were not fully up-to-date on British Parliamentary practice concerning the reporting of debates. See also Jonathan Roberts' remark, in 1813, that English reporters were not permitted to take notes; Annals, 13th Cong., 1st sess., 121, and above, n.3.

for a law, not merely the voting tally. Publications of these reasons, shown by the debates before passage, was an instrument for social control. The reasons knitted the people together in support of the legislation and government. They had an educational function too, and when spread into remote areas, they softened the necessary use of power. As Smith said, "When a law passes, imposing a tax, would not the people be reconciled if they saw, from the discussions of the House, that such tax was unavoidable, and that the particular mode of taxation was the best which could be devised?"<sup>29</sup>

Smith's mode of argument shows how Federalists could easily support open government. They too wanted an informed voting populace, not to instruct their representatives, but so that their representatives could instruct them, hopefully, to recognize talented and virtuous statesmen.<sup>30</sup> In any case, the plan to take the task of reporting out of the hands of the press and place it under House authority did not prevail. The Committee on Stenography was dismissed without further action by the members.<sup>31</sup> A month later a Virginia Republican, John Heath, made a futile

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<sup>29</sup>Annals, 4th Cong., 1st sess., January 29, 1796, 281-82.

<sup>30</sup>See traditional Federalist toast quoted in David H. Fischer, The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy (New York: Harper, 1965), p. 38.

<sup>31</sup>Annals, 4th Cong., 1st sess., February 2, 1796, 286.

effort to reintroduce the plan. He moved "that until a stenographer be appointed, or further provision made for publishing the debates of this house, that no printer be permitted to publish abstracts of speeches unless by the approbation of the member delivering the same."<sup>32</sup> This invitation to censorship was not accepted by the Representatives, but it was noted with disapproval by some of the newspaper printers. William Cobbett saved his choicer abuse for Heath, and in so doing, he reflected in an exaggerated way the partisan political heat and sectional jealousies of the time:

As to the Gentlemen from Virginia, I am not surprised; for we know that when a sulky negro will not lick up his mess clean, however insipid, disgusting, and nauseous it may be he is muzzled till his stomach comes to. But are we Pennsylvanians to be treated thus? --- No, no, Mr. Heath; when you get the government on the other side of the Potomack, you may, and undoubtedly will, do what you please with it; but we have four years to live, at any rate; be not in such haste to muzzle us then.<sup>33</sup>

Men on both sides of the political spectrum, it can be seen, supported the publication of House debates because they valued the principle of an informed public. They differed to some extent over the best method to achieve this; still, here again, no clearly developed partisan

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<sup>32</sup>Heath's motion does not appear in the Annals of Congress. It evidently was overlooked in favor of reporting the long, important House debate over a call for the Jay Treaty papers, March 7 to April 7, 1796. It was commented on, however, by both William Cobbett and Benjamin F. Bache. See Porcupine's Works, III, 263-64, and (Philadelphia) General Advertiser. Aurora, March 9, 1796.

<sup>33</sup>Cobbett, Porcupine's Works, III, 264.

position revealed itself. What was most important was that the House of Representative's custom of admitting reporters contributed to the regular publishing of the debates in the newspapers. The practice had become well established. Greater accuracy would come in time with stronger newspapers and a larger number of skilled reporters.<sup>34</sup> From 1796 on, questions about newspaper reporting shifted from thoughts of creating an official House reporter, to considerations of the rules and the Speaker's control over what reporters could be seated -- a concern primarily brought on by the growth of the Federalist and Democratic-Republican parties. Here the Jeffersonians took the more libertarian position, as they fostered the effort to release the newspapermen from the Speaker's control.

This development in the practice of the House of Representatives will be described in a later chapter. At this point we should retrace our steps to the beginning of the new Congress under the Constitution, and examine the

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<sup>34</sup>A correspondent to B. F. Bache's paper said there was a dearth of skilled shorthand reporters in the House after Congress moved from New York City to Philadelphia. (Philadelphia) General Advertiser. Aurora, March 9, 1796. Reporting of the Congressional debates evidently improved after Congress was established in Washington. From 1820 the number of reporters was sufficient for full coverage of both Houses. See McPherson, "History of Reporting," p. 53. Lawrence A. Gobright wrote that there was no deficiency of well educated and critically expert reporters for the Register of Debates, which was instituted in November 1824. Recollections of Men and Things at Washington During the Third of a Century (Philadelphia: Claxton, Remsen & Haffelfinger, 1869), p. 400.

evolution of the procedure of the Senate with regard to its debates. Initially, they took place in seclusion behind locked doors.

## Chapter III

## The Senate Opens Its Legislative Sessions to Reporters

An enthusiastic admirer of George Washington's administration wrote in the spring of 1795 that, of any people on earth, Americans could be certain their government acted honorably and in their interest. Their rulers returned to, as well as came from, the community at large. They maintained common concerns with the ruled; moreover, their property, reputation, past services, and future hopes, were all pledged to the nation. "Our existing rulers are also entitled to our confidence," the writer added, "by the inclination they have discovered to make public their measures, and the wisdom and integrity which have uniformly characterized them. They have taken precautions that the doors of both branches should be open, and their debates published accurately."<sup>1</sup>

The point was well taken. At the time this was printed in the Boston Centinel, the sessions of both houses were normally open to the public. Yet the Senate's practice had been quite the opposite a year earlier. The first meetings of the Senate had begun in private and remained so until December 12, 1795. The institution of public Senate sessions that day was the consequence of a resolution passed at last on February 20, 1794, after three previous

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<sup>1</sup>"Yankee II," (Boston) Columbian Centinel, April 20, 1796.

consecutive failures. Then, slow carpentry work on the galleries delayed implementation of the new procedure for almost two years. The doors to the newly constructed galleries were finally opened at the first meeting of the Fourth Congress in December 1795. The opening marked the success of a movement begun in 1791.

It was two years following the organization of the First Congress before the propriety of closed Senate legislative sessions was formally questioned. On February 24, 1791, in response to a resolution from their state legislature, the Virginia Senators, Monroe and Lee, proposed opening the upper chamber's proceedings: "Resolved, that it be a standing rule that the doors of the Senate Chamber remain open whilst the Senate shall be sitting in their legislative capacity, except on such occasions as, in their judgment, may require secrecy: and that their rule shall commence, and be in force on the first day of the next session of Congress." The resolution was negatived by seventeen to nine.

As the speeches on this issue were not published, the logic of either side cannot be determined directly; however, sufficient indirect evidence exists to permit a reasonable reconstruction of the arguments. Monroe's speech supporting his resolution has survived in draft form, and from it we can infer something of the majority position as well as that of the minority.<sup>2</sup> Evidently a number of the

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<sup>2</sup>Monroe Papers, NN, Mss. Div., Misc. Box. James

Senators feared a diminution of their dignity and prestige if the proceedings were opened to the public. They believed that the Senate's weight in the government was at stake. "I think to be a little more out of view would conduce to its respectability in the opinion of the country," said Senator Paine Wingate.<sup>3</sup> It is also probable, although Monroe mentions it only obliquely in passing, that a few members thought the Senate's studiously polite, clubby manner of operation might deteriorate in the light of publicity. In expectation of just such a change, Supreme Court Justice James Iredell reversed an earlier predilection in favor of open doors. He evidently believed that Senators could not resist an opportunity, if working in public, to display oratorical skills and thereby retard the legislative process.<sup>4</sup>

More fundamentally at issue, as Senator Maclay's

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Monroe's biographer says it is the only one of his speeches in the Senate preserved. See Harry Ammon, James Monroe, The Quest for National Identity (New York: McGraw-Hill, 1971), p. 84.

<sup>3</sup>Life and Letters of Paine Wingate, ed. Charles E. L. Wingate (Medford, Mass.: Mercury Printing Co., 1930), II, 302.

<sup>4</sup>Iredell to John Hay, April 4, 1791, in Griffith J. McRee, Life and Correspondence of James Iredell: One of the Associates of the Supreme Court of the United States (New York: D. Appleton, 1857), II, 327-328. Iredell added that open doors would not prevent improper legislation. The Senators could pretend a need for secrecy if they intended mischief; and it would not do to decree continuously open sessions, because every nation requires legislative secrecy at times. Cf. Roy Swanstrom, "The United States Senate, 1787-1801" (Ph. D. Diss., Univ. of California, Berkeley, 1958), rpt. in U. S. Congress, Senate, 87th Cong., 1st sess., Doc. 64 (Washington, D. C.: GPO, 1962), p. 244.

journal reveals, was the principle of instruction. Governor Clinton of New York, in a note to Monroe, wrote that instruction itself was a point of contention. For, as a corollary, the resolution to open the doors implied responsibility. In offering it, the Virginia delegates were following the instructions of their state legislature. The legitimacy of constituents' instructions therefore became involved in the debate over the motion. Oliver Ellsworth said these "amount to no more than a wish, and ought to be no further regarded." Ralph Izard asserted, "No Legislature had a right to instruct at all, any more than the electors had a right to instruct the President of the United States." Robert Morris expressed himself as violently opposed to instruction.<sup>5</sup> The division in the Senate suggests that those opposed to opening the upper chamber were opposed to instructions, and those voting in favor of the Virginians' resolution were in favor of instructions from provincial legislatures and citizens. Maclay himself, in support of Monroe's position, wrote in his journal that he knew "but two lines of conduct for legislators to move in -- the one absolute volition, the other responsibility. The first was tyranny, the other inseparable from the idea of representation." Senators were servants of the public, so, as Maclay declared, his policy

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<sup>5</sup>William Maclay, The Journal of William Maclay, ed. Edgar S. Maclay, 2nd ed. (1927; rpt. New York, Frederick Ungar Publishing, 1965), pp. 387-88. George Clinton to James Monroe, February 16, 1791, Presidential Papers, James Monroe, microfilm, ser. 1, reel 1, DLC.

was to ask himself what his constituents would do if they were in the Senate. For Maclay the Senate was fundamentally indistinguishable in its nature from the House of Representatives. "I know no reason for keeping the door of any legislative assembly open," he said, "that did not apply with equal force to us."<sup>6</sup>

Basically, the debate and subsequent voting division hinged on differences over the Senate's role in the political system. In the opinion of some, the Senate was established as a relatively aristocratic body to provide balance between the Executive and the popularly elected branch. In the opinion of others, the Senate was based on popular will, organized in state units, and should reflect this will.<sup>7</sup> Maclay clearly felt this way, and Monroe, although he argued his case for open doors in the classical terms of mixed government, affirmed popular control of the branch he considered most durable, powerful, and dangerous to the prerogatives of the other branches.<sup>8</sup> In contrast, Senator Paine Wingate, who wanted the doors kept closed, saw no immediate threat to the coordinate powers or to individual liberties from the upper legislative body, but

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<sup>6</sup>Maclay, Journal, p. 388.

<sup>7</sup>For shifting theories underlying bicameralism, see Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill: Univ. of North Carolina Press, 1969), pp. 553-62.

<sup>8</sup>Monroe Papers, NN. Maclay, Journal, pp. 387-88.

he did see a need to counterbalance the "tumultuous" House. The Senate was to be the offsetting weight. He said, "I believe that the people in general will often derive considerable advantages from the check of the Senate over so numerous a branch of government as the other house will consist of."<sup>9</sup>

Concepts of the Senate's place in the government being in flux, there was uncertainty about the Senate's precise function and also about the role of the citizenry in its processes. This ambiguity produced in turn a variety of considerations that left Senators with opposite opinions about the value of closed or open sessions.

Some historians have tried to construe this confusion about the Senate's role in government as a Federalist-Republican split.<sup>10</sup> However, although the opposition to the proposal to open the doors was predominately Federalist, it is an oversimplification to view this as a clear-cut party issue. Among the nine who voted on February 25, 1791, to open the Senate doors during legislative sessions were

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<sup>9</sup>Life and Letters of Wingate (E. L. Wingate), II, 302, 316-17.

<sup>10</sup>William P. Cresson, James Monroe (Chapel Hill: Univ. of North Carolina Press, 1946), pp. 111-12. This biographer asserts that Monroe and Lee's attempt to end secret legislative sessions "aroused the ire of the Federalist faction." Also, Henry H. Simms, in discussing John Taylor of Caroline's Senate career, suggests that the division followed party sympathies. Life of John Taylor: The Story of a Brilliant Leader in the Early Virginia States Rights School (Richmond: William Byrd Press, 1932), pp. 59-60.

Benjamin Hawkins, Theodore Foster, Philip Schuyler, and Rufus King, future stalwarts of the Federalist party; while on the negative side there were several Republicans-to-be.<sup>11</sup> William Few of Georgia and Joseph Stanton, Jr., of Rhode Island voted against the resolution. John Langdon of New Hampshire, who drifted into the Republican camp about 1793, voted against it.<sup>12</sup> John Henry of Maryland also voted with the opposition; and when he did this again the second time the resolution was proposed, in 1792, he disregarded instructions to the contrary from home and was censured by the Maryland House of Delegates.<sup>13</sup> His compatriot in the Senate, Federalist Charles Carroll of Carrollton, first voted with Henry in opposition; but, faithful to the Maryland legislature's instructions, he changed in 1792 to a position favoring the resolution.<sup>14</sup> Perhaps Carroll simply reacted pliantly to the pressure applied by his state's legislature, but there is evidence that he had changed his mind and that his views coincided with the movement to end Senate secrecy. According to Maclay,

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<sup>11</sup>For the vote, see Annals of Congress, 1st Cong., 3rd sess., March 7, 1791, 1811-12.

<sup>12</sup>See Lawrence S. Mayo, John Langdon of New Hampshire (Concord, New Hampshire: Rumford Press, 1937), pp. 244-47, for Langdon's shift to Republicanism.

<sup>13</sup>For the censure, see sketch of John Henry, DAB, IV; also Kate M. Rowland, Life and Correspondence of Charles Carroll of Carrollton (New York: G. P. Putnam's Sons, 1898), II, 179, 188.

<sup>14</sup>Rowland, II, 179.

Carroll told John Adams that the American people were enlightened and that information and knowledge, not ignorance, would provide ample assurance of governmental stability.<sup>15</sup> Similarly, Langdon, who remained steadfast on the negative side of the proposition through successive annual votes until he switched February 20, 1794, when it passed, said, "Secrecy and mistary in our sort of Government I consider a curse."<sup>16</sup>

It appears that adherents of both national parties stood on each side of the issue. Federalist doctrine, which stressed governmental aloofness, administrative expertise, and proper distance between representative and constituent, fitted well with senatorial secrecy. On the other hand, the ideal of high-minded men legislating for the good of all rather than for the interested views of their constituencies, a concept of representation that flowed from Federalist doctrine, was, at the time, shared by many of those who became Republicans, and it, too, was not incompatible with secrecy. Besides, the concept was in transition. As the principle of instruction gained respectability, public agitation for an open Senate, coupled with an absence of support for closed sessions, broke down the original majority. Federalists joined Republicans in desiring an informed public, if not to exercise powers of instruction, then to

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<sup>15</sup>Maclay, Journal, p. 53.

<sup>16</sup>Mayo, John Langdon, p. 266.

exercise discrimination in judgment and loyalty to national goals. As a result, Federalists voted with Republicans in the final vote that opened the doors. The minority was formed wholly of Federalist members, but it was a minority of merely eight among a total of twenty-seven votes. Although the initial agitation against closed Senate sessions had come from Republicans, state legislators, and the public, there was very little resistance from the Federalists.<sup>17</sup>

The vote on the resolution opening the Senate to the public on a regular basis followed within a few days the vote that opened the Senate during the contested election of Albert Gallatin. The division over this temporary break in the upper house's wall of secrecy was not recorded, but some of those who opposed the seating of Gallatin were willing to publicize the proceedings.<sup>18</sup> The temporary change in rules probably helped to ease the permanent change that shortly took place.

The change was the result of a shifting concept of the Senate's nature. The incongruity of the closed sessions gradually occurred to the people at large as well as to

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<sup>17</sup>I discovered little in the press about the Senate's non-public sessions. Roy Swanstrom says there was surprisingly little support for closed sessions in the newspapers, "United States Senate," pp. 242-43. Most of the pressure for open sessions seems to have come through professionals, the local legislators.

<sup>18</sup>See Robert Ernst, Rufus King, American Federalist (Chapel Hill: Univ. of North Carolina Press, 1968), pp. 195-96.

state and national politicians, enabling those who each year proposed new rules for the legislative sessions to attract a majority.

Alexander Martin of North Carolina, who introduced the successful motion to open the doors of the Senate, was a newly elected member who is difficult to classify politically. A shrewd politician, he was sensitive to public sentiment. He had Republican backing, but he eventually alienated the party by voting in favor of the Alien and Sedition Acts.<sup>19</sup> Probably he can be correctly regarded as a moderate but flexible Federalist with broad local support. In any case, he took over the annual task of offering proposals to open the Senate, with a resolution that in wording was severely critical of the existing policy of secrecy. His preliminary paragraph illustrated the view of popular sovereignty that had developed from the Revolution: "the Senate of the United States, being the Representatives of the sovereignties of the individual States, whose basis is the people, owe equal responsibility to the Powers by which they are appointed, as if that body were derived immediately from the people. ..." The conclusion drawn from this proposition was that the Senate's judicial and legislative sessions should be fully public. The preamble to Martin's resolution was not considered, but the main proposal passed, amended only to exclude judicial sessions and to provide

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<sup>19</sup>DAB, XII; also Swanstrom, "United States Senate," pp. 245, 248.

time for constructing public galleries.<sup>20</sup> Upon its passage, the Senate had to formalize its first rule on secrecy, and on the same day it was decided: "That on the discussion of any business which may, in the opinion of a member, require secrecy, the President shall direct the gallery to be closed; and that, during the discussion of such motion, the doors shall remain shut."<sup>21</sup>

It is difficult to tell to what degree public pressure contributed to the final result. The Republican press had called for opening the doors, but did little about reporting the sessions once they were open.<sup>22</sup> The instructions from state legislatures to their Federal Senators were important, yet they may have originated more from parochial considerations than from popular pressures.

Abraham Baldwin, the Founder from Georgia, said at a later date that the public generally disapproved of closed Senate proceedings.<sup>23</sup> The New York State ratifying convention proposed an amendment to the Federal Constitution requiring both houses of the Congress to remain open, except

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<sup>20</sup>Annals of Congress, 3rd Cong., 1st sess., February 19 and 20, 1794, 33-34, 45-47.

<sup>21</sup>Annals, February 20, 1794, 47.

<sup>22</sup>Roy Swanstrom thinks that this indicates political opportunism on the part of the Republican-sponsored newspapers. See his "United States Senate," p. 251. It could also indicate a lack of public interest in the Senate's proceedings.

<sup>23</sup>Annals of Congress, 7th Cong., 2nd sess., February 23, 1803, 106.

when secrecy was required in the national interest.<sup>24</sup> The state's own constitution of 1777 had prescribed open sessions for the two houses of the state legislature when secrecy was not thought to be essential. The New Hampshire constitution framed in the winter of 1791, in like manner, contained a section explicitly requesting open doors for both its legislative chambers.<sup>25</sup> The New York legislature, as in the case of Virginia's and Maryland's, put pressure in 1791 on its United States Senators to work for open sessions. Schuyler and King responded by a public statement: "We have each had the honor to receive from you a letter, covering a copy of the resolutions of the senate and assembly of the fifth inst. Having for sometime thought that it would be expedient that the legislative debates of the senate should be public, it affords us much satisfaction that our sentiments on this subject concur with those entertained by the senate and assembly of the state we have the honor to represent."<sup>26</sup>

The contrast with an open House undoubtedly pointed up the anomaly of the Senate's hidden proceedings. This led to disapproval and even ridicule from persons outside the

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<sup>24</sup>Debates (Elliot), I, 330. Noted in Swanstrom, "United States Senate," pp. 240-41.

<sup>25</sup>Federal and State Constitutions (Thorpe), IV.

<sup>26</sup>New York Journal and Patriotic Register, March 7, 1791; (Philadelphia) Gazette of the United States, March 9, 1791. The letter had been read in the New York legislature, February 28, 1791.

Senate, especially from sympathizers with the French Revolution who compared the Senate's rules with unpopular aspects of the English constitution and unfavorably with French practice.<sup>27</sup> In the National Gazette "Condorcet" wrote,

This Patrician stile, this concealment, this affection of preeminence but illy accords with the spirit of republican government. The Constitution of the United States acknowledges no superiority of one legislative body over the other, and to assume it is a violation of its principle, and an insult to the character of free-men. It is a strange maxim in republican policy, that the agents of the people should keep their deliberations concealed from those from whom they derive their political existence. It augurs an unfriendly disposition in a public body that wishes to masque its transactions. --- Upright intentions, and upright conduct are not afraid or ashamed of publicity.<sup>28</sup>

Another correspondent to the same paper called the Senators "Peers" who scorned the view of "vulgar eyes." The Senators, this writer said, "usurp the secret privileges of the House of Lords. . . ." <sup>29</sup> But others besides cosmopolitan Francophiles ridiculed the pretensions they saw in the Senate's secretive practices. For example, a group of Monroe's constituents asserted that the Senate's conduct "had impaired the popularity of the general government."<sup>30</sup>

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<sup>27</sup>Roy Swanstrom's "United States Senate" brought this to my attention; see p. 241.

<sup>28</sup>Swanstrom, "United States Senate," p. 68.

<sup>29</sup>Ibid., p. 241.

<sup>30</sup>Petition dated (March 21, 1794), Presidential Papers, James Monroe, microfilm, ser. 1, reel 1, DLC. See also Joseph Jones to Monroe, March 1, 1794, ibid.

William Barry Grove, a North Carolinian who was quite hostile towards the Virginian political aristocracy, joked broadly about the Vice President and Senators after the doors were finally opened. Take a look into the Senate chamber, he wrote, at

that mighty conclave where it has been surmised Majestic Majack dwelt, where the illumed minds of mortals shone so bright as to exclude the rays of light from Heaven -- where it has been suggested that Dangerous Vice sits as a minion on a throne, to make the hateful monster aristocracy lose all its proud and surley Features by dressing it in the garb of Davilla, the Deception however is discovered, and the Lords, the mighty Lords, are to be held as soon as accommodations can be prepared for the People, who in their compassion must behold some of them with Pity because they may expose their weakness in an unguarded hour.<sup>31</sup>

Thus, whether the public at large cared much or little about the Senate's original decision to sit privately, the choice left it far out of line with the tendency of republicanism and with the precedents established by the House. Older views of representation lent support to closed sessions, but the revolution in sovereignty which began after separation from England worked in the opposite direction. Popularly based government, even if variegated in the distribution of power through its branches, permitted no distinctions in responsibility. A theoretically egalitarian social base clearly weakened the rationale for classical governmental mixture. The balanced scales had been discarded in

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<sup>31</sup>"Papers of John Steele," ed. H. M. Wagstaff, in Publications of the North Carolina Historical Commission (Raleigh: Edwards and Broughton Printing, 1924), I, 105-6, 108-9. Also quoted in Swanstrom, "United States Senate," p. 248.

favor of a broadly based mechanical lift as an analogy for American government.<sup>32</sup> So, in the last analysis, support for the continued practice of closed Senate sessions waned, and, under the pressure of Republican agitation, whatever there was vanished, bringing the practice to an end.

After the doors opened, the Senate debates were erratically published, because there was no place on the floor for a reporter, and from the gallery it was difficult to hear members. When Congress moved to Washington, reporters at first made no attempt to take down the Senators' speeches, as the galleries were so far from the floor. Consequently, reports of Senate debates were not issued between November 17, 1800, and January 6, 1802. On the latter date, Samuel Harrison Smith, publisher of the National Intelligencer, took a seat at a convenient place in the Senate chamber. The previous day Smith had addressed a request to the President, asking for a place in the Senate. Jefferson referred the letter to the members of the upper chamber, who immediately agreed to a resolution admitting reporters to seats on the floor assigned by the President of the Senate.<sup>33</sup> From that day on, Senate coverage improved, a product initially of an aggressive

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<sup>32</sup>John Stevens of New Jersey's simile (1787). See Wood, Creation of the American Republic, p. 584.

<sup>33</sup>(Washington, D. C.) National Intelligencer, January 8, 1802; McPherson, "History of Reporting," pp. 9-10; Samuel Oppenheim, The Early Congressional Debates and Reporters (New York, 1889), p. 42.

publisher and Jefferson's faith in his own party's press. Reports, nevertheless, remained selective until the newspapers had staffed a sufficient number of stenographers and common curiosity about affairs in the Senate had increased.

## Chapter IV

## Rights of the Press, 1798-1828

With the Senate legislative proceedings now accessible to the public by way of the press, and with the place of news reporters in the House informally fixed by precedent, the nation's legislators had created the primary institutional elements of open government. The legislators also had the power to either enhance or inhibit these elements. Would they publicize the legislative process to the fullest degree, or would the display turn out to be less than the reality? Would the proceedings be as open as promised by the footing they had received? Whatever would be the case depended upon future practice, and by the late 1790's practice was being swayed by unusual events. Repeated international crises, as well as heightened strife between newly crystallized political parties, shaped ideas about congressional procedure.

The day Roger Griswold caned Mathew Lyon, February 15, 1798, John Dawson of Virginia offered an addition to the rules that would have eliminated the Speaker's removal power over reporters. There was no specific rule dealing with them, but the rule placing in the Speaker's hands control of the galleries and the admission of strangers, had been interpreted so as to include reporters. Customarily, then, newspapermen were admitted to the floor

at the Speaker's indulgence.<sup>1</sup> Dawson wanted to change all this by insuring admission on a regular basis. The standing rules and orders of the House of Representatives should be amended, he stated, "by adding to them a provision, that persons attending this House to take down its debates and proceedings, for the purpose of publication, shall be permitted to take their place within the bar of the House."<sup>2</sup> The effect of the resolution was to abolish, in the case of reporters, the Speaker's power to remove people from the House at will. Not surprisingly, the Speaker, Jonathan Dayton, took the resolution as a personal affront. He assumed it was directed against a decision he had made some time previously to bar a printer for offensive conduct.<sup>3</sup> With the backing of John Rutledge, Jr., he attacked Albert Gallatin and John Nicholas for their active support of the resolution. He and Rutledge felt that the two Republicans should well understand that the Speaker had long controlled the privilege of seats upon the floor. Gallatin said he knew what the practice had been; he thought it was time to change it. To the sensitive Dayton, Gallatin's remarks, and those of others defending Dawson's proposal, were sheer

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<sup>1</sup>See Annals of Congress, 5th Cong., 2nd sess., March 21, 1798, 1294-95.

<sup>2</sup>Annals, 1036. Also in Oppenheim, Early Congressional Debates and Reporters, p. 25.

<sup>3</sup>Annals, 1286-87.

demagoguery.<sup>4</sup> Darkened by acrimony, this debate revealed little more than party positions, and when the resolution came to a vote, the Federalist majority was able to stifle it on a party-line division.<sup>5</sup>

By the time the Speaker's control over the placing of shorthand reporters again became a question, the nation had turned against the Federalists. The popular verdict had made them a lame-duck majority when in November, 1800, Congress convened for the first time in the District of Columbia. At the beginning of the session Speaker Sedgwick refused the applications of several reporters for a place on the floor. Perhaps he acted out of pique, though he himself explained that his action was prompted by the cramped conditions of the House -- not a far-fetched reason, since congressmen had dubbed their quarters the "Oven."<sup>6</sup> Anyhow, persons wishing to record the debates received seats in the public galleries only. John Nicholas, like John Page, another Virginian who consistently defended the reporters' place within the bar, protested strenuously; and as a result, a memorial from three printers was referred to a select committee. The committee recommended that no action

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<sup>4</sup>Annals, 1293-95.

<sup>5</sup>Only two Republicans voted in opposition to the resolution, and no Federalists supported it. Annals, 1295-96.

<sup>6</sup>Annals, 6th Cong., 2nd sess., 798; McPherson, "History of Reporting," pp. 33-34; Samuel Eliot Morison, Harrison Grey Otis, 1765-1848: The Urbane Federalist (Boston: Houghton Mifflin, 1969), p. 175.

be taken on the matter.<sup>7</sup> Nicholas responded by objecting to the committee's rationale: the Speaker's opinion of the new hall's inconvenience was unfounded, he said, and the reporters' work was not given an official character by their positions on the floor. On the positive side, in support of the memorial, he noted that reporters had always been permitted places where they could hear best, because this was essential to republican government.

In a government like ours, the theory of which is republican, and the practice of which he hoped would always continue to be republican, he considered the representatives of the people responsible to the people, by whom they were created. It was necessary, to give efficacy to this responsibility, that the people, who were to judge, should possess the purest information, as to not only the acts, but the motives of the public agents. It was of little consequence to them to know what laws are enacted, compared with a knowledge of projects that were attempted or prevented, and the grounds on which they were supported or opposed. Nor could the merits of the acts themselves be understood, unless the reasons for them were stated. It was, therefore, of the highest consequence that the reasons for our conduct should be clearly understood, that our measures may be comprehended, and our motives also known, that our constituents may judge whether we have faithfully discharged our duty.<sup>8</sup>

Harrison Gray Otis thought John Nicholas had overstepped the mark in his oration. Those who supported the committee's report, he replied, were not thinking of hiding their proceedings from the public. Federalists John Rutledge, Roger Griswold, and Henry Lee spoke to the same point. The question was not one of secrecy, they emphasized,

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<sup>7</sup>Annals, December 9, 1800, 806.

<sup>8</sup>Annals, 806-8.

but really one of the Speaker's power to remove an insolent stenographer. To keep proper order, the Speaker must have control over such matters.<sup>9</sup> Nicholas answered that their arguments in favor of removal of the newspapermen were so weak he could only assume they did not want publicity given to the House debates. The same view was reiterated at length by a correspondent writing in a principal Republican paper. The Federalists, he thought, were maneuvering to prohibit eventually all reports of the debates. Underneath, the question of the Speaker's discretionary power amounted to "whether in a republican government those who make laws for the people have a right to conceal from the people the ground on which those laws are made."<sup>10</sup> Whatever the truth of those allegations, the vote on the committee's report recommending no change in the Speaker's discretionary authority over reporters was a tie, but of course the Speaker broke it in favor of acceptance<sup>11</sup>

A month later Theodore Sedgwick tangled publicly with one of the printers, editor of the National Intelligencer, Samuel H. Smith. Sedgwick stated on the floor that he had been grossly misrepresented by the newspapers. Afterwards, through the pages of his paper, Smith wrote in

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<sup>9</sup>Annals, 808-9, 811-13.

<sup>10</sup>Annals, 815-16. "A Representative of the People," in (Washington, D. C.) National Intelligencer, December 19, 1800.

<sup>11</sup>Annals, 816-17.

an insulting manner that he as well as others often had difficulty understanding the Speaker, even when they heard his words clearly.<sup>12</sup> The exchange itself was unimportant, as was the event from which it arose, but it reveals the animosity between Federalists and press that originated from the Alien and Sedition Acts and the hostilities with France. It was this crisis in international affairs that underscored the need for a House rule providing security for the reporters. As Republican leader Nathaniel Macon had said, "A rule in relation to the admission of the stenographers ... would be placing law in the room of discretion."<sup>13</sup>

This, in fact, was to be achieved after the organization of the next Congress, when the Jeffersonians took office and swept in with a majority in both Houses for the first time. When the newly organized House reconsidered its standing rules, Michael Leib suggested the elimination of the Speaker's arbitrary power to exclude individual reporters. The Republican majority was insurmountable, so Leib's addition to the rules passed easily. It read: "Stenographers shall be admitted; and the Speaker shall assign such places to them on the floor, as shall not interfere with the convenience of the House."<sup>14</sup>

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<sup>12</sup>Annals, January 6, 1801, 886.

<sup>13</sup>Annals, December 9, 1800, 814.

<sup>14</sup>Annals, 7th Cong., 1st sess., January 7, 1802, 408-9. John Rutledge's effort to modify the intent of Leib's resolution was defeated prior to the vote on the rules.

The Leib amendment apparently secured the place of reporters within the bar of the House. This, however, did not prove to be the case. In 1813 a reporter was excluded from the floor, the Speaker's discretionary powers were reaffirmed, and then all reporters were removed to the galleries. Under the pressure of wartime conditions the Republicans managed a complete reversal of their position of 1802.

The Speaker then was Henry Clay, who, at the beginning of the Thirteenth Congress in May, 1813, refused a request by George Richards of the Federal Republican for admittance to the floor. Apparently he saw no contradiction between his action and the standing rule introduced by Michael Leib in 1802. Clay said four reporters on the floor were enough, but in fact three of the four worked for Administration-sponsored papers; and the Federal Republican had been extremely critical of the war with Britain, thus embittering Republicans within the House.<sup>15</sup> Debate broke out when Thomas Grosvenor, a New York Federalist, presented the excluded reporter's petition to the Representatives.<sup>16</sup> William Gaston, a young Federalist from North Carolina, and

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<sup>15</sup>See Annals, 13th Cong., 1st sess., May 28 and 31, 1813, 112-13, 119; also cf. Hildreth, The History of the United States, VI, 414. Warhawk Jonathan Roberts named the paper the "lathing hatchet vehical" of the opposition. "Memoirs of a Senator from Pennsylvania," ed. Philip S. Klein, Penna. Magazine of Hist. and Biog., LXII (April, 1938), 233.

<sup>16</sup>Annals, May 28, 1813, 112.

Alexander C. Hanson, owner of the Federal Republican and Richards' employer, led their party in support of the petition.<sup>17</sup> John C. Calhoun, Maryland's Robert Wright, and Jonathan Roberts of Pennsylvania, took up the Speaker's cause, while Nathaniel Macon and Jefferson's son-in-law, John Eppes, attempted to moderate their colleagues' stand by siding with the Federalist members. Now it was the Republicans who were willing to restrict reportorial coverage in the House and the Federalists who spoke of a need for widened press coverage and of its importance to republican government. There was talk of removing the newspapermen to the galleries, and a resolution specifically limiting the number of reporters within the confines of the House lost by only six votes.<sup>18</sup> The application of George Richards, needless to say, was not granted.<sup>19</sup>

Patriotic fervor had beclouded older principles. The majority now concluded that the Speaker could determine who should be seated. Robert Wright said, "The nation would

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<sup>17</sup>Both Gaston and Hanson would be counted as late generation Federalists, yet in most other ways they were different. Gaston had absorbed much pure Jeffersonian ideology, while Hanson fanatically adhered to old-school Federalism. On the two men, see Fischer, Revolution of American Conservatism, pp. 394-95, 366-67. For biographical sketches of members of the Federalist party I have relied heavily upon this work.

<sup>18</sup>See Annals of Congress, 13th Cong., 1st sess., May 28 and 31, 1813, 112-26.

<sup>19</sup>Annals, June 1, 1813, 127. Georgia Republican William W. Bibb's motion to reject the petition passed 88 to 72 on an unrecorded division.

applaud the decision of the Speaker on excluding this stenographer from the House." William Cobbett in England had claimed that the editor of the Federal Republican was in the pay of the British government, and Wright repeated this allegation to his colleagues.<sup>20</sup> Ironically, Cobbett, who in this country had vehemently supported the Federalists, was now required reading and a sure authority for the Jeffersonians. This irony was not lost on the minority members of the House.<sup>21</sup> They also reminded the Republican legislators of their party's position in the Seventh Congress and the decision made then to restrict the Speaker's powers. Hanson remarked, "After this decision, when all the old members now in Congress on the other side of the House, were against giving any discretion to the Speaker, in limiting the number or saying who they should be, -- after this, and when so much has been often said about the Federal reign of terror," the House was "now attempting to exclude the stenographers of one party, and to keep information from the people."<sup>22</sup> Gaston, too, stressed the incongruity of the

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<sup>20</sup>Annals, 112-13.

<sup>21</sup>See, e. g., Thomas Grosvenor's remarks, Annals, 116-17. My researches through the Republican press for the period of the Napoleonic wars indicates that Cobbett's Weekly Political Register had become their favorite English journal, extensively quoted as authoritative support. Probably Cobbett's iconoclastic criticism of his country's warfare with France was the major reason for Republican editors' high appraisal -- although the Register was also widely respected for its accuracy.

<sup>22</sup>Annals of Congress, 13th Cong., 1st sess., 114.

Republican position by defending Richards' place on the floor in terms and axioms associated with Jeffersonian values. He said that freedom of discussion and publicity of congressional proceedings were intimately tied to the fundamental principles of Republican government. For this reason, George Richards' petition was of major importance, not inconsequential as Clay had said; and its rejection was a great mistake. "Majorities are frequently tempted to exercise their power with a high hand"; however, he concluded, it would be an act of conciliation to reverse their action this time.<sup>23</sup> John C. Calhoun took the position, so long opposed in past years, that the proper place for newsmen was the galleries. Both he and Jonathan Roberts worried lest the reporters would overhear from their locations on the floor private conversations between the members -- conversations that would, but should not, be publicized.<sup>24</sup>

Two days after Richards' petition was dismissed, Hugh Nelson of Virginia tried to undo his party's decision by offering a rewording of the old rule: "Resolved, that, for disseminating information among the good people of the United States, it is expedient to admit stenographers into the House of Representatives; and that the Speaker of this House do cause seats to be provided for such additional stenographers as may be admitted, according to the standing

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<sup>23</sup>Annals, 119-21.

<sup>24</sup>Annals, 121.

rules and orders of this House."<sup>25</sup> Nelson said that he had made the motion out of a need to gratify his personal sense of right, and to salve his conscience concerning justice for the Federalist minority. "The public ought not to be debarred from any source of information; the minority ought not to be deprived of a stenographer by any exercise of power on the part of the majority."<sup>26</sup> This appeal produced an astonishing and unintended backlash. Republicans Willis Alston and Samuel Farrow rose to say that they would rather see all the reporters in the gallery. A committee with Alston as chairman was immediately selected, and, upon its recommendation a week later, the reporters were sent to the galleries.<sup>27</sup> Party conflict in the midst of wartime hysteria was the basic condition behind this change. The reporters remained in the public galleries for two and a half years, until a new Congress, with the nation at peace, brought them back again to the floor.<sup>28</sup>

Thereafter, in the years ending in Andrew Jackson's

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<sup>25</sup>Annals, June 3, 1813, 133.

<sup>26</sup>Annals, 133-34.

<sup>27</sup>Annals, 133, 153. Elizabeth G. McPherson, who has attempted to assay the accuracy of the early reports, says the quality depreciated when the reporters were banished to the galleries. See "History of Reporting," p. 40.

<sup>28</sup>Annals, 14th Cong., 1st sess., December 12, 1815, 383-84. The motion authorizing the Speaker to assign the reporters seats on the floor of the House was presented by Bartlett Yancey of North Carolina. It passed without recorded division. Cf. McPherson, "History of Reporting," pp. 40-41.

presidency, reporters faced only a few and ineffectual threats to their security. The Speaker retained nominal control, but no problems between newsmen and Speakers appeared in the records.<sup>29</sup> Reporters ran into a number of encounters with the eccentric John Randolph, and there were several individual attempts to register them and to make them take oath to report accurately. But these dissensions never provoked a vote. Probably in response to intense sectional feelings of the debate over Missouri's admission as a State, James Pindall of Virginia offered a revision of the standing rules that would have forced stenographers to swear to transcribe the speeches accurately "without addition, diminution, or alteration. ..." A month later John Randolph, angered at the poor newspaper coverage given his eulogy to Stephen Decatur, asked for Joseph Gales' and William Seaton's removal from the House.<sup>30</sup> As these cases illustrate, annoyance with the reporters usually stemmed from overheated individual emotions or, at times, sectional antagonism; in fact, the irascible partisanship of the press had abated, and the number of qualified stenographers had increased.<sup>31</sup> Also, lack of any legislative response shows

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<sup>29</sup>The standing rule for admission of stenographic reporters read: "Stenographers wishing to take down the debates, may be admitted by the Speaker, who shall assign such places to them, on the floor or elsewhere, to effect their object, as shall not interfere with the convenience of the House." See Annals, 19th Cong., 1st sess., 925.

<sup>30</sup>Annals, 16th Cong., 1st sess., 1023, 1633-34, 1693-98.

<sup>31</sup>See McPherson, "History of Reporting," pp. 32-33;

that Representatives were generally satisfied with the reporting and that the habit of publicizing the speeches had been strengthened in practice as well as rule.

In his final struggles with the press, John Randolph was all but ignored. He had railed at the reporters and the editors of the National Intelligencer especially, for he felt he had been made to look foolish by misquotation. He asked that the standing rule that provided for the admittance and seating of stenographers be referred to a committee for revision, but the House took little notice and no action.<sup>32</sup> Later, when the distribution of the Register of Debates, Gales' and Seaton's new compendium of congressional proceedings, was discussed in the House, Randolph arose in opposition to continued support for the project. He maintained that the Register was full of the "most infamous falsehoods." As before, the Representatives ignored his complaints and tabled his resolution without division. Unwittingly Randolph gave the principal reason for the growth of the press's immunity to attack: "For what purpose are stenographers admitted to the places

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Gobright, Recollections of Men and Things at Washington, pp. 400-401; Allen C. Clark, "Joseph Gales, Junior, Editor and Mayor," Records of the Columbia Historical Society, 23 (Washington, D. C., 1920), pp. 95-113.

<sup>32</sup>Annals of Congress, 20th Cong., 1st sess., January 14, 1828, 1002; (Washington, D. C.) National Intelligencer, January 12 and 15, 1828; (Washington, D. C.) United States Telegraph, January 16, 1828; Oppenheim, Early Congressional Debates, p. 50; McPherson, "History of Reporting," pp. 86-7.

assigned them? It was not surely that we might figure in the newspapers, or rather be disfigured in them, but it was for the information of the sovereignty of this country, the good People, our consitituents."<sup>33</sup>

The Constitution had prescribed the publication and distribution of the congressional journals; still, as practically everyone recognized, the schematically written journals were quite inadequate as a source of information and understanding. The legislators' reasoning had to be opened to the public. "To a right understanding of statutes," a congressional committee stated in 1818, "nothing is more essential than knowledge of the causes and motives which produced their enactment."<sup>34</sup> Most politicians recognized this from the beginning, although the Senate at first thought it necessary to sit *in camera*. Federalists too, being committed in principle to the desirability of independent representatives, sometimes were insensitive to the need for a full flow of information to the public. Nevertheless, most politicians did see the need, and the opposition to displaying legislative proceedings was weak. The Senate opened up to the public within five years after the seating of the First Congress, and the dignity of the reporters' position within the halls was rapidly established. The

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<sup>33</sup>(Washington, D. C.) National Intelligencer, March 10 and 13, 1828; Annals, 1003; McPherson, "History of Reporting," pp. 91-2.

<sup>34</sup>Annals, 15th Cong., 1st sess., 1650.

development of partisan papers worked to augment the advance in the same direction, even though the legitimacy of organized political opposition was not yet fully accepted.

The greatest threat to publicized debates came about in response to worries and tensions brought on by war and animosities produced by political conflict. Here the Federalists, as a desperate minority, found themselves championing publicity, and the Republicans temporarily found themselves denying once trusted principles. After the war, in the atmosphere of peace and minimal formal political quarrels, the press's position within Congress and the publicity of legislative proceedings were firmly established.

Important as the establishment of reported debates was to open government, it represented only a single facet of the problem. Questions of balance between secrecy and publicity were more subtle and complex. Just as almost everyone agreed the government must be open, almost everyone also agreed that governments must have secrets. This sort of contradiction came up more often with regard to foreign relations than to other fields, and evoked different attitudes about the breadth of information flowing between executive and legislature.

## CHAPTER V

Attitudes Toward Secrecy in Foreign Affairs:  
 Their Relation to Executive Leadership

Today it is commonplace to observe that United States Presidents are virtually unchecked in foreign affairs. Because of unrestrained presidential initiative and discretion in international fields, commentators here and abroad liken the office's prerogatives to those of monarchs of old. American Presidents have in fact been called "temporary armed royalty."<sup>1</sup> Yet this is far from what the nation's founders expected. They wanted much stronger executive control of foreign affairs than the Old Congress had, but not nearly as strong as England's monarch wielded. They hoped for a good measure of legislative oversight; even though their precise intentions remain unclear, this conclusion seems certain. The Constitution's framers did establish joint responsibility for foreign policy: Congress received the important powers of declaring war, regulating commerce, raising and controlling military forces, and

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<sup>1</sup>Rexford G. Tugwell, "The Historian and the Presidency: An Essay Review," Political Science Qrtly, LXXXVI (June, 1971), 194. Also see Robert Sherrill, Why They Call It Politics: A Guide to America's Government (New York: Harcourt Brace Jovanovich, 1972), pp. 7-8; Nelson W. Polsby, Congress and the Presidency (Englewood Cliffs, N. J.: Prentice-Hall, 1964), pp. 12-13; Arthur M. Schlesinger, Jr., "Congress and the Making of American Foreign Policy," Foreign Affairs, LI (October, 1972), 79-80, and his Imperial Presidency; James Reston, The Artillery of the Press: Its Influence on American Foreign Policy (New York: Harper, 1966).

regulating immigration. In treaty-making and appointments, the Senate was joined with the Executive. At the outset, in fact, President Washington acted on the assumption that the Senate was his equal partner in the process of negotiation. Still, the wording of the Constitution was vague, creating a battle ground from which the Executive emerged the master of the legislative branches.<sup>2</sup>

The complex history of this development has been thoroughly described and analyzed, but in this and the following chapter I wish to focus upon the prevailing view among Americans of the early national period that secrecy was an inseparable part of diplomacy, and upon the companion belief that the republic would be at a disadvantage in foreign affairs if its operations were entirely in the open, as a republic's operations ought in theory to be. These opinions were part of a cluster of factors which enabled the Executive to gain discretionary power over the flow of information pertaining to foreign matters, a primary reason in turn for the Executive's growing ascendancy in that sphere.

Presidential hegemony over foreign affairs resulted from a tendency to release the President from strings attached by the Constitution in order to give him the same

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<sup>2</sup>See Edward S. Corwin, The President: Office and Powers, 1787-1957, History and Analysis of Practice and Opinion, 4th ed. rev. (New York: New York Univ. Press, 1957), p. 171; Schlesinger, "Congress and the Making of American Foreign Policy," p. 81; Carroll, The House of Representatives and Foreign Affairs, pp. 5-6.

unfettered range of action in foreign negotiation as executive powers in European countries enjoyed. The Constitution's wording, as well as traditional protocol, gave the President the initiative in arriving at agreements with other governments. But more important, American statesmen assumed that their new republic must match monarchical methods if it were not to be outsmarted and outdone in international fields. Although they were not as candid about it as in later years, when the nation would be more secure and less self-conscious concerning vestiges of monarchy, Americans could see no reason why the United States government could not employ the latitude of powers and methods used by foreign governments; and this meant, as it turned out, clothing the Executive with broad powers liberally drawn from the Constitution's Article II, which defines the Presidency.<sup>3</sup>

As the only governmental officer elected by the entire people, it was natural that the President should represent the United States. This was a clear carry-over from the monarchical principle, but it was also an essential

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<sup>3</sup>The majority of the Senate Foreign Relations Committee said, February 26, 1894, "There seems to be no reason why the Government of the United States cannot, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general, or as limited and peculiar, or special, as any other government." Quoted in Henry M. Wriston, Executive Agents in American Foreign Relations (Baltimore: Johns Hopkins Press, 1929), pp. 293-94. In my opinion, this view does not differ essentially from that held in the early years. Cf. Corwin, The President: Office and Powers, pp. 179-80.

element of Federalist theory, and it was an idea later given renewed emphasis by the Jacksonians. The axiom was firmly established during Washington's first administration, and was reaffirmed by the legislative statement of the Logan Act in 1799.

Initially, in 1790, documents from the French Assembly which were sent to the Senate by Washington were returned by Vice President Adams to the President unopened. Adams acted on the assumption that the Senate ought not to communicate with foreign governments. Three years later Jefferson reinforced the precedent by informing Citizen Genet that all communications between other nations and the United States must be channeled through the President. The Logan Act then made it a crime for American citizens to correspond unofficially with foreign governments about their country.<sup>4</sup> After the passage of this decade, John Marshall summed up the precedents as he stood on the floor of the House: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>5</sup> The exclusive ear and voice of the President in diplomatic discourse was set. As lone

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<sup>4</sup>See Swanstrom, "United States Senate," pp. 114-15; Wriston, Executive Agents, pp. 113, 116; John C. Miller, The Federalist Era, 1789-1801 (New York: Harper, 1960), p. 243. Debate over the Senate's rejection of its own expression of goodwill to France, and the substitution of the President's expression of friendship, can be seen in Annals of Congress, 4th Cong., 1st sess., January 5 & 6, 1796, 28-36.

<sup>5</sup>Quoted in Wriston, Executive Agents, p. 114.

intermediary, he gained elemental control over information. He could act with secrecy and speed; and, because these attributes of the Executive could not be matched by the legislative branches, the Senate's role as a consultative council atrophied, and the House of Representatives' place in foreign affairs diminished.

In January 1818 Rufus King spoke to the Senators about their constitutional function as counselors to the President in the management of foreign affairs, and he called this function indispensable. "In this capacity," he said, "the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient."<sup>6</sup> However, King's view of the Senate as an active participant in the government's alignment of international relations was already anachronistic. By 1816 the Senate as a body was resigned to a position that did not permit intrusion into the direction of foreign affairs even though the principle of participation

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<sup>6</sup>Annals of Congress, 15th Cong., 1st sess., January 12, 1818, 106; rpt. in Records (Farrand), III, 424-25. King spoke in support of a resolution calling for an inquiry into the desirability of U. S. association with other nations for the purpose of suppressing the international slave trade; Annals, 94-95.

was never formally renounced.<sup>7</sup> Rufus King's opinion to the contrary notwithstanding, the advisory aspect of the Senate's constitutional partnership with the Executive had been abandoned by mutual agreement. Fundamentally, Congress deferred to the President because he could equal continental monarchs in his special sources of information, his efficiency, secrecy, and consistency of purpose.

Two years before King made his statement, in 1816, the Senate's first standing Committee on Foreign Relations put forth the prevailing opinion on the subject:

If it be true that the success of negotiations is greatly influenced by time and accidental circumstances, the importance to the negotiative authority of acquiring regular and secret intelligence can not be doubted. The Senate does not possess the means of acquiring such intelligence. It does not manage the correspondence with our ministers abroad nor with foreign ministers here. It must therefore, in general, be deficient in the information most essential to a correct decision.

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.<sup>8</sup>

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<sup>7</sup> [Joseph] Ralston Hayden, The Senate and Treaties, 1789-1817: the Development of the Treaty-making Functions of the United States Senate During Their Formative Period (New York: Macmillan, 1920), pp. 199-208.

<sup>8</sup> United States Senate, Compilation of Reports of

The Foreign Relations Committee's report reflected the Senate's sense of its inferiority to the President. It assumed a want of expertise in international fields; and fundamental to this want, this difference between legislature and executive, was the difference in capacity to handle secret material. Politicians had always considered the House to be an insecure repository of secrets; and now, although the committee understandably did not spell it out, the Senate was no longer considered to be safe. In fact the creation of a standing committee on foreign relations was itself a recognition of this opinion.<sup>9</sup> The Senate, Americans felt, had become too large to hold the secrets that fell to it; and since almost everyone agreed that secrets were essential to successful diplomacy, this incapacity was a critical obstacle to its participation in foreign affairs.

The incongruity between the institutional requirements of the legislative process and those befitting the conduct of diplomacy went back to the origins of the

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of the Committee on Foreign Relations, 1789-1901 (Washington, D. C., GPO, 1901), VIII, 24-25. Quoted extensively in Corwin, President: Office and Powers, p. 441, n. 114; also Hayden, Senate and Treaties, pp. 206-207.

<sup>9</sup>Corwin, President: Office and Powers, p. 211. The chairman of the congressional committees on foreign relations came to be regarded as quasi-members of the cabinet. Consequently, their loyalty to the Administration was of paramount importance. See John Quincy Adams, Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848, ed. Charles F. Adams (Philadelphia, J. B. Lippincott, 1874-77), IV, December 26, 1817, 31; V, January 2, 1822, 474.

republic. In 1781 a committee, assigned the task of putting together ideas for creating the nation's first Department of Foreign Affairs, reported that the most desirable "mode of conducting the Business of the Department . . . would be thro' a Minister vested with Confidential powers after the Example of other nations."<sup>10</sup> In actual practice, matters were not handled this way; the Secretary for Foreign Affairs was little more than a congressional clerk and, in view of his situation, could neither exercise discretionary authority nor insure full confidentiality. Nonetheless, throughout most of the Revolution, foreign relations were managed by a Committee of Secret Correspondence which operated outside of the regular scrutiny of Congress.<sup>11</sup> The committee in 1781 on the Department of Foreign Affairs had rightly expressed the predominant doctrine. James Wilson's disregard of this attitude and of the immediate past led to a round repudiation by the delegates in the Philadelphia Convention of his attempt to include the House in the treaty-making process.<sup>12</sup> In the discussion of the Senate's functions in treaty-making, proponents of the Constitution

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<sup>10</sup>JCC, XIX, January 10, 1781, 43. Cf. Wriston, Executive Agents, p. 18.

<sup>11</sup>Jennings B. Sanders, Evolution of Executive Departments of the Continental Congress, 1774-1789 (Chapel Hill: Univ. of North Carolina Press, 1935), pp. 38-49, 109-127.

<sup>12</sup>Records (Farrand), II, 538; see above, Ch. I.

assumed that secrecy would play a part in foreign negotiations.<sup>13</sup> John Jay and Alexander Hamilton repeated this assumption in the Federalist.<sup>14</sup> In 1796, when George Washington pondered the House of Representatives' call for the Jay Treaty papers, Alexander Hamilton reasserted that diplomacy and secrecy went hand in hand. At the time Hamilton was offering his advice on the Jay papers to Washington, a prominent member of the Federalist party, William Loughton Smith of South Carolina, made the same point to the House: "Diplomatic transactions are in all countries of a secret nature; in the progress of negotiation, many things are necessarily suggested, the publication of which may involve serious inconvenience and disadvantage to the parties negotiating. Our Constitution has, therefore, wisely assigned this duty to the Executive."<sup>15</sup>

Hamilton and Smith definitely were thinking solely of negotiation as distinct from policy, but these two different aspects of foreign affairs tended to be confused in the minds of many. Though Smith's view was a conventional one, it was not true that the Constitution assigned

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<sup>13</sup>Debates (Elliot), III, 112; IV, 280-81.

<sup>14</sup>Nos. 64, 70, & 75, Federalist (Cooke), pp. 434-46, 474-80, 507.

<sup>15</sup>Hamilton, "Draft of Message for Washington to Congress, in Reply to a Call for Papers Relating to the Treaty with Great Britain," March 29, 1796, Works of Hamilton (J. C. Hamilton), VII, 568. For Smith, see Annals of Congress, 4th Cong., 1st sess., March 8, 1796, 441-42.

negotiation exclusively to the Executive. The wording of the treaty-making power, Article II, section 2, actually was ambiguous, but Washington's administration originally presumed it meant consultation with the Senate during the progress of negotiation.<sup>16</sup> The Senate was informed of the shape a treaty was taking for the purposes of preliminary consent, although Washington immediately discarded the notion of performing this task in person. He and his cabinet, however, soon chose to present the Senate with the finished articles, because they lost assurance in that body's ability to retain confidences.

In March 1792, Washington and Secretary of State Jefferson, having both agreed that the formative steps in arranging foreign agreements required secrecy, discussed the advisability of prior consultation with the Senate. Washington expressed doubts about the ability of Senators to keep silent about negotiations. He complained to Jefferson that his friend Senator Izard had commented in front of a lady and the French ambassador on plans for the return of Algerian captives. Izard's stutter caused him to speak more and more loudly as he struggled to get his thoughts out, making it doubly certain that all could overhear.<sup>17</sup> A year later the members of Washington's cabinet

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<sup>16</sup>See Swanstrom, "United States Senate," p. 115; Hayden, The Senate and Treaties, pp. 17-22, 24-26.

<sup>17</sup>The Writings of Thomas Jefferson, ed. Paul L. Ford (New York: G. P. Putnam's Sons, 1892-99), I, 183-84, 191. See also Leonard D. White, The Federalists: A Study

agreed with him that the Senate should not be previously consulted about how much land might be allowed by treaty to the Indian tribes north of the Ohio River. England's minister, George Hammond, would undoubtedly learn of the outside limits of the amount to be offered, they believed, and this would take away the Administration's bargaining power with the Indians. "We all thought if the Senate should be consulted & consequently apprized of our line," Jefferson noted, "it would become known to Hammond, & we should lose all chance of saving anything more at the treaty than our Ultimatum."<sup>18</sup> Ironically, Alexander Hamilton had long since made it his business to keep Hammond well informed about developments within the government.<sup>19</sup>

The Senate as a whole was not again asked for advice prior to or during the process of making treaties with other nations. From an original coordinate position suggested by the wording of the Constitution the Senate became subordinate, dependent upon the Executive for information, and excluded from the regular process of

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in Administrative History, 1789-1801 (New York: Free Press, 1948), p. 62.

<sup>18</sup>Writings of Jefferson (Ford), I, 220. As Roy Swanstrom writes, "All in all, these Indian treaties [1789-1794] reveal the trend of events -- less and less Senate participation in the early stages of treaty-making." "United States Senate," p. 119. Hayden, The Senate and Treaties, pp. 34-39.

<sup>19</sup>Dumas Malone, Jefferson and the Rights of Man, Vol. II: Jefferson and His Time (Boston: Little, Brown & Co., 1951), pp. 396, 413; John C. Miller, The Federalist Era, p. 88.

international give and take because of a presupposed need for secrecy. The role of the Senate might have evolved differently but for a consensus on this matter of secrecy. The presumed need for absolute privacy in foreign relations, having deprived the Senate of a share in negotiation, deprived it also of a role in policy formation. In stressing the need for secrecy most American politicians were thinking primarily of the process of negotiation before agreement. Nevertheless, without giving much further thought to the subject, they assumed other nations must be kept unaware of one's own nation's aims. As a consequence of this judgment, policy became inseparable from the regular diplomatic process, so to be kept equally confidential.

Few Americans, a very few indeed, explicitly condemned secret foreign negotiations as contrary to either American institutions or interests, and the views of those who did were never widely accepted nor really seriously considered. In December 1793, when the House doors were closed at presidential request upon the discussion of a treaty with Morocco, a small group of congressmen led by John Nicholas questioned the propriety of excluding the public. "Secrecy in a republican Government wounds the majesty of the sovereign people," they said. "This Government is in the hands of the people; and . . . they have a right to know all the transactions relative to their own affairs." The majority abruptly replied that "because this Government is Republican, it will not be pretended that it

can have no secrets." The people may have a right to know, but they also have "a right to be well governed." Besides, they have interests as well as rights, and it is the duty of Congress to do everything possible to advance these interests. "To discuss the secret transactions of the Government publicly, was the ready way to sacrifice the public interest, and to deprive the Government of all foreign information."<sup>20</sup> The majority of Representatives concluded that the United States had important interests to consider in relation to foreign nations and, therefore, possibly some "very important secrets" to safeguard.<sup>21</sup> The basic assumptions they expressed were not questioned again. The real problem thereafter, for officials and legislators, would be the proper balance between governmental secrecy and public knowledge, which now and then became a matter of controversy; however, the idea that governments must have secrets was accepted without much question.

There were a number of dissenters. During the

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<sup>20</sup>Annals of Congress, 3rd Cong., 1st sess., December 27, 1793, 150.

<sup>21</sup>Annals, December 30, 1793, 151. Unfortunately, the reporters did not relate the different sides of the argument to individuals, and no votes were recorded on John Nicholas's resolutions. But he thought it necessary to alter his original motion to reconsider the rule providing for the public's exclusion upon reception of confidential communications from the President, to one amounting to an amendment to the existing rule. This became the standing rule of the House concerning confidential materials; nevertheless, I think it reasonable to conclude that the majority opposed his original argument in favor of open discussion. See ibid., 149-151.

significant debate in the lower house over a call for the Jay Treaty papers, Abraham Baldwin, Founder from Georgia, said, "The passion for mystery was exploded." He told the members that he had come to believe "the importance of having many Governmental secrets was diminishing. The doctrine of publicity." he thought, "had been daily gaining ground. . . ." <sup>22</sup> It is quite possible, although it can be no more than conjecture, that Baldwin had been influenced by the principles of open government expressed in the French republican constitutions and decrees. He did not specify where and among whom the "doctrine of publicity" had gained acceptance, but it may have been among those sympathetic with the French Revolution. His brother-in-law, Joel Barlow, an American supporter of the French, who lived in England and France, corresponded regularly with him. Barlow may have influenced his wife's brother's thinking on the subject of government secrecy. <sup>23</sup>

The idea must remain conjectural, however, because

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<sup>22</sup>Annals, 4th Cong., 1st sess., March 7, 1796, 435.

<sup>23</sup>Henry C. White says that Baldwin had respect for Barlow's political opinions; Abraham Baldwin, One of the Founders of the Republic, and Father of the University of Georgia, the First of American State Universities (Athens, Georgia: McGregor Co., 1926), pp. 134-35. The two men were close friends and roommates at Yale. Barlow also lived with the Baldwin family in Guilford, Conn., and married Abraham's sister Ruth. See James Woodress, A Yankee Odyssey, the Life of Joel Barlow (Philadelphia: J. B. Lippincott, 1958), pp. 53, 61-62; also Theodore A. Zunder, The Early Days of Joel Barlow, a Connecticut Wit, ... His Life and Works from 1754 to 1787 (1934; rpt. Hamden, Conn.: Archon Books, 1969).

in all of Joel Barlow's formal political writings there is nothing directly on secrecy in government. He never came to grips with the subject, even though an anti-secrecy argument would appear to have followed immediately from his principles: governments must be "invigorated by the enlightened reason of the people. . . ." He presented this statement as axiomatic, and offered the corresponding reflection that "knowledge is the foundation of obedience, and that laws shall have no authority but where they are understood."<sup>24</sup> He was thinking, however, of the society's general level of knowledge, not specifically of concealed policy. "The representative system must necessarily degenerate, and become an instrument of tyranny, rather than liberty," he wrote, "where there is an extraordinary disparity of information between the generality of the citizens and those who aspire to be their chiefs."<sup>25</sup> Like other eighteenth-century political theorists, Barlow was profoundly interested in a knowledgeable citizenry, and he was concerned about the overall flow of information between governments and peoples; but he failed to deal with problems posed by concealed policy, legislation, or diplomacy. "It

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<sup>24</sup>Joel Barlow, A Letter to the National Convention of France, on the Defects in the Constitution of 1791, and the Extent of the Amendments Which Ought to be Applied (London: J. Johnson, 1792), pp. 57, 60.

<sup>25</sup>Joel Barlow, Two Letters to the Citizens of the United States, and One to General Washington, Written from Paris in the Year 1799, on Our Political and Commercial Relations (New Haven: Sidney's Press, 1806), p. 79.

is essential to the character of a free republic . . . that no shadow of deception should ever be offered to the people."<sup>26</sup> The deception he had in mind was on the grand scale of popular delusion -- a mistaken belief that the good of the people and the interests of a monarch or nobility can ever be in harmony. In Barlow's view, informed reason would never fall into such an error. Apparently, in his theoretical analyses at least, he did not worry about deception arising from secretive policy formed in the name of national goals or national security. This is the more surprising because Barlow and his cosmopolitan republican comrades plumbed most of the monarchical rationalizations for policy that they conceived of as being contrary to the public good.

Joel Barlow was one of those who universalized the American and French revolutions as beneficial portents for all mankind, and he expressed his feelings often, both publicly and privately.<sup>27</sup> In a letter to Baldwin,

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<sup>26</sup>Barlow, A Letter to the National Convention, p. 50.

<sup>27</sup>For the European radicals associated with Joel Barlow, and for his cosmopolitan humanitarianism, see Robert F. Durden, "Joel Barlow in the French Revolution," William & Mary Qrtly., 3rd Ser., VIII (July, 1951), 327-54. In July 1789, Barlow wrote from Paris to his wife, then in America, about the cruelties he had seen: "Nothing but the contemplation of the infinite happiness that I am sure will result to millions of human beings from these commotions could enable me to tolerate the observance of them." Quoted in Charles B. Todd, Life and Letters of Joel Barlow, LL.D., Poet, Statesman, Philosopher (New York: G. P. Putnam's Sons, 1886), p. 87. Joel Barlow, Advice to the Privileged Orders in the Several States of Europe, Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government (Pt. I, 1792; Pt. II, 1795;

October 1791, Barlow said he was full of indignation and argument. He contemplated writing on something such as the "Renovation of Society, or an Essay on the Propriety of a Revolution in the Government of Europe."<sup>28</sup> His pamphlet directed to the French National Convention prophesied the imminent coming of "a great Revolution in the management of the affairs of nations." The final result would be lasting peace for the world.<sup>29</sup> Two years later, in the winter of 1794, Barlow wrote his old friend Oliver Wolcott to say that revolution was no longer necessary in America, but a freer flow of information and greater equality among

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rpt. Ithaca, N. Y.: Cornell Univ. Press, 1956). Looking back from a decade's perspective upon the attitude of radical republicans toward the French Revolution, Tunis Wortman said, "Our every hope and every sentiment was ardently engaged -- perhaps it was imprudent! But yet it was a weakness springing from the best of motives, which heaven will forgive." An Address to the Republican Citizens of New York, on the Inauguration of Thomas Jefferson (New York: William Durell, 1801), p. 17.

<sup>28</sup>M. Ray Adams, "Joel Barlow, Political Romanticist," American Literature, IX (May, 1937), 124; Durden, "Joel Barlow in the French Revolution," pp. 334-35.

<sup>29</sup>Quoted in Durden, "Joel Barlow in the French Revolution," p. 338. Full text in letter to the Society for Constitutional Information, dated October 4, 1792, Joseph Gurney, The Trial of Thomas Hardy for High Treason, (London, 1795), II. In an open letter to the Piedmontese he wrote, "The principles of this revolution are those of universal peace; and it is impossible that it should fail to produce the effect, because it takes away every motive for national hostility, and teaches the people of all countries to regard each other as friends and fellow-citizens of the world." "A Letter Addressed to the People of Piedmont," in The Political Writings of Joel Barlow (New York: Mott & Lyon, 1796), pp. 219-20.

men must evolve.<sup>30</sup>

Whether or not the radical republicanism of Barlow and his thoughts about the connection between the American and French revolutions led Abraham Baldwin to his categorical position on diplomatic secrecy, Federalists certainly thought French ideas were involved. "And in the true cant of the party," one wrote, "we are told by Mr. Baldwin, that Republics have no secrets -- that none but monarchs and tyrants have secrets. Stop, Mr. Baldwin; not quite so fast. Has the French Republic, which you and your friends so much admire, no secrets?"<sup>31</sup> In fact, numerous Republicans did not agree with Abraham Baldwin.<sup>32</sup> Federalists were primarily trying to erect a devil behind the party opposition they abhorred; on the other hand, doctrinaire sentiments against secrecy were sometimes really associated with sympathy for France. Correspondents to Benjamin Franklin Bache's newspaper denounced the executive meetings of the Senate while that body considered ratification of the Jay

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<sup>30</sup>George Gibbs, Memoirs of the Administrations of Washington and John Adams, edited from the Papers of Oliver Wolcott (New York, 1846), I, 161.

<sup>31</sup>"A Federalist," (Boston) Columbian Centinel and Massachusetts Federalist, April 16, 1796.

<sup>32</sup>E.g., Republican Samuel Smith of Maryland said, "The gentleman from Georgia had reprobated all secrets in Republican Governments," but secrets, on the contrary, are "unavoidable in all Governments." Annals of Congress, 4th Cong., 1st sess., March 8, 1796, 443. William Maclay said, "The good of the public ... required secrecy in many things." Journal, p. 77.

Treaty during the special session of June 1795. As a demonstration of proper republican conduct, they cited the action of the French ministry, whose treaty with Prussia had been openly read to the National Convention.<sup>33</sup> Bache himself called the American Senate's procedure a practice borrowed from monarchs and their ministers.<sup>34</sup> Secrecy was a prime tool of monarchy and might well be interdicted by those who glorified European republican movements and who imagined they saw the resurgence of monarchy at home -- as some Republicans did.<sup>35</sup>

However Republican congressmen as individuals might hedge their commitment to open diplomacy, Republicans were identified in their party position with the principle that in republics there ought not to be secrets. In later years, when the country accelerated towards war with Great Britain, the Federalists discovered the axiom for themselves and accused the Republicans of abandoning their own principles.<sup>36</sup> Even then, Federalists were not categorical in

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<sup>33</sup>(Philadelphia) General Advertiser. Aurora, June 16 & 23, 1795.

<sup>34</sup>Aurora, June 22, 1795.

<sup>35</sup>For Republican belief in Federalists' monarchism, see Marshall Smelser, The Democratic Republic, 1801-1815 (New York: Harper, 1968), p. 223 et passim. For Jefferson's own assertion of the monarchical principles of federalism, see his "Notes on Professor Ebeling's letter of July 30, [1795]," Writings of Jefferson (Ford), VII, 44-49.

<sup>36</sup>New York Evening Post, January 12, 1818; see Ch. VIII below.

their dedication to open government; they actually questioned governmental practice that they thought merely too heavily weighted on the side of secrecy, never expecting diplomacy to be completely open.

After the War of 1812, with party strife at a minimum, Henry St. George Tucker of Virginia argued that complete frankness and candor, an unreserved communication between the executive and legislature in the area of foreign relations, would be most beneficial. He seems to have had nonpartisan cooperation between the branches in mind, but his words sounded more like a condemnation of executive secrets.<sup>37</sup> Two other Virginians, George F. Strother and Charles F. Mercer, voiced doctrinaire opposition to secrecy. When publication of the secret journals of the Old Congress was being considered by Congress, Mercer said that "all State secrets were unnecessary, and that the most candid would ever be the most successful negotiator." Strother even more forcefully stated the point by voicing the criticism that, in keeping diplomatic secrets, the government had departed from national principles and "gone into the winding and devious course of European diplomacy."<sup>38</sup> Admitting that the idea was visionary, John Randolph thought an

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<sup>37</sup>For Tucker's speeches, see Edward S. Corwin, The President's Control of Foreign Relations (Princeton: Princeton Univ. Press, 1917), pp. 75-76, or his President: Office and Powers, p. 187.

<sup>38</sup>Annals of Congress, 16th Cong., 1st sess., February 3, 1820, 1053-54.

international archive should be established at Paris to give scholars access to the diplomatic correspondence of all nations.<sup>39</sup>

These doughty states-rights Southern conservatives, who considered themselves virtually abandoned by their own party, were as a group most consistently concerned about concealed governmental processes. It probably is not entirely coincidental that the man they once sought to champion in opposition to Madison, James Monroe, was alone among the early Presidents to make extreme statements in opposition to secrecy in foreign affairs. He had a cast of mind they recognized as being similar to theirs. As President, Monroe, in response to a call by the House of Representatives for information, sent all the relevant documents, along with a message explaining his philosophy about discretionary control over foreign intelligence. His view was that the President should be willing to communicate to either house all that would not harm the nation -- and he surmized that few instances would arise in which public disclosure would damage the national interest. He deemed "it more consistent with the principles of our Government to hazard error by the freedom of the communication rather than by withholding any portion of information belonging to the subject. . . ." <sup>40</sup> Two years later, Monroe in his seventh

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<sup>39</sup>Annals, 1059.

<sup>40</sup>Annals, 17th Cong., 1st sess., January 29, 1822, 826-27.

annual message reemphasized this suggestion for public consumption at home, at the same time he put forth his doctrine of continental separateness for Europeans to read. The phrases reflect Enlightenment faith, less ambiguously than was typical of many of the revolutionary generation, coupled with a deference to popular sovereignty and to the hopeful nationalism associated with the Era of Good Feelings:

The people being with us exclusively the sovereign, it is indispensable that full information be laid before them on all important subjects, to enable them to exercise that high power with complete effect. If kept in the dark, they must be incompetent to it. We are all liable to error, and those who are engaged in the management of public affairs are more subject to excitement and passions than the great body of our constituents, who, living at home in the pursuit of their ordinary avocations, are calm but deeply interested spectators of events and of the conduct of those who are parties to them. To the people every department of the Government and every individual in each are responsible, and the more full their information the better they can judge of the wisdom of the policy pursued and of the conduct of each in regard to it. From their dispassionate judgment much aid may always be obtained, while their approbation will form the greatest incentive and most gratifying reward for virtuous actions, and the dread of their censure the best security against the abuse of their confidence. Their interests in all vital questions are the same, and the bond, by sentiment as well as by interest, will be proportionably strengthened as they are better informed of the real state of public affairs, especially in difficult conjunctures. It is by such knowledge that local prejudices and jealousies are surmounted, and that a national policy, extending its fostering care and protection to all the great interests of our Union, is formed and steadily adhered to.

Monroe included diplomatic affairs under the important subjects of which the people must be informed, and as he stated it, this meant "precise knowledge" of

"negotiations" as well as knowledge of the finished policy.<sup>41</sup> During the course of his presidential terms, Monroe did not stray far from his principles. His administrations' foreign affairs were relatively open to the public; on the other hand, his presidency was not troubled by either party conflict or international conflict. Hence, his administration was not tested by the circumstances faced by Jefferson's and Madison's. Nevertheless, Monroe had an acute appreciation for public service. Probably more than most men, he viewed the presidency in relation to this goal. It is therefore reasonable that he would consider the office less in terms of its potential for power than in terms of its place in the total scheme of government.

Executive Agents:

To this point the general subject has been the rapid removal of legislative restraints from executive discretion in the field of foreign relations. Although unmentioned until now, executive agents were an important catalyst in this release. The employment of special presidential agents, officially unknown to the Senate, served both as a recognition and a reinforcement of the President's control over international discourse. Coupled with the withdrawal of congressional oversight, executive or 'secret' agents increased the information gap between

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<sup>41</sup>Compilation of the Messages and Papers of the Presidents, 1789-1897, ed. James D. Richardson (Washington, D. C., 1907), II, 777.

President and legislature.

Beginning with Washington's first year as President, special agents served as executive aids. Their initial use was a resumption of practices common since the formation of the United States. They were sent abroad at the President's will, without Senate nomination, on diplomatic, semidiplomatic, or merely information gathering missions. They were often, but by no means always, sent as secret operatives.<sup>42</sup> Because of this variation, because they were asked to handle all manner of diplomatic tasks, and because by the end of the nineteenth century they sometimes received official titles, executive agents are not easily defined. They may be described simply as persons engaged for diplomatic business without nomination to or confirmation by the Senate. In other words, due primarily to the temporary character of their duties, they have not been considered as holding office within the meaning of the constitutional clause (Article II, section 2) covering the appointment of officers.<sup>43</sup>

Washington appointed Gouverneur Morris on October 13, 1789, as his private agent to Great Britain

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<sup>42</sup>I have drawn my discussion of special agents almost exclusively from the definitive work by Henry M. Wriston, Executive Agents in American Foreign Relations. See also Corwin, President: Office and Powers, pp. 71, 207.

<sup>43</sup>Wriston, Executive Agents, pp. 162-66, 170-72, 177, 180.

without consulting the Senate. Morris was the new nation's first executive agent, his mission to sound out the possibilities of an Anglo-American commercial agreement. In making the appointment, Washington fell back upon the country's revolutionary tradition of special missions and secret agents.<sup>44</sup> Resumption of the custom had been anticipated by John Jay in his writings in the Federalist, and evidently no one objected to Morris's appointment except William Maclay, who sourly remarked that he was "half pimp, half envoy."<sup>45</sup> Thereafter, the designation of executive agents became commonplace. By the close of Washington's second administration thirty-eight special agents had been utilized, and before the first congressional discussion of the practice, which did not occur until 1818, ninety-one additional executive agents had been appointed. The missions at times involved a group of individuals so to place the practice in terms of distinct agencies, the government employed sixty-four over the years, 1789 through 1818.<sup>46</sup>

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<sup>44</sup>National Archives and Records Service, List of Documents Relating to Special Agents of the Department of State, 1789-1906, comp. Natalie Summers, National Archives Publication No. 51 - 17 (Washington, D. C., 1951), p. 118; American State Papers, Foreign Relations, I, 121-22; Wriston, Executive Agents, pp. 104-05.

<sup>45</sup>No. 64, The Federalist (Cooke), pp. 434-35; Maclay, Journal, p. 389; Wriston, Executive Agents, p. 210.

<sup>46</sup>List of Documents Relating to Special Agents, pp. vii, 1-199. These totals do not include ceremonial, commercial, nor consular agents, nor agents on boundary and claims commissions, nor commissioners sent to represent the United States at international conferences.

Despite this ample number of instances, the subject of executive agents was not debated in Congress until Henry Clay introduced it in March 1818, and then the debate was only a show piece for Clay's ambitions.

The act which originally provided compensation for agents was enacted by the First Congress in July 1790.<sup>47</sup> Even then the legitimacy of their use was not discussed. A modern student of executive agents asserts that the House assumed they were providing for the unexpected, essentially secret, business of fully responsible diplomatic emissaries, not for persons who would not be nominated to the Senate.<sup>48</sup> The debates in the House -- though imperfectly recorded -- clearly show this judgment to be correct, but more pertinent is the revelation that secret foreign activities were assumed and commended by all. In fact the Contingent Fund established by Congress was sometimes called the "secret service fund."<sup>49</sup>

In his first annual message Washington asked for an appropriation to compensate officers abroad, and for "a competent fund designated for defraying the expenses

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<sup>47</sup>Annals of Congress, 1st Cong., 2nd sess., July 1, 1790, 2292.

<sup>48</sup>Wriston, Executive Agents, pp. 208, 695.

<sup>49</sup>Annals of Congress, 15th Cong., 1st sess., March 24, 1818, 1467; 15th Cong., 2nd sess., February 11, 1819, 1151, in which the reporter inserted the statement that the Contingent Fund was "generally called the secret service fund;" Register of Debates, 21st Cong., 2nd sess., 295. Cf. Wriston, p. 695.

incident to the conduct of our affairs."<sup>50</sup> When the House acted on this recommendation there was a good deal of discussion about general or specific appropriations for various ministerial ranks and about whether or not the arrangement of the diplomatic corps was a senatorial prerogative in concert with the President. Government frugality and House control over the purse strings were the fundamental basis of opposition, as the reported speeches indicate.<sup>51</sup> Nonetheless, when a select committee reported a bill authorizing the President to draw on a contingent fund of up to \$40,000, providing specific accounting only when he might feel that public disclosure would be advisable, it was quite apparently expected that the monies would be used for secret work. Even opponents of a general appropriation assumed this. For example, Thomas Scott of Pennsylvania said, "I know occasions, at times when the Legislature is not sitting, will present themselves, when money for secret services may be required; yet, in these cases, proof must be made of the expenses before they will be allowed in account. . . ."<sup>52</sup> However, as the bill was finally written, the only proofs required were certificates from the Secretary of State signed by the President that indicated gross amounts

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<sup>50</sup>Annals, 1st Cong., 2nd sess., January 8, 1790, 933; American State Papers, Foreign Relations, I, 11-12.

<sup>51</sup>Annals, January 19, 1790, 1062-66; January 26, 1790, 1081-85; see esp. Roger Sherman, 1085.

<sup>52</sup>Annals, January 27, 1790, 1091.

expended without a description of purpose.

The Representatives had debated the extent of discretionary powers in terms of governmental checks and balances and public control, not in terms of secrecy. Executive discourse with other nations in a strictly confidential way, and the funds to implement this, were accepted by everyone. What was not accepted by a minority was loosened control over the public purse. Still, although the act establishing the Contingent Fund prescribed specific accounting, it permitted unquestioned presidential discretion, in the national interest, over cases where funds from the Treasury could be withdrawn without designation. This loophole, combined with the President's control over information from the State Department, insured preeminent executive initiative in foreign affairs.

The basic act, providing a fund of \$40,000, was extended by subsequent Congresses, and, at the end of each accounting period, the government transferred unexpended amounts to its surplus account while Congress then made a new appropriation to the fund. Eventually the House raised the total sum at the President's command to \$50,000; but after the War of 1812, it reduced the Contingent Fund to \$30,000.<sup>53</sup> Probably the reduction was a reaction to

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<sup>53</sup>For Contingent Fund Acts, see Annals, 1st Cong., 2nd sess., July 1, 1790, 2292; 2nd Cong., 2nd sess., December 7, 1792, 740, and February 9, 1793, 1411-12; 3rd Cong., 1st sess., March 18, 1794, 1422-23. On mode of accounting for Contingent Fund, see Albert Gallatin to Thomas Jefferson and Jefferson to Congress, both

President Madison's expenditure of the entire fund, a large amount relative to the federal budget, for the useless John Henry letters.<sup>54</sup> As congressman Charles Mercer said in 1820, the only secret the United States Government had ever purchased was a swindle that made the Administration look foolish.<sup>55</sup> Mercer was unusually sceptical about the value of state secrets to be sure, but undoubtedly the shame produced by the Henry-Crillon plot encouraged Congress to restrict the amounts available in the fund for contingencies.

Nevertheless, no one challenged in principle confidential presidential control of limited funds for missions abroad, even when the issue of executive agents was broached by Henry Clay in the spring of 1818. A three-man commission had been sent by President Monroe and Secretary Adams to investigate the character of the new South American republics. Though this was done in part to placate Clay and other proponents of recognition, Clay took it as an opportunity to vent his hostility toward the Administration and

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February 25, 1802, Jefferson Papers, microfilm, reel 42, vol. 121, fols, 20854-55, DLC. For reduction of contingent appropriation from \$50,000 to \$30,000, see Annals, 15th Cong., 2nd sess., February 11, 1819, 1151. The debate on this amendment to the act was not reported.

<sup>54</sup>For a full account of the hoax, see Samuel E. Morison, "The Henry-Crillon Affair of 1812," in By Land and by Sea: Essays and Addresses by Samuel Eliot Morison (New York: A. Knopf, 1953), pp. 265-86.

<sup>55</sup>Annals of Congress, 16th Cong., 1st sess., February 3, 1820, 1054-55.

to further his own political fortunes.<sup>56</sup> As a result the arguments lacked depth, Clay's critique was insincere, and supporters of the Administration avoided a substantive discussion by ignoring the constitutional veneer in which he surrounded his position.<sup>57</sup> Actually, as Clay raised the issue, it did not impinge upon the President's acknowledged power to use confidential agents. Clay's objection was founded upon the argument that the mission was of a general public nature, hence the Senate should have had the privilege of approving the appointment of the commissioners chosen by the President. If the special agents to South America had been spies paid secretly out of the Contingent Fund, then the mission would have been entirely proper in Clay's eyes. In fact, he thought this would be the most effective mode of operating.<sup>58</sup>

Clay obviously assumed the Contingent Fund was appropriated primarily for secret governmental activities abroad -- official in the broadest sense, but secretive in essence. This conception of the fund, though firmly established from the beginning, was most often revealed by the absence of controversy. Years later, however, it was

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<sup>56</sup>John Quincy Adams, Memoirs (C. F. Adams), IV, 70-71; Ammon, James Monroe, p. 428; Wriston, Executive Agents, p. 220.

<sup>57</sup>See, e. g., John Forsyth's reply to Clay, his stress on expedience, Annals of Congress, 15th Cong., 1st sess., March 23, 1818, 1467. Also Wriston, Executive Agents, p. 220.

<sup>58</sup>Annals, 1465-66.

forcefully promulgated by President Polk when the House of Representatives made an effort to gain a specific accounting of payments from the fund. On April 9, 1846, the Representatives asked Polk to account for all sums disbursed under his predecessor's certificate during a period when Daniel Webster was Secretary of State. Backed by his Secretary, James Buchanan, Polk refused the request. He told the House that the Contingent Fund Act made the President the sole judge of the utility of keeping the expenditures concealed. There was no appeal from this discretionary power, and since it was specific, he said, it must have been prescribed for a purpose.<sup>59</sup> "The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity."<sup>60</sup>

Polk expressed what American statesmen and politicians believed to be axiomatic. Moreover, most of them thought secret diplomatic activity was not inconsistent with democracy and popular sovereignty. If only foreign agreements were basically open, negotiation could be secretive,

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<sup>59</sup>For a full summary of and extensive quotes from Polk's message, see Wriston, Executive Agents, pp. 265-66. Cf. Edward C. Mason, "Congressional Demands upon the Executive for Information," in Papers of the AHA, V (October, 1891), 36-37. See The Diary of James K. Polk During His Presidency, 1845 to 1849, ed. Milo Milton Quaife, 4 vols., in Collections of the Chicago Historical Society, (1910), 331-34.

<sup>60</sup>Quoted in Wriston, Executive Agents, p. 266.

not as a means for deceiving the citizenry, but for deceiving other nations in the interest of the national welfare. Whenever it did occur to politicians that concealed diplomacy could be a way of distracting the nation from an awareness of special interests or governmental blundering, discussion of the idea always became bogged down in partisan political warfare, and even then the overriding axiom -- governments must have secrets -- remained basically untouched. Consequently, leadership over foreign policy came increasingly from an Executive regnant.

## Chapter VI

The House of Representatives  
Calls for the Jay Treaty Papers

In the preceding chapter on attitudes toward secrecy in foreign relations, the idea was developed that the information gap between legislative and executive branches of the government, which gave the executive a distinct superiority, did much to aid the eventual triumph of a latitudinarian (Hamiltonian) view of executive authority over international affairs. Following the outbreak of European war and after President Washington had issued his Proclamation of Neutrality, the theory of liberal executive power itself and its opposite were thoroughly aired in 1793 in newspaper articles written by Alexander Hamilton on the one hand and James Madison on the other.<sup>1</sup> At the time, Hamilton took the position that management of foreign relations is by nature an executive function. The legislature is not "the organ of intercourse between the UStates and foreign Nations," nor is it "charged . . . with making or interpreting Treaties." In Hamilton's view all initiative must come from the presidential office, and to support this he interpreted the opening clause of Article II of the

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<sup>1</sup>For a fine capsuled summary of the "Pacificus" and "Helvidius" articles, written by Hamilton and Madison respectively, see Corwin, President's Control of Foreign Relations, p. 28.

Constitution not merely as descriptive but as a positive grant of power. So, where the Constitution does not provide otherwise, the powers should devolve upon the Executive; where it does provide otherwise, as in the Senate's participation in making treaties, the legislative authority should be narrowly construed.<sup>2</sup>

Writing at Jefferson's request to undermine and weaken the structure of Hamilton's theories, Madison held that the President was fundamentally the agent of Congress in establishing foreign policy. The most important powers, the powers to make treaties or war, Madison wrote, could not possibly be encompassed by any proper definition of executive powers. They were clearly legislative, or, as in the case of treaty-making, at least partially so. In foreign, just as in domestic affairs, the Executive should be little more than the instrument for fulfilling Congress's wishes.<sup>3</sup>

The broad interpretation of executive powers was of course basic to presidential control of foreign relations. The use of executive agents, for example, could be reconciled only with such a constitutional interpretation. However, working as both a cause and a consequence, total presidential discretion over the information Congress

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<sup>2</sup>See "Pacificus" No. 1 in Papers of Hamilton (Syrett and Cooke), XV, 33-42, esp. 37, 42.

<sup>3</sup>"Helvidius" Nos. I, II & III in Letters and Other Writings of James Madison (Congr. ed.), I, 614-40, esp. 614-15, 639-40.

received about foreign affairs reinforced executive leadership. In this particular, the authority of the President to determine what information should be forwarded to Congress was firmly established by the close of the party battle over fulfillment of the Jay Treaty. At that time the foremost issue was a constitutional one: if a treaty required an act of Congress to be put into effect, was Congress obliged to take action when the treaty had been duly sanctioned by the Senate and ratified by the President?<sup>4</sup> This was the basic question, but there was also an ancillary issue of great importance raised about presidential control over the flow of information between the State Department and the lower house of the legislature. Was it the President's ultimate privilege to determine just what foreign-affairs materials Congress could have access to? Concerning the primary issue, the historical development has tended away from the interpretation taken by Washington's administration, but on the secondary issue, the precedent established -- a refusal to transmit to the House any of the papers related to Jay's work in England -- has been extended to the point where Presidents have denied information to the Senate, their constitutional partner in international affairs.<sup>5</sup> Historians have noted this

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<sup>4</sup>For a summary of the constitutional issue and of Hamilton's expression of it, see Corwin, President's Control of Foreign Relations, pp. 92-98.

<sup>5</sup>Corwin, President, Office and Powers, pp. 182,

development and have correctly assessed the importance of the precedent; nevertheless, though acquiescence in Washington's refusal to submit the papers firmly established presidential control over information, the Senate was already receding to a subordinate position, as I have said, because it was no longer thought safe for secrets.

Jay's treaty came as a response to a long-standing movement for retaliation against British commercial restrictions on American trade and British violations of the peace treaty of 1783. The public protest against the Jay Treaty provisions, its ratification, and the organized opposition to its implementation brought the alignment of the new political parties into sharper focus than at any previous time. The Jay Treaty was, therefore, a product of both international developments and certain facets of domestic politics.<sup>6</sup>

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428-29, n. 41; Arthur Schlesinger, Jr., "Congress and the Making of American Foreign Policy," 82-83. For a different viewpoint on the same circumstance, see Raoul Berger, "On War and Treaties: The Constitution is Clear Enough," The Nation, March 26, 1973, p. 394.

<sup>6</sup>See Noble E. Cunningham, Jr., The Jeffersonian Republicans: The Formation of Party Organization, 1789-1801: (Chapel Hill, Univ. of North Carolina Press, 1957), p. 78; Samuel F. Bemis, Jay's Treaty: A Study in Commerce and Diplomacy, 2nd ed. (New Haven: Yale Univ. Press, 1962); Jerold A. Combs, The Jay Treaty: Political Battleground of the Founding Fathers (Berkeley: Univ. of California Press, 1970), pp. 31-136. For a general narrative, I relied heavily on this most recent work on the treaty. For George Washington's view of the treaty, I depended upon James T. Flexner, George Washington, Anguish and Farewell (1793-1799) (Boston: Little, Brown, 1972), pp. 203-276.

Led by Jeffersonians, the movement to take commercial action against Great Britain gained an overwhelming impetus after France went to war with the British early in 1793. Although unfavorable public opinion tended to swing back and forth between the two belligerents as one or the other transgressed American rights and interests, it soon fixed upon Great Britain. In the winter of 1793 the English negotiated a truce with Portugal unleashing as a by-product the Algerian corsairs upon Atlantic, and largely American, shipping. Even Anglophilic Federalists found the British action difficult to explain. It appeared calculated to hurt American trade with France.<sup>7</sup> England's no-holds-barred maritime war with France further antagonized Americans. His majesty's government absolutely rejected the principle "free ships make free goods" as being an unjustified innovation in international law; but what was more aggravating, the British government encouraged unrestrained privateering and defined contraband loosely to mean anything that would possibly aid the enemy's war effort. This included foodstuffs.<sup>8</sup> So Congress began in 1794 to examine ways to act coercively against British commerce.

Hamilton and his friends, certain that English imports were vital to the United States government's fiscal stability, were hard pressed to stave off resolutions

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<sup>7</sup>See Combs, Jay Treaty, p. 116.

<sup>8</sup>Ibid., pp. 138-40.

calling for discriminatory duties. Successfully organizing public opinion, they were able to prevent a Republican victory in Congress, yet they were not strong enough to permanently quash the idea of commercial discrimination. Republican hopes for retaliation came to life again on news, in February 1794, of a secret order-in-council of November 6, 1793, which brought about wholesale seizures of American vessels in the French West Indies. A further provocation arose with news of Canadian preparations for border hostilities.<sup>9</sup> A general embargo for one month passed through Congress in March 1794 as Federalists felt compelled to go along with the country's virulent anti-British attitude. Republicans, nonetheless, were not at all satisfied with an embargo; they wanted commercial warfare with England. To defeat this policy a number of Federalist Senators approached Washington, asking him to initiate a special mission to their seemingly bellicose old motherland.<sup>10</sup> At first Washington evidently believed the British were bent on war with the United States; negotiation then seemed a fruitless course to him. He soon changed his mind, however. After learning of the relaxation of the orders-in-council of November 6, 1793, and of George Hammond's statement to Rufus King that his government had not authorized the Governor of Canada's provocative speech to the Northwestern Indians, the

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<sup>9</sup>Ibid., pp. 120-21.

<sup>10</sup>Ibid., p. 121; Bemis, Jay's Treaty, pp. 265-66.

idea of negotiating through a special envoy seemed sensible.

After considering Hamilton for the post but then realizing, as Hamilton himself knew, that he was a political liability, Washington proposed John Jay to the Senate. Following a battle over the choice, Jay was approved April 19, 1794.<sup>11</sup> Jay's instructions were not placed before the Senate because the Federalist leaders there felt certain they would have difficulty passing them. As a result, wholly for reasons of expediency, they consciously surrendered the Senate's right to review instructions for foreign missions, further undermining the upper house's consultative role. Instead, a small number of Senators friendly to the Administration talked informally to Jay about his instructions, and one month after his nomination he sailed for England.<sup>12</sup>

The treaty John Jay was able to obtain was not nearly as favorable to the United States as Americans had come to expect in view of the difficulties England was having with France. Hamilton was disappointed by it, and Washington did not like it when he finally saw a copy of the agreement four days after Congress had adjourned. He and

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<sup>11</sup>See Combs, Jay Treaty, pp. 125-27; Bemis, Jay's Treaty, pp. 270-72; Hayden, Senate and Treaties, p. 71.

<sup>12</sup>See Rufus King, The Life and Correspondence of Rufus King, Comprising His Letters, Private and Official, His Public Documents, and His Speeches, ed. Charles R. King (1894-1900; rpt. New York: De Capo Press, 1971) I, 521; Hayden, Senate and Treaties, pp. 69-71; Swanstrom, "United States Senate," pp. 121-22.

Secretary Randolph decided to conceal the terms from the public until they presented them to the Senate at a special session called for June 8, 1795.<sup>13</sup> Despite Washington's stringent precautions to prevent disclosure, fairly accurate rumors of aspects of the agreement had been circulating since early in the year.<sup>14</sup> On the strength of these, Republicans set about massing opinion in opposition to the treaty. They hoped popular revulsion would prevent ratification and redound as well in their party's favor. Federalists did all they could to forestall this result by making it impossible for the public to gain access to the actual terms. The Senate studied the treaty in closed, executive sessions -- there was no procedural rule requiring this -- and Senators were bound to secrecy outside the chamber.<sup>15</sup> Republican supporters tried to make capital of this. They stated that the treaty had to be extremely disadvantageous, since otherwise its terms would be

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<sup>13</sup>Combs, Jay Treaty, pp. 159-60.

<sup>14</sup>Aside from his one confidant, Edmund Randolph, Washington withheld the treaty terms even from his department heads. See Madison to Monroe, December 20, 1795, Madison, Letters (Congressional ed.), II, 64. Also Flexner, George Washington, Anguish and Farewell, pp. 207, 222. The clerk's reading of Washington's message, which transmitted the treaty and some of the documents, proceeded for a time until it was halted and the injunction of secrecy was ordered. Journal of the Executive Proceedings of the Senate of the United States of America (Washington, D. C.: Duff Green, 1828), I, 178, 191.

<sup>15</sup>King, Life and Correspondence, II, 9-10. See also Combs, Jay Treaty, p. 161.

publicized.<sup>16</sup> They compared the government's conduct in not openly debating the agreement unfavorably with French practice.<sup>17</sup> A number of writers dwelled upon the impropriety of concealed deliberations in a country with a representative government. Senator John Langdon wrote to Monroe in France, "We need not, we ought not, to fear the people (whose Agents we are). . . . Secrecy and mystery in our sort of Government I consider as a curse." Benjamin Franklin Bache argued that secrecy negated the principle of popular sovereignty. "Secrecy," he said, "supposes an inferior." So by concealing the treaty the Senators had placed the people, supposedly sovereign and thus supreme, in an inferior position. This was the practice of kings, Bache concluded.<sup>18</sup> Others, writing in the Aurora through a week of newspaper issues, reiterated the incompatibility of secrecy with the form of federal government. "There is no authorized secrecy in our government, & to infer the right of secrecy from the practices of other nations, is

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<sup>16</sup> (Philadelphia) General Advertiser. Aurora, June 16, 18, 20, 1795; (New York) Argus, or Greenleaf's New Daily Advertiser, June 24, 1795; Pierce Butler to James Madison, June 12, 1795, Presidential Papers, James Madison, microfilm, ser. 1, reel 5, DLC.

<sup>17</sup> Aurora, June 16, 1791.

<sup>18</sup> Aurora, June 22, 1795. In an editorial a week and a half later, Bache, commenting on the Franco-Prussian peace treaty, assumed that there were some secret articles. This brings into question the sincerity of his comments on the Senate's procedure. See ibid, June 12, 1795. Langdon to Monroe, June 24, 1795, in Mayo, John Langdon, p. 266.

a prostitution of republican principles."<sup>19</sup>

Upon approval of the treaty, subject to elimination of an especially objectionable article, the Senate resolved against permitting publication of the terms. Rufus King and Hamilton thought this decision, pushed through by the Federalist majority, was a great mistake, and they succeeded in persuading Washington of the correctness of their opinion. But, just as the Administration was about to release an official text, Pierce Butler of South Carolina sent a copy to Madison, and Senator Steven T. Mason, deliberately defying the special injunction, opened the treaty to the public by handing a copy to Bache's newspaper.<sup>20</sup> With the treaty publicized, Bache called the Senate's procedure "a studied parade and ostentation of contempt for the sentiments of the people at large."<sup>21</sup>

The most recent student of the Senate's early history concludes that the Republican agitation over non-public deliberations was more of a protest against the treaty than against secrecy as such.<sup>22</sup> Certainly it is true

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<sup>19</sup>Aurora, June 20, 1795.

<sup>20</sup>King, Life and Correspondence, II, 10; Combs, Jay Treaty, pp. 161-62. See also Dice R. Anderson, "Edward Randolph, Secretary of State, January 2, 1794, to August 19, 1795," in The American Secretaries of State and Their Diplomacy, ed. S. F. Bemis (New York: Knopf, 1927-29), II, 141.

<sup>21</sup>(Philadelphia) General Advertiser. Aurora, July 4, 1795.

<sup>22</sup>Swanstrom, "United States Senate," pp. 248-49.

that once the Jay Treaty was officially publicized the opposition focused upon its provisions and no longer mentioned the Senate's executive sessions. But this would be expected. The agreement with the British was part of a much larger conflict between political factions hoping to gain national support for their ideas about relations with Great Britain and France. Questions about the correct procedure for popular control of foreign relations took a back seat. Still, they were raised from time to time as the contest over the treaty dragged on into the following year. When they were suggested, however briefly and whatever the motivation, the principles expressed were not strained to fit opposition to the treaty. They were reasoned with the context of republican theory. They simply were not developed very far nor discussed deeply with any give and take from both sides. The entire debate came up anew, in any case, when in 1796 Republicans again sought some way to circumvent John Jay's work and at the same time promote the status of the House of Representatives.

Washington having signed the treaty, the second opportunity for the opposition to block it came from a need of a House appropriation of revenues in order to establish the arbitration commissions provided as part of Jay's agreement. The deliberation about this appropriation turned into a full dress and open debate over the Jay Treaty and over the propriety of the Representatives' call for State Department papers on the negotiation.

On December 8, 1795, in his annual message, Washington formally informed Congress of his acceptance of the treaty and told the lower house to expect to receive an official copy as soon as it arrived from England signed by George III.<sup>23</sup> This did not occur until March, but the struggle to come was presaged by an acrid little controversy in the Senate over its reply to Washington's annual message. The Senate doors were open at a regular session for the first time in its existence; therefore, objections to the reply's wording became a successful attempt by Republican Senators to publicize their previous summer's opposition to the treaty. Short though the debate was, it represented from the Republican viewpoint, as Madison wrote to Jefferson, the "first fruits" of public Senate proceedings.<sup>24</sup> It also represented part of an amazing, unprecedented personal attack which Washington had sustained since he had placed his signature on the treaty. This began when Stevens T. Mason moved to have several clauses of the answer to Washington expunged.<sup>25</sup> Pierce Butler, one of the Senators who, besides Mason, had exposed the agreement with England when Federalist Senators had tried to keep it from the

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<sup>23</sup>Annals, 4th Cong., 1st sess., 11.

<sup>24</sup>Madison to Jefferson, December 13, 1795, in Letters of Madison (Congressional ed.), II, 63.

<sup>25</sup>The exposition in reply to the President's message, Mason's resolution, and the entire debate over the resolution, can be seen in Annals, 4th Cong., 1st sess., December 11, 1795, 15-23.

public, objected to the accolade "firm" applied to the President's conduct. Where and when had Washington been firm in pressing American rights or in confirming France's fight against despotism? He had been firm, Butler said, only in opposing the will of the American people. This speech outraged Senator Jacob Read. The European belligerents would have drawn the United States into war if not for the treaty, he countered; and what proof was there that a majority of the people opposed it? Whatever popular opinion was, what significance did it have in regard to the treaty anyway? On the last point Read's words revealed a philosophy of representation congenial to a widely accepted notion of a Senator's role and to Federalism, but foreign to the localism of so many Republicans. In affairs affecting the nation, Senators should exercise their own judgment and disregard their constituents, Read believed; they should represent the "Union." Only in "local questions" should they consider their constituents' views. In the area of foreign affairs, moreover, the people were not knowledgeable. Expertise lay wholly within the government. "The people could not," Read concluded, "deprived of proper information, possibly form an opinion that deserved weight. . . ." <sup>26</sup>

This sort of thinking assuredly influenced the Administration's original effort to keep Jay's treaty from the public. In addition, the outlook reinforced itself.

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<sup>26</sup>Annals, 19-20.

Since the public was considered to be ignorant of the general principles governing international relations, it would seem best to keep foreign agreements confidential, in order to avoid misunderstanding, at least until all was completed. Most Republican politicians would not have disagreed substantially with this appraisal of the public's competence in the field of foreign relations, but they evidently disagreed with the tactics of the administration because they themselves were forced to appeal to popular opinion in order to defeat the rapprochement with Great Britain. Perhaps too, from a wholly basic plane of political theory, as a group they were anxious to assert the participation of the House of Representative's in the decision-making process of the nation.

Because of Washington's decision to present the House with the original, not a copy, of the treaty, Republican leaders were obliged to wait from December until the first of March and wonder what strategy would be best. While Madison criticized the President's delay, he feared his party's support would dwindle. Finally, when Washington declared the treaty to be law, the opposition's course was still undecided.<sup>27</sup> Then, prematurely in Madison's view and and apparently entirely on his own initiative, Ed ard

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<sup>27</sup>See Madison to Jefferson, January 26, 1796; Madison to Monroe, January 26, 1796; Madison to Edmund Pendleton, February 7, 1796; Madison to Monroe, February 26, 1796, in Letters of Madison (Congressional ed.), II, 71-82. Also Combs, Jay Treaty, pp. 173-77.

Livingston offered to the Representatives a resolution requesting President Washington to submit to the House all papers related to the negotiation of the Jay Treaty. Madison did not approve of Livingston's action -- he hoped he would withdraw the resolution -- but when Livingston persisted in his course, Madison supported the call for the Jay Treaty papers.<sup>28</sup> Livingston first presented his resolution without qualification; then a few days later he added the proviso that the President could retain papers whose disclosure might interfere with ongoing negotiations.<sup>29</sup> At the close of the day's session Madison tried to generalize this qualification, making it possible for the President to withhold any documents he considered it in the national interest to sequester. The following day Madison's amendment to the resolution was voted down, but it would prevail in future practice because his wording would become the approved form for congressional requests for information from the Executive.<sup>30</sup> But in this instance the resolution

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<sup>28</sup>Madison to Jefferson, March 6 & 13, 1796, in Letters of Madison (Congressional ed.), II, 87-88.

<sup>29</sup>For Livingston's resolution and amendment to his resolution, see Annals, 4th Cong., 1st sess., March 2, 7, 1796, 426.

<sup>30</sup>Annals, March 7 and 8, 1796, 438. A Richmond, Virginia, merchant with Federalist sentiments later wrote Madison that Livingston's resolution as originally phrased was "extremely objectionable." Only Madison's qualifying amendment, he thought, could make "such a requisition Constitutional." See R [obert] Gamble to James Madison, April 4, 1796, Presidential Papers, James Madison, microfilm, ser. 1, reel 6, DLC. For Gamble's career and political position, see his letters to Madison, January 21 and February 7, 1797, ibid.

remained as Livingston had reworded it: all papers, which in no way reflected on existing foreign negotiations, were requested. The resolution did not provide for general presidential discretion.

Temporarily then, the thrust of the debate was shunted from the main problem of the lower house's constitutional role to its right to request and expect to receive executive documents on foreign negotiations. Nevertheless, the main question was always in the forefront of the Representatives' minds; the related question about the call for papers was secondary.

Some Federalists conceded the right of the House to call on the Executive for information about the treaty, but argued that the call's purpose must be made clear. Livingston said a purpose -- consideration of the treaty's constitutionality or of grounds for impeachment -- could not be stated until the Representatives scrutinized the papers. He admitted, however, that he had requested the papers because he believed the House had the power to use its own judgment whether or not to carry the treaty into effect.<sup>31</sup> Livingston acknowledged that the President should retain any information he thought improper to submit -- a concession the House was to explicitly include in future petitions for foreign policy information from the Executive, and which, once there was general assent to the practice of

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<sup>31</sup>Annals, March 7, 1796, 426-28.

withholding documents, meant absolute executive control of information.

Republicans proposed, one must assume sarcastically, that the information in the papers would quiet the people's anxiety over the treaty. They said that denial of the information would certainly further excite them.<sup>32</sup> Federalists on the other hand tried to play down the idea that the papers were in themselves important and play up what they thought to be the dangerous implications of the call. As William Vans Murray told the House members, the demand for the papers suggested the House had authority to evaluate and to accept or reject treaties.<sup>33</sup> This was the constitutional interpretation supporters of the Administration would not concede, and some of their number were emotional about it too. Daniel Buck believed that anarchy, chaos, and then despotism would result from a vote in favor of the resolution. Asserting the principle that each branch of the government ultimately derived its power and functions from the people, he said that the President was the people's expert in foreign affairs. The House was not, and would overturn popular will by assuming such a position. "As I consider the passing of this resolution a direct step towards the abolition of these sacred rights for which we have fought and bled, should I give my consent to it, the

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<sup>32</sup>See, e. g., speeches by William Lyman and William B. Giles, Annals, 428.

<sup>33</sup>Annals, 429.

blood which I have shed, and my own mutilated frame, would reproach me."<sup>34</sup>

Buck had added a popularly based twist and emotional pull to the argument of Washington and his supporters that the House of Representatives must not impose upon the Executive's clearly defined prerogatives and responsibilities. Treaties were the law of the land when ratified by the President and Senate acting in its executive capacity; therefore, they were paramount in authority and had no need of additional sanction from the lower house. To presume that they did would be to deny the principle of the separation of powers. The Republicans reasoned, to the contrary, that congressional and executive powers were cooperative with regard to treaties, so that, in areas where the Constitution explicitly empowered Congress to act, legislative approval was required. In their judgment the treaty power as defined by the Administration encroached upon the functions of the House by establishing into law matters which were clearly legislative in nature.<sup>35</sup>

These diametrically opposite viewpoints were sustained by the vagueness of the Constitution and by the doctrine of the separation of powers. It followed from the

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<sup>34</sup>Annals, 432-35.

<sup>35</sup>See, e. g., James Madison's full delineation of the constitutional positions, in Annals, March 10, 1796, 487-94. Also see A Review of the Question, In Whom Has the Constitution Vested the Treaty Power, ... by a Senator of the U. S. (1796), pp. 4-5, 7-11, esp. 21-22, 26-27.

latter that each branch had a duty to defend its characteristic functions, but the extent of the claims for the treaty-making power and the extent of the claims for the legislative function produced an irreconcilable dilemma.<sup>36</sup> At all events, the confused and problematic constitutional rules for completing international agreements gave the Republicans an ideal opportunity to press their demands for the chamber of the people's representatives. They thought they saw in the treaty a conspiracy against the prerogatives of the popular branch, and they acted, in their own view, to restore the House to its proper place in the constitutional system of checks and balances. The Federalists on their side saw this effort as an attempt to push the House forward out of line with traditional eighteenth-century conceptions of governmental balance.<sup>37</sup>

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<sup>36</sup>James Madison, on the floor of the House, said the principle of departmental autonomy was vital to the American political system; Annals, March 10, 1796, 487. Days later, William Findley said, "The express words of the Constitution will not support either position without a liberty of construction." Ibid. March 16, 1796, 589.

<sup>37</sup>See, e. g., Jefferson to William B. Giles, December 31, 1795; Jefferson to Monroe, March 21, 1796; Jefferson to Madison, March 27, 1796; in Writings of Jefferson (Ford), VII, 41, 67-68, 69; also Jefferson to Edward Rutledge, November 30, 1795, ibid., p. 40. [William Duane] A Letter to George Washington, ... Containing Strictures on His Address of the Seventeenth of September 1796, ... by Jasper Dwight of Vermont (Philadelphia, 1796), pp. 22-23. For the Federalist view, see Alexander Hamilton to Washington, Draft of Message, March 29, 1796, in Works of Hamilton (J. C. Hamilton), VII, 564-65; Washington to Charles Carroll of Carrollton, May 1, 1796, in The Writings of George Washington from the Original Manuscript Sources, 1745-1799, ed. John C. Fitzpatrick (Washington, D. C.: GPO, 1931-40), XXXV, 29-30; also his

When George Washington read about Livingston's resolution, he immediately sought Hamilton's opinion on what he should do. Washington dimly remembered a similar case in the past, when Hamilton was still Secretary of the Treasury.<sup>38</sup> The President was thinking of a House investigating committee's call for papers relevant to Major General St. Clair's defeat by Indians in November of 1791. At that time Washington had sought the views of all his cabinet members, because he recognized that his action would form an important precedent for executive-legislative relations. As he told his cabinet on the last day of March 1792, "He could readily conceive there might be papers of so secret a nature as they ought not to be given up."<sup>39</sup> After some consideration, the department heads unanimously agreed that the House, which had investigatory functions, might rightfully call for papers on a general basis. But they also believed that the President should transmit only "such papers as the public good would permit, & ought to refuse those the disclosure

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Farewell Address, September 19, 1796, ibid., p. 228; Fisher Ames' speech, Annals, 4th Cong., 1st sess., April 28, 1796, 1242-43, rpt. in Works of Fisher Ames (Boston: T. B. Wait & Co., 1809), pp. 63-64.

<sup>38</sup>Washington to the Secretary of the Treasury [Oliver Wolcott], March 3, 1796, in Writings of Washington (Fitzpatrick), XXXIV, 481-82.

<sup>39</sup>For the House resolutions, see Annals, 2nd Cong., 1st sess., March 27, 1792, 490, 493. For Washington's comment, see Jefferson's Anas, March 31, 1792, Writings of Jefferson (Ford), I, 189.

of which would injure the public." They further agreed that the House, or its committees, had no right to call directly on a department head -- the President must be the medium. Hamilton remarked, if Jefferson noted accurately, that he would never feel obliged to provide everything Congress requested, as the members might "demand secrets of a very mischievous nature." In any case, these were the principles unanimously decided upon though not published or communicated; and in the practical matter of the papers about St. Clair's military campaign against the Indians, Washington and his cabinet concluded that there was no reason not to furnish them to the committee.<sup>40</sup>

The congressional call for information about St. Clair's defeat, when the requested papers were submitted, and then Washington's refusal to the House, though not to the Senate, of all the Jay Treaty papers three and a half years later can be regarded as the remote origins of that troublesome "gray area" of our times, "executive privilege." Nevertheless, before Washington's influential decision not to grant, even in part, the lower house's call for information with respect to the Jay papers, the Representatives themselves brought their debate squarely around to consideration of the propriety of the resolution.

Abraham Baldwin thought the request for the papers

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<sup>40</sup>Writings of Jefferson (Ford), I, 189-90.

<sup>41</sup>Annals, 4th Cong., 1st Sess., March 7, 1796, 435-36.

was entirely unexceptionable. He told the House that secrets were out of fashion and that the more publicity the reasons behind measures received, the better.<sup>41</sup> Trying momentarily to evade an unfavorable reaction to Baldwin's assertions, Albert Gallatin said that the motion did not lay claims on executive secrets. If the President did decide to conceal information, then the Representatives would have to determine whether or not to ask for the secrets. Two days later, however, the Republican leader revealed his own advanced, democratic position by unequivocally expanding on the subject. The House had a certain right to ask for information because its cooperation was necessary in placing the treaty into effect, and in the course of the action, it had a right to judge the expediency of the treaty. Even if this were not granted, Gallatin concluded, because of its ultimate responsibility, the House "could not be denied the papers." It must be permitted to see the reasoning which led to the treaty's formation.<sup>42</sup>

Few other Republicans would join Baldwin and Gallatin in the lengths to which they would go to publicize foreign negotiations.<sup>43</sup> More typical was John Swanwick's

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<sup>41</sup>Annals, 4th Cong., 1st Sess., March 7, 1796, 435-36.

<sup>42</sup>Annals, March 7, 1796, 436; March 9, 1796, 465-74.

<sup>43</sup>John Heath, Republican representative from Virginia, was one; he said, "The request ... is a Constitutional right of this House ... founded upon a principle of publicity essentially necessary in this our Republic ..." Annals, March 8, 1796, 448.

opinion that there was no impropriety in making a call for the Jay Treaty papers, but the President should withhold those he thought it best to conceal.<sup>44</sup> The Federalists, however, preferred to draw attention to Baldwin's and Gallatin's idea, which to them seemed dangerously utopian. Baldwin was unrealistic, William Loughton Smith said; "he had reprobated all secrets in Republican Governments, though he admitted there might evils arise by divulging papers whilst a negotiation was yet pending." Negotiations, Smith told the House, must be by their nature and for the convenience of the parties involved, confidential. Because of this, the Founders at Philadelphia had properly assigned the task to the Executive, who must have unqualified discretion over the information he chose to send to Congress.<sup>45</sup> Another Representative, Ezekiel Gilbert, a New Yorker, chastened the two Republicans with a rationale for secrecy that by now seems a terribly overworked, almost hackneyed excuse for discarding principles. Fresher then, it must have carried much weight with the House members, who were at this time unquestionably hypersensitive to the fragility of their experiment in self-government and overconscious of American vulnerability in a hostile world. The New Yorker warned them that secrecy would always be necessary for the United States as long as negotiations were carried on with

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<sup>44</sup>Annals, 449.

<sup>45</sup>Annals, 439-43.

despotic governments.<sup>46</sup>

Robert Goodloe Harper thought Baldwin's equation between full publicity and republicanism was insincere. He ridiculed the theory by a reductio ad absurdum. He said that the arguments based on a need for information, and its importance to representative government, would apply to all the branches. The President could expect all House procedures to be open on his request and the Senate executive sessions must be public. Harper assumed no one in Congress would agree with this. His argument was backward-looking, to the English Parliament's tradition of protecting itself by seclusion from the King. It was also narrow in scope, for he made the question of publicity a matter solely of relations between government branches; he completely shied away from the question of information for the appraisal of the general public. Yet, in its peculiar way, Harper's justification for full presidential discretion over communications to Congress was based on the popular derivation of the President's power. The President alone was responsible to the whole nation, so he alone must make the choice as to what might be revealed and what should be concealed.

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<sup>46</sup>See Ezekiel Gilbert's words, Annals, March 7, 1796, 437. For a modern example, see Lyman B. Kirkpatrick, Jr., The Real CIA (New York: Macmillan & Co., 1968), pp. 300-01. The former Executive Director of the CIA wrote: "That such an organization is essential to our survival seems apparent as long as there are politicians dedicated to the destruction of our way of life, closed societies that cannot stand exposure to outside scrutiny, and an arms race developing mass-destruction weapons in secrecy."

Harper felt the information issue was not the real one anyway; it was the constitutional one of the Representatives' place in making international agreements. In this case, the House was duty bound, for the sake of the government's integrity, to carry the treaty, good or bad, into effect.<sup>47</sup>

A day later, Thomas Hartley, a Pennsylvanian in Congress from the first years, discoursed on the practice of nations, emphasizing that all relied at times and to varying degrees on secrecy.<sup>48</sup> Afterwards the debate turned back to the chief controversy, the one over the Founding Fathers' intentions concerning legislative participation in the formation of treaties. Representatives were aware of the significance of the correlation between representative government and open international negotiations, but they mentioned it only a few more times before Washington's final decision.<sup>49</sup> In his major speech supporting his motion, Edward Livingston argued that past practice conformed with the sense of his resolution. The House had been consulted, under an obligation to maintain executive confidence, on relations and agreements with the Indians and with the nations of the Barbary Coast. He thought the Representatives

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<sup>47</sup>Annals, March 9, 1796, 458-64.

<sup>48</sup>Annals, March 10, 1796, 475.

<sup>49</sup>See, e. g., Annals, March 14, 1796, 531, 554-55; March 15, 1796, 575; March 17, 1796, 622, 625; March 21, 1796, 642; (Boston) Independent Chronicle, March 28, 1796.

could be confided in. He would reverse this opinion thirty-five years later, shortly before his entry into Andrew Jackson's cabinet, when he would declare before the Senate that neither branch of Congress could be trusted with confidential executive affairs.<sup>50</sup>

The constitutional points made by each side have perplexed authorities ever since; for, as Madison said then, "No construction might be perfectly free from difficulties." In general, however, the Republicans sought to restrict executive power by limiting the treaty power. The Federalists, on the other hand, consistent in their attempts to fortify executive leadership, sought to place foreign agreements out of the reach of the House of Representatives. This was not a successful effort in the long run, but Washington's refusal to submit the treaty papers has proved to be a conclusive precedent.<sup>51</sup>

That Washington did not transmit any of the papers after Livingston's resolution passed the House astonished James Madison; he had expected some of the materials to be communicated. Nevertheless, Washington, who was conscious of the principle of executive control that he wanted to

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<sup>50</sup>Annals, March 18, 1796, 630-38; Register of Debates, 21st Cong., 2nd Sess., February 23, 1831, 253.

<sup>51</sup>For Madison's remark, see Annals, March 10, 1796, 493. Samuel Smith of Maryland admitted that a precedent set by George Washington would carry such weight as to be beyond dispute; Annals, March 17, 1796, 624-25. For a discussion of constitutional questions involved, see Corwin, President's Control of Foreign Relations, p. 92ff.

establish, did not want the principle obscured by the suspicion that there was something to hide in the papers. This he thought would be more likely to occur if he withheld a portion of the papers than if he withheld them all.<sup>52</sup> He fully explained his decision in a special message to Congress: diplomacy required care and secrecy, and it is for this reason that the process was placed exclusively in the hands of the President, aided and checked only by the Senate, a small body. Consequently, to concede to the House of Representatives the right of requesting and receiving information regarding negotiations would be to establish a dangerous innovation. Washington said all the papers were in fact laid before the Senate: he had no inclination to withhold information from those charged with the task of considering treaties, but to include the House was against his understanding of the Constitution as well as the sense of the members of the Philadelphia Convention.<sup>53</sup>

Washington's conclusion was considered prudent, common-sense reasoning. It was echoed and reinforced in the papers for Federalist readers: "Every individual has secrets; every head of a family; every corporation has secrets: Why are the doors of the Senate of Massachusetts

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<sup>52</sup>Washington to Hamilton, March 31, 1796, in Writings of Washington (Fitzpatrick), XXXV, 6-7.

<sup>53</sup>Madison to Jefferson, April 4, 1796, and Madison to Monroe, April 18, 1796, in Letters of Madison (Congressional ed.), II, 89-90, 96-97; Richardson, Messages, I, 186-87; Writings of Washington (Fitzpatrick), XXXV, 2-5.

shut? Why has the House of Representatives, and every legislative body throughout the Union, and I may say throughout the world, authority to shut their doors, and impose secrecy on their Members -- because the affairs they transact, frequently are of that nature, that an exposure of them would injure the people who have delegated to them that trust." The writer of this passage in a Boston newspaper accentuated the practical necessity of governmental secrets, while another in a later issue reminded the readers that the federal administration was exceptionally open in practice and because of this deserved the nation's trust.<sup>54</sup>

As Samuel Smith had foretold, Washington's decision would be overwhelming, although it did not quiet Republican objections.<sup>55</sup> With some isolated exceptions, newspaper comment before Washington had delivered his message was minimal, other than to note that the congressional discussions over Livingston's resolution were important.<sup>56</sup> But after the President's message the writings on the subject were profuse. Much of it was extreme to the point of

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<sup>54</sup> (Boston) Columbian Centinel and Massachusetts Federalist, April 16 & 20, 1796.

<sup>55</sup> For Smith, see n. 51 above.

<sup>56</sup> E. G., (Boston) Columbian Centinel, March 19, 1776; (Boston) Independent Chronicle, April 1, 1796; (New York) Weekly Museum, March 7, 1796; (Philadelphia) General Advertiser. Aurora, March 14, 1796. The last mentioned newspaper, the most prominent Republican organ, said of the debate, "The crisis is momentous, the liberties of our country under the constitution hang in awful suspense." No other newspaper contained special comments on the debates.

foolishness. William Duane called Washington's action despotic and Machiavellian. The President had resorted to "reserve" and "secrecy," the "cloaks which covered the wily mischiefs of politicians in all the governments of the old world." Other Jeffersonian partisans said that the country was in the throes of a monarchical coup, something dark and injurious was hidden in the treaty materials, and a plot had been hatched with the British against France.<sup>57</sup> The more thoughtful Republicans, however, expressed fears of excessive executive power and the need for popular surveillance of foreign relations. In general, they sought to reverse the Federalists' exclusive focus upon the government's more popularly elected branch as a threat to liberty, but even these writers revealed expectations of unnamed conspiracies in executive proceedings.<sup>58</sup> The conspiracy theories,

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<sup>57</sup> [William Duane] Letter to Washington, p. 10. (Mount Pleasant) Jersey Chronicle, April 2 & 16, 1796; (Boston) Independent Chronicle, April 14, 1796. See also Flexner, George Washington, Anguish and Farewell, p. 277.

<sup>58</sup>E. g., (Boston) Independent Chronicle, April 7 & 14, 1796. Conspiracy theories appeared in the (Philadelphia) General Advertiser. Aurora and the (New York) Argus, or Greenleaf's New Daily Advertiser. See especially "A Swine" in the Argus, March 17, 1796; also the five "Codrus" (v. "Cordus") articles originally printed in the Aurora, March 4, 9, 11, 15, & 21, 1796, and at later dates in the New York and Boston Republican-sponsored papers. For fully developed Federalist arguments, see "Yankee" I and II, (Boston) Columbian Centinel, April 13 & 20, 1796. A correspondent in the (New York) American Minerva, April 18, 1796, wrote of the Republican efforts: It is an attempt, as far as it goes, to concentrate the whole legislative authority in a part of the legislative body. ... If acquiesced in, there will be just cause to despair of the Republic." See also "An American," in ibid. These writers repeated the view of Federalist congressmen, such as John Williams, that

erroneous as they were, were an understandable product of the feeling that much of the reasoning and maneuvering leading to the Jay Treaty had never been in the open. Or, when the theories were purely politically motivated and intended for party gain, their influence was enhanced by this same sense of hidden processes. The fact that the events surrounding the development and completion of the treaty with England were comparatively public made no difference; they were not as public as doctrinaire republican philosophy would require. At the time, for example, a commentator whose thoughts were printed in two of the most widely-read Republican papers summed up all these ideas as he sought to defend the claims of the House of Representatives against those of the Executive:

The power vested is alleged, and acknowledged, to be subject to abuse. But would the liability to abuse be diminished by the exclusive exercise of the power by the President and Senate? The deliberations of these departments are conducted with secrecy. Secrecy is for ever opposed to full information. It forbids access to that very species of information which is the most desirable, viz. the feelings and opinions of the people, who are eventually to be rendered happy or miserable. The force of this remark is destroyed by applying it to the House of Representatives. The publicity of their proceedings invites discussion, and has often been found to draw from the private citizen interesting information.<sup>59</sup>

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power was more likely to be abused by the House than the Executive. It was asserted at the time that James Madison once held an equivalent opinion; see Annals 4th Cong., 1st sess., March 21, 1796, 644, 650. For just such a statement from Madison, see Madison to Jefferson, October 17, 1788, in Papers of Jefferson (Boyd), XIV, 19-20.

<sup>59</sup> (Philadelphia) General Advertiser. Aurora, March 29, 1796; also in (New York) Argus, or Greenleaf's New Daily Advertiser, April 4, 1796.

Within the chambers of the House, the Republican majority reasserted the members' right and duty to deliberate on the expediency of treaties, when called to act upon them, and reaffirmed their right to apply to the Executive for relevant information. Resolutions encompassing these conclusions, moved by Thomas Blount, were passed at the close of the session of April 7, 1796. Madison, prepared to debate at length, was disappointed to find that the Federalist members let the resolution go through without demur.<sup>60</sup> In a manner akin to the spirit of his Helvidius articles, Madison differed with Washington's recollection of the Founders' intentions, and he earnestly opposed the President's interpretation of the Constitution's treaty-making provisions. To his mind, jealousy over the powers of commerce, purse, and war was so great it would be inconceivable that the general expectation was to allow the President and Senate full authority concerning foreign agreements affecting these areas without any check from the House. Madison also felt that Washington's denial of the treaty papers was improper on several counts; but what was most significant for the future, he admitted that the President could and should withhold papers he deemed it in the national interest to conceal. "If the Executive conceived that, in relation to his own department, papers could

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<sup>60</sup>Annals, 4th Cong., 1st sess., April 6, 1796, 771-72; April 7, 1796, 782-83; Madison to Jefferson, April 11, 1796, in Letters of Madison (Congressional ed.), II, 94.

not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department. If the papers could be communicated without injury to the objects of his department, he ought not to refuse them as irrelative to the objects of the House of Representatives; because the House was, in such cases, the only proper judge of its own objects."<sup>61</sup>

Republicans tried to link their cause against the treaty with the cause of civil liberty everywhere. The Jay Treaty might end, they said, in the extermination of budding republicanism throughout the world -- even in the United States. "Beware then in carrying a treaty into effect with a government now engaged in crushing civil liberty. ... Beware of any principles or conduct on our part, that may ever so indirectly tend to favor what we profess so much to reprobate."<sup>62</sup> Nevertheless, owing to assiduous Federalist efforts and to the close connection in the minds of Westerners between Pinckney's treaty with Spain and Jay's with Britain, the Republican constituency withdrew their support from their congressmen's opposition to the Jay

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<sup>61</sup>Annals, April 6, 1796, 772-81.

<sup>62</sup>From "A Maryland Yeoman," in (Philsdelphia) General Advertiser. Aurora, May 4, 1796. Of course, William Duane's thought was a prime example of this sort of outlook: the cause of France was the cause of freedom, and the cause of freedom was the cause of humanity; see, e. g., his Letter to Washington, p. 37.

Treaty.<sup>63</sup> Thus, the House eventually approved the necessary funds. Nevertheless, for our purposes, two distinct principles had been established in the long party battle. The House might call for such general information on foreign affairs as it wished; yet, presidential discretion over what information might actually be communicated was unqualified -- a seemingly countervailing autonomy that in fact placed the executive departments virtually outside congressional control in the area of international relations.

The realist position had been preempted by the Federalists; the Republicans often chose more idealistic grounds. The evidence is slim concerning the common level of the Republicans' opinion of French practice, but they seem to have felt that the diplomatic process was more open in France. In fact, American practice was decidedly open in comparison with European; yet there were ambiguities and anomalies in terms of American principles that political thinkers were not prepared to face. The practical problem of competing in the international arena seemed paramount at the time; and republicans -- of all degrees -- seemed to lack confidence in their ability to confide in the general populace and still protect the national interest. As a result, doubts about the benefits of popular control

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<sup>63</sup>Albert Gallatin papers, NHi, Box 4; see letters and petitions Nos. 6-8, 10, 13-15; Flexner, George Washington, Anguish and Farewell, p. 276; Stephen G. Kurtz, The Presidency of John Adams: The Collapse of Federalism, 1795-1800 (1957; rpt. New York: A. S. Barnes & Co., 1961), pp. 67-69. Cf. Combs, Jay Treaty, pp. 185-86.

in domestic affairs that would have otherwise been rejected out of hand were almost universally accepted when it came to international relations.

## Chapter VII

## Expediency Plays Its Role in Views of Secrecy

## The XYZ Papers and the Purchase of Louisiana

The last years of Federalist control of the government -- the years of Washington's retirement and John Adams's administration -- were marked by hardened party lines, intensified party organization and strife, foreign meddling in internal American affairs, undeclared war with France, and serious governmental attacks on individual civil liberties. Strained by the circumstances, the new nation faced the threat of civil war, but the threat evaporated as the trend in events swiftly changed. When unchecked militarism seemed probable, Adams succeeded in restoring amicable relations with the French. Then the Democratic-Republican party's transfer by peaceful means from opposition to office restrained political strife by tangibly defining the limits of its reasonableness and legitimacy.

Despite the extreme political tensions these events produced, issues involving secrecy in government were few; but these few revealed to a significant degree the true attitudes of the nation's politicians towards the problem. It was for many primarily a question of whose ox was gored. The indicative developments from Adams's administration into Jefferson's were threefold. In the first place, the principle of executive control over the records of foreign

discourse, firmly fixed by Washington's refusal of Jay's papers, became temporarily muddled during the political infighting over relations with France, as some Federalists shifted to a once repudiated ground on the chance of embarrassing the Jeffersonians. Secondly, the Senate's casual practice of deliberating over treaties behind closed doors was codified into formal procedure by additions to the standing rules. Finally, the Republicans gained office promising more open government than before, but they soon adjusted their ideals to the inflexible realities of turbulent worldwide affairs.

The Undeclared War with France and the Treaty of Mortefontaine

When George Washington retired, he was no longer talking as a man above partisan expression, but in strongly political tones. His Farewell Address could be properly regarded as a manifesto of Federalism. Undoubtedly the vituperation he had absorbed after his acceptance of Jay's treaty had affected his outlook. Also the sectional jealousies the controversy unleashed seemed fearful to him; for there had been numerous and intense expressions of sectional resentments when the House deliberated over appropriations for the settlement with England.<sup>1</sup> Therefore

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<sup>1</sup>E. g., during the floor debate over Livingston's resolution, Representative Isaac Smith (N. J.) ridiculed the Virginia members for statements of their "love of liberty" when the "groans of three or four hundred thousand black people held in bondage ... afflicted his ears. ..."

he warned the nation against indulging local feelings. He declared that not only factional spirit with the country, but also partisan sentiments towards other nations, would assuredly create irrational attitudes dangerous to the union of the states. Finally he advised against involvement in foreign intrigues and conflicts. For security of popular liberties and for continued peace, he recommended reliance upon a strong union with a comparably strong government.

Of course, all the tendencies Washington abhorred were in evidence when he left office, and they caused him before leaving to compromise his own rules of official conduct. He felt constrained to publish diplomatic correspondence in the newspapers. He did this to parry the actions of Pierre Adet, France's minister in America, and to support a candidate for the presidency who was also the standard-bearer of a political party.

Assuming, as did his home government, that a

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Annals of Congress, 4th Cong., 1st sess., March 18, 1796, 627-28. Many letters to the newspapers on the subject of the Jay Treaty showed sectional antagonism against Southerners or Northerners. See esp. "Spectator" and "An American" in (Philadelphia) Gazette of the United States, March 23, 1796 and April 14, 1796. "Harrington," in the same paper, dated March 22, 1796, wrote, "To degrade, abuse, and vilify Virginia, and Virginians, has long been 'the order of the day,' with men, who, by way of pre-eminence, stile themselves 'federalists and friends of order.'" On the origin and significance of Washington's valedictory, cf. Alexander DeConde, "Washington's Farewell, the French Alliance, and the Election of 1796," Mississippi Valley Hist. Rev., XLIII (March, 1957), 648-58, and Felix Gilbert, The Beginnings of American Foreign Policy to the Farewell Address (New York: Harper Torchbooks, 1965), pp. 115-36, 166, 168.

Republican administration would be more sympathetic to France, Adet tried to influence the national election of 1796 in favor of Jefferson. Relations with France had rapidly deteriorated after the signing of the Jay Treaty, as the Directory unleashed its nation's privateers upon American shipping. Adet, in an appeal to the American public, tried to place the blame for the demoralization of Franco-American relations on Washington's leadership. In response, Secretary of State Timothy Pickering, with the President's approval, countered Adet's efforts by publishing his government's answers to the Frenchmen. The publication was a surprising breach of traditional practice for someone as punctilious as Washington. It even disturbed Alexander Hamilton, who was afraid the country might lose respect in international circles by having chosen the same weapons as Adet. This reaction was typical of Hamilton, but he himself was perfectly willing to use his own unofficial knowledge of Pickering's correspondence to write polemics against the French minister.<sup>2</sup>

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<sup>2</sup>Hamilton to George Washington, November 4 & 19, 1796; and Hamilton to Oliver Wolcott, November 22, 1796, in Works of Alexander Hamilton, ed. H. C. Lodge, 2nd ed. (New York: G. P. Putnam's Sons, 1904), X, 198-99, 208-10; Miller, Alexander Hamilton, pp. 449-50; Broadus Mitchell, Alexander Hamilton, the National Adventure, 1788-1804 (New York: Macmillan, 1962), p. 396; Miller, The Federalist Era, p. 200. For this chapter's general narrative I have relied heavily on the last-mentioned work, as well as on Alexander DeConde, The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801 (New York: Charles Scribner's Sons, 1966); Kurtz, Presidency of John Adams; and Smelser, Democratic Republic.

If it had any effect at all, Adet's intrusion into the presidential election worked contrary to his intention; John Adams was elected President and Thomas Jefferson became his Vice-President. Dissatisfied with the outcome, the French Executive recalled their minister, rejected Charles C. Pinckney, the United States government's replacement for the unneutral Monroe, and stepped up the raids upon neutral shipping. Still many Americans thought there was hope for a return to normal relations. Thus the change in administration seemed a good time to launch a mission to France. The French, it was thought, could negotiate with the new government without losing face, and outstanding differences might be settled. Republican politicians believed a special mission would be a desirable course, and even Hamilton thought it a good idea. Above all, Adams believed it would be desirable and that the outcome would most probably be good.<sup>3</sup> Consequently, after some difficulties over personnel, a three-man commission was sent to Paris which included Pinckney, already abroad, John Marshall, and for Republican assurance, Elbridge Gerry. Despite the initial hopes of success, the related domestic outlook was really quite bleak, because Adams faced the distrust of Republican leaders and unknowingly the disloyalty of his High-Federalist colleagues. Moreover, the mission was

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<sup>3</sup>DeConde, Quasi-War, pp. 11-12, 16. See Hamilton to Washington, January 22, 1797, in Works of Hamilton (Lodge), X, 233.

launched in the midst of all kinds of evidence of partisan bitterness. For example, the quarreling in the special session of Congress called by Adams, the Blount-Chisholm conspiracy case, and Monroe's return and public defense of his behavior in France kept the tempers of members of both political parties boiling.

William Blount's filibustering plans against Spanish territory bore the appearance of British meddling, and Republicans were certain Blount's activities would be covered up.<sup>4</sup> In fact, however, John Adams thoroughly aired them to Congress, and Blount was expelled from the Senate, although impeachment proceedings were later dismissed for want of jurisdiction. The affair with Monroe was less abstruse but more interesting. After requesting a statement from the State Department of the reasons for his recall and receiving the answer that no official reasons could properly be made public, and after Chancellor Robert R. Livingston of New York had suggested that the argument was not merely between the Administration and himself, but between the Administration and the nation, Monroe set about to publicize his story. It appeared in a long pamphlet outlining his

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<sup>4</sup>See Jefferson to Madison, January 3, 1798, in Writings of Jefferson (Ford), VII, 190. Jefferson wrote, "It is most evident, that the anti-republicans wish to get rid of Blount's impeachment. Many metaphysical niceties are handing about in conversation, to show that it cannot be sustained. To show the contrary, it is evident must be the task of the republicans, or of nobody." Unlike his Jeffersonian brother Thomas, William at this time was a Federalist.

opinion of the conduct of affairs with France during his ministry.<sup>5</sup> This was printed and distributed during the turn of the year 1797-98 as Americans awaited news from the commissioners.<sup>6</sup> Monroe argued that publication of the reasons for his actions in France and of his government's instructions was a check against abuse of executive power and fitting to "the spirit of elective government." George Washington from his home wrote that Monroe's course in exposing "to public view his private Instructions, and correspondence with his own Government" would be condemned by the "well informed and intelligent of all Nations."<sup>7</sup> High-Federalist Uriah Tracy in his own lengthy pamphlet wrote that Monroe had violated an obligation to keep silent, which he accepted when he accepted the office; furthermore, that Monroe was absolutely obliged to maintain secrecy whether he was in or out of office. "No permission was asked by Monroe to publish the confidential correspondence

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<sup>5</sup>See Monroe to Timothy Pickering, July 6, 19, & 31, 1797; Pickering to Monroe, July 17, 24, & 25, 1797; R. R. Livingston to Monroe, July 23, 1797; Presidential Papers, James Monroe, microfilm, Ser. 1, reel 2, DLC.

<sup>6</sup>James Monroe, A View of the Conduct of the Executive, in the Foreign Affairs of the United States, Connected with the Mission to the French Republic, During the Years 1794, 5, and 6 (Philadelphia, December 21, 1797). Only one copy of Monroe's "View" had gotten south as far as Richmond by the end of January, 1798. See Madison to Jefferson, January 21, 1798, in Letters of Madison (Congressional ed.), II, 121.

<sup>7</sup>Monroe to Pickering, July 19, 1797, Presidential Papers, James Monroe, microfilm, Ser. 1, reel 2, DLC. Washington to John Nicholas, March 8, 1798, in Writings of Washington (Fitzpatrick), XXXVI, 183-84.

between the President of the United States and their minister in France, and in doing this he appears to me to have committed a breach of duty for which he merits a more exemplary punishment than the silent disapprobation of the good and faithful."<sup>8</sup>

Uriah Tracy was one among several extremely reactionary Federalists whose views were often obnoxious to their own colleagues in the party.<sup>9</sup> Nevertheless, most of them would have wholly agreed with him on the impropriety of Monroe's performance. The dominant opinion among Federalist spokesmen was that the Executive was not accountable for his opinions and actions concerning officials who held office at his pleasure. He should use this power with discretion certainly, but his actions must by all means never be a subject for public debate. On the other hand, Republicans as a rule maintained that the Executive must always be checked by public observation of his actions, except where the exigencies of foreign affairs came into play. Therefore, as for the open discussion of the nation's diplomatic business, they supported Monroe, of course, but they were not entirely comfortable with his approach.<sup>10</sup> They certainly rejected it in later years when

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<sup>8</sup>[Uriah Tracy] Reflections on Monroe's View of the Conduct of the Executive, as Published in the Gazette of the United States, Under the Signature of Scipio. ... (Philadelphia, 1798), pp. 5-6.

<sup>9</sup>See Fischer, Revolution of American Conservatism, p. 23.

<sup>10</sup>See Pickering to Monroe, July 24, 1797,

they were in office and the Federalists in opposition. In fact, without exception, approval or condemnation of Monroe's work depended upon party affiliation.

In the midst of this acrimony news began to arrive of the failure of the mission to France.<sup>11</sup> The reasons for its failure are familiar. Either Talleyrand or his government, or both, miscalculated in assuming negotiations could be prolonged until the Republican party gained strength and office. Also Talleyrand's intermediaries informed the

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Presidential Papers, James Monroe, microfilm, Ser. 1, reel 2, DLC; also in The Writings of James Monroe, ed. Stanislaus M. Hamilton (New York: G. P. Putnam's Sons, 1898-1903), III, 76. Undoubtedly related to the publication of Monroe's View, a petition from the residents of Huntington County, Pa., was presented to the House by Federalist Congressman John Wilkes Kittera on March 26, 1798. The petition, which was referred on a close vote to a select committee, asked that the United States laws be adjusted so that "persons employed by the United States after they were discharged from office" could no longer "publish with impunity the secrets of Government" (Annals of Congress, 5th Cong., 2nd sess., 1312). Unfortunately, since the committee's report would have been most revealing of prevailing attitudes, I can discover no further action on this petition. For Jefferson's and Madison's approval of Monroe's View, see Jefferson to Madison, January 3, 1798, in Writings of Jefferson (Ford), VII, 190; Madison to Jefferson, January 21, 1798, Letters of Madison (Congressional ed.), II, 121. See also John Adams to John Murray Forbes, February 6, 1798, Adams Papers, John Adams Letterbook, microfilm, reel 117, MHi.

<sup>11</sup>Rumors of probable failure were heard in the United States by January 1798; see Jefferson to Madison, January 25, 1798, in Writings of Jefferson (Ford), VII, 191-92; Madison to Jefferson, January 21, 1798, in Letters of Madison (Congressional ed.), II, 122; Abigail Adams to her sister [Mary Cranch], January 5, 1798, in New Letters of Abigail Adams, 1788-1801, ed. Stewart Mitchell (Boston: Houghton Mifflin, 1947), p. 123. Rufus King, in London, heard from Pinckney, in a letter dated December 27, 1797, of the attempted bribe. King then wrote Pickering, on January 9, 1798, predicting that the mission would fail; Life and Correspondence (C. R. King), II, 266, 270.

American commissioners that a bribe as well as a loan would be necessary before direct negotiations could take place. Evidently the bribe request in itself was not especially surprising to the envoys, but that it should precede recognition horrified them. Still they lingered on for months without really expecting meaningful negotiation to take place. At last Pinckney and Marshall became convinced that there would be no dealing with a Directory absolutely determined to humiliate the United States. Hence these two left; Gerry remained behind, thinking his presence in Paris might prevent a final rupture and war between the two countries.<sup>12</sup>

Meanwhile, in the United States informed persons within and without the government were amazed at the commissioners' silence. George Washington wondered if the envoys had been guillotined. Jefferson wrote Madison in January 1798 that "either the Envoys have not written to the government, or their communications are hushed up." He subsequently suspected the Administration of having received and concealed news because it might dampen down the rising war spirit among Americans. The Republican leader was certain Adams and his administration wanted war with France.<sup>13</sup> Other Republicans in the house entertained the

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<sup>12</sup>DeConde, Quasi-War, pp. 36-63, esp. 59. Lawrence S. Kaplan, Colonies into Nation: American Diplomacy, 1763-1801 (New York: Macmillan Co., 1972), pp. 274, 276.

<sup>13</sup>Washington to the Secretary of War, March 4, 1798, in Writings of Washington (Fitzpatrick), XXXVI, 179. Jefferson to James Madison, January 24, 1798, Presidential

same suspicions.<sup>14</sup>

When, early in March, John Adams actually received the first dispatches from the three envoys, he reacted angrily. He wanted to go immediately to Congress with them and ask for military preparations. Upon second thought, however, he realized that revelation of the French requests for a bribe might endanger the American commissioners. So he withheld all but the first of the dispatches while he informed Congress that the mission had failed and that he wanted it to prepare for hostilities. He decided not to say that war was inevitable, as he originally intended, but he revoked Washington's proscription against armed American merchant ships.<sup>15</sup> Republicans responded with scepticism. One offered a resolution asserting that it was inexpedient for the United States to resort to war with France.<sup>16</sup> Republicans evidently thought the news from abroad would uncover French willingness to make some accommodation. In Jefferson's opinion, Adams's message to Congress was "almost

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Papers, James Madison, microfilm, ser. 1, reel 6, DLC; Jefferson to Monroe, February 8, to Horation Gates, February 21, and to Madison, March 15 and 21, 1798, in Writings of Jefferson (Ford), VII, 199, 204, 216-21.

<sup>14</sup>E. g., Albert Gallatin and Edward Livingston; see Annals, 5th Cong., 2nd sess., March 30, 1798, 1363, 1365.

<sup>15</sup>For Adams's message, see Annals, March 19, 1798, 1271-72. DeConde, Quasi-War, pp. 66-70.

<sup>16</sup>Abraham Sprigg's resolution, Annals, 5th Cong., 2nd sess., March 27, 1798, 1319-20.

insane." Jefferson was afraid that the majority opposed to war was very narrow, and he was certain that to help sustain it the Republicans should ask for the papers. Madison agreed: the Representatives must insist on all the intelligence on which Adams had based his recommendations for military measures.<sup>17</sup>

As if in answer to the opposition's wishes, a rabid Federalist named John Allen requested the dispatches. His resolution read, "That the President of the United States be requested to Communicate to this House the despatches from the Envoys Extraordinary of the United States to the French Republic, Mentioned in his Message of the 19th instant, or such parts thereof as considerations of public safety and interest, in his opinion, may permit."<sup>18</sup> The Republican side of the House wanted to see the papers, but they argued that the request should be worded to allow for no exceptions. If there was anything confidential, they said, it could be read to the House in a closed meeting. William B. Giles stated outright that he did not trust the

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<sup>17</sup>Jefferson to Monroe, March 21, 1798, in Writings of Jefferson (Ford), VII, 221-22; Madison to Jefferson, April 2, 1798, Letters of Madison (Congressional ed.), II, 131. Adams received public support for his message of March 19, and numerous letters, addresses, and memorials throughout the winter of 1797-98 conveyed approval of his martial stance. See Tristram Dalton to John Adams, March 26, and Cotton Tufts to Abigail Adams, March 31, 1798, Adams Papers, Letters Received and Other Loose Papers, microfilm, reel 387, and John Adams Letterbook, reels 117 and esp. 119.

<sup>18</sup>Annals, March 30, 1798, 1355 (italics in the original).

President's sincerity, so he wished to see the instructions as well as all the correspondence.<sup>19</sup> Federalists for a time argued that the President must be permitted to retain discretion over what was to be communicated. "Without some portion of this discretion being allowed him," Allen said, "the Government could not proceed." Most Federalists believed that the call of the House should be worded as the call for the Jay papers had been: papers touching upon existing negotiations could be excluded. Nevertheless, Robert Goodloe Harper did say the case differed from the Jay Treaty, and if the House had a right to any of the papers, it should have them all. Summing up the Republican position young Edward Livingston exclaimed, "How could they say to their constituents, without this information, all has been done that could be done to preserve the country in peace? ..." In the end, the request for the dispatches went to the President without qualification, and Adams on his part was only too glad to send all of the papers unmasking the XYZ affair. He merely substituted alphabetical letters for the names of the French contacts and requested that the papers be examined in confidence until the congressmen were "fully possessed of their contents."<sup>20</sup>

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<sup>19</sup>Annals, 1358.

<sup>20</sup>Annals, March 30 and April 2, 1798, 1358-71; for Livingston, see 1359; for John Adams's message delivering the XYZ papers, see ibid., April 3, 1798, 1374-75. Abigail Adams wrote to her son John Quincy, in Berlin, about the House call for instructions and dispatches: "today they will receive them, they cannot therefore any longer complain that they are called upon to legislate in the dark." Adams

Only twenty-seven members had voted against the request for the papers. All were Federalists, but this number was less than half the party's delegation in the House, a total of fifty-seven. Ten Federalists abstained and twenty voted with the Jeffersonians supporting the request for the papers. Therefore, a large segment among the Federalists reversed their party's stand at the time of the call for Jay's instructions. This inconsistency has caused historians Manning J. Dauer and Alexander DeConde to conclude that the Republicans fell into a trap.<sup>21</sup> Albert Gallatin, although he supported Allen's resolution, sounded as if he suspected as much in his last speech just before the vote.<sup>22</sup> It does seem probable that some of the Federalists knew the contents of the envoys' letters would be inflammatory and hurt the Republicans' pacifistic cause. Three days before Allen offered his resolution, Alexander Hamilton received a letter from Timothy Pickering detailing, much to Hamilton's delight, the activities of the French intermediaries, X, Y, and Z. From his reaction to the disclosure, Hamilton obviously had not heard of the demands for money before. Pickering, in communicating this news to Hamilton, said that a call for the dispatches was probable,

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Papers, Letters Received and Other Papers, microfilm, reel 388, MHi; italics in original.

<sup>21</sup>DeConde, Quasi-War, pp. 71-72; Manning J. Dauer, The Adams Federalists (Baltimore: Johns Hopkins Press, 1953), p. 141.

<sup>22</sup>See Annals, 5th Cong., 2nd sess., April 2, 1798, 1370-71. Abigail Adams thought Gallatin was aware that the call would backfire; see her letter to her sister [Mrs. Cranch], April 4, 1798, New Letters (Mitchell), p. 151.

but in any event, they would be laid before Congress whether demanded or not.<sup>23</sup> It seems, therefore, entirely possible that a hint of the damaging nature of the letters had gotten out to John Allen and a few of his colleagues. Nonetheless, the evidence is scanty, and the assumption must remain no more than that.

Also, the vote on Allen's resolution does not actually indicate unusually inconsistent or opportunistic behavior on the Federalists' part, although Dauer and DeConde imply that it did. They assert that the group voting along with the Republicans were High-Federalists. Moderate Federalists, they say, opposed the call for the XYZ papers. In their opinion, apparently, it was the moderates who were satisfied with the President's judgment and who remained true to the principle that the Executive should retain complete control over the flow of information about foreign affairs. Conversely, the extremists, having at least an inkling of the papers' harmful content, broke the rule they helped to establish at the time of the Jay treaty by joining the Republicans in requesting delivery of the diplomatic

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<sup>23</sup>I have examined all of Alexander Hamilton's correspondence for March, 1798, in typescript (The Hamilton Papers, ed. Harold C. Syrett, Columbia University). The key letters are: Hamilton to Pickering, March 23, 1798, copy Massachusetts Historical Society; two letters, Pickering to Hamilton, March 25, 1798, orig. Hamilton Papers, DLC; and Hamilton to Pickering, March 27, 1798, orig. Hamilton Papers, DLC. The last can be seen in Hamilton, Works (Lodge), X, 280. Cf. Gerard H. Clarfield, Timothy Pickering and American Diplomacy, 1795-1800 (Columbia, Mo.: Univ. of Missouri Press, 1969), pp. 145, 152-54.

materials to the House. As Dauer views the case, "the High-Federalists, who had most vehemently opposed the call for dispatches on the Jay Treaty, were now extremely anxious for the papers. On account of the inconsistency, their position was embarrassing."<sup>24</sup>

It makes good reading to say that the most extreme members of the anti-Jeffersonian party trapped their political opponents by a crafty, Machiavellian maneuver, but the assertion weakens under close scrutiny of the voting. Fifteen of those who opposed Allen's resolution must be considered arch-Federalists by any standard, including roll-call analysis. These fifteen voted with the party consistently without exception during the second session of the Fifth Congress when the nation's representatives put the country on a war-footing.<sup>25</sup> On the other side of the division, moreover, I find six Federalists who should be classified as moderates, both by vote and by reputation. Voting to call for the XYZ papers were George Dent, George Baer, Jr., and William Matthews, all of Maryland and all moderates. In fact George Dent voted with the Jeffersonians almost half the time.<sup>26</sup> John Chapman of Pennsylvania, one

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<sup>24</sup>Adams Federalists, p. 141; DeConde, in Quasi-War, pp. 71-72, follows Dauer's analysis.

<sup>25</sup>Based on Dauer's own analysis of key roll-call votes; see Adams Federalists, pp. 306-09. Besides my own research into the political views of Federalists and Republicans, I have relied heavily on Dauer's work, and upon David H. Fischer, Revolution of American Conservatism.

<sup>26</sup>In the 6th Congress Dent became more Republican,

of the group, was a moderate, and James A. Bayard and William Barry Grove were foremost examples of middle-of-the-road Federalism. Bayard annoyed many of his party colleagues by his easy fraternization with Democratic-Republicans. Grove, from North Carolina, was anti-aristocratic and had always voted independently.<sup>27</sup> On the other hand, among those who voted against the call for the XYZ papers, really no more than eight, not many more than on the other side, could be looked upon as moderates. Among those opposed to the call few could match the ideological conservatism, the firm Federalism, of Roger Griswold, Chauncey Goodrich, and Samuel Dana of Connecticut, of Lewis R. Morris from Vermont, or of George Thatcher, Samuel Sewell, and Harrison Gray Otis from Massachusetts.

Otis was a young Federalist who, in later years after the Jeffersonians gained office, tried to lead his party towards an enhanced popular image and appeal; but he was a staunch Federalist, a firm believer in political loyalty who voted in unbroken concert with his party. He was also an unrelenting Francophobe. Thus, although he

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and in the election of 1800 he supported Jefferson over Burr. See Fischer, Revolution of American Conservatism, p. 359.

<sup>27</sup>Chapman voted 25 percent of the time with the Republicans, 5th Cong., 2nd sess.; see Dauer, Adams Federalists, p. 308. For Bayard, see Fischer, pp. 41-42; George Dangerfield, The Era of Good Feelings (New York: Harcourt, Brace & World, 1952), p. 13. For Grove's opinions, see "Papers of John Steel" (Wagstaff), Publications of the North Carolina Historical Commission, I, passim.

eventually broke with the High-Federalists, he was at this time in their camp.<sup>28</sup> Thatcher was an exceptionally conservative politician. Samuel Sewell was a lawyer from an old New England family of lawyers and jurists. He himself eventually became Chief Justice of Massachusetts. Philosophically he believed that security was a major ingredient in human liberty and that executive power was the fundamental basis for security. He reasoned from this to the conclusion that opposition to executive authority was a kind of treason against popular liberty. Lewis Morris was one of those who thought the country was going to the devil at a gallop.<sup>29</sup> The Connecticut Representatives were notorious arch-Federalists. All of these men, as well as eight more (a total of fifteen) of the twenty-seven who opposed Allen's resolution, had voting records that would place them among the firmest party regulars according to Manning Dauer's own analysis. I would add Thomas Hartley (Pennsylvania) to this group, although he missed many important divisions. He was, in terms of views expressed, one of the most conservative Federalists.

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<sup>28</sup>Cf. Fischer, Revolution of American Conservatism, Chap. II, esp. 38-40; DeConde, Quasi-War, pp. 98, 170-71, 183.

<sup>29</sup>See Fischer, Revolution of American Conservatism, pp. 240, 256, 258. Also, for Sewell, see The National Cyclopaedia of American Biography (New York: James White & Co., 1929), VI, 189. George Thatcher, on the floor of the House, accused Benjamin F. Bache of being an agent of the French government; Annals of Congress, 5th Cong., 2nd sess., June 18, 1798, 1972.

Admittedly, John Allen, who originally proposed the resolution requesting the papers, had the reputation of being a choleric Federalist.<sup>30</sup> It should be noted, however, that he was not a member of the congressional delegation which deliberated over the call for Jay's instructions. In fact only three of the twenty Federalists voting in favor of demanding the dispatches from the envoys in France voted in 1796 on and against Livingston's resolution. Of these three, one was definitely an extremist, Peleg Wadsworth (Massachusetts); the other, John Williams (New York), appears to have been a middle-of-the-roader. The third was Robert Goodloe Harper, a leading and very flexible member of the young, new school of Federalist politicians.<sup>31</sup> Of those against the call, fourteen voted precisely as they had in 1796, in opposition to an unqualified lower-house request for diplomatic correspondence.

The point to all this is not to criticize the well drawn picture of a division in Federalist ranks between Hamiltonians and Adams moderates, but to point out that, in the instance of the vote on the call for the XYZ papers, no definable group within the party acted in an opportunistic

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<sup>30</sup>He was known for his wild, vituperative speeches against democracy, during one of which he became so overwrought that he fainted afterwards; see Fischer, Revolution of American Conservatism, p. 22.

<sup>31</sup>Williams voted with Republicans 40 percent of the time, 5th Cong., 2nd sess.; see Dauer, Adams Federalists, p. 307. For Harper and Wadsworth, see Fischer, Revolution of American Conservatism, pp. 36-38, 258-59, et passim.

way. On the whole, there does not seem to have been anything particularly unprincipled about Federalist behavior. Most Federalist members of Congress did not have the chance to vote in both divisions concerning the diplomatic papers; but of those who did, most remained consistent. Federalists of every stripe were on each side of the XYZ issue. Many of them may have decided by this time that it was best to put all before the public when popular support for military expenditures was needed. They probably also thought that withholding the papers would aid opposition criticism. Hamilton said as much to Pickering when he learned the Senate had requested the envoys' correspondence.<sup>32</sup> Of course the request for the papers brought about a situation the High-Federalists could exploit whatever may have been the case and whatever motives prompted the voting.

When the papers were submitted to the House, Republican leaders certainly were disturbed. A question arose over the number of copies of the envoys' dispatches that should be published. Albert Gallatin said they should not be published for public consumption until the final result of the negotiations should be known. Matthew Lyon remarked that the papers were "so trifling and unimportant that no printer would risk the printing of them in a pamphlet." Federalists replied that they were astonished at the opposition's reluctance to publish the XYZ papers since they

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<sup>32</sup>Hamilton to the Secretary of State, March 23, 1798, in Works of Hamilton (Lodge), X, 279.

had always stated a wish for publicity. The Speaker eventually reminded them that the question related merely to the number of copies to be printed, and in the end the House decided to publish the usual number, not the extra batch some Federalists desired.<sup>33</sup> In later weeks, when enough Republicans had left Congress to give the Federalists a solid majority and as more dispatches came in, great numbers were printed to be spread in areas of the United States where it was believed adequate newspaper coverage might be lacking.<sup>34</sup>

At any rate, the American public learned of the insulting conduct of the French diplomats. Its reaction was swift and violent; sympathy for France changed to amazement, outrage, and warlike anger.<sup>35</sup> Anti-French sentiment undermined Republican opposition to military action and aided Federalists' efforts to associate their war measures with patriotism. All Federalists, moderate or extreme, supported a military program; they differed only over the lengths it was to go. Adams at this time, enjoying the popularity of a patriot leader, adopted a belligerent stance. So, Republican strength having ebbed, Federalists were able to control

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<sup>33</sup>Annals of Congress, 5th Cong., 2nd sess., April 6, 1798, 1378-80.

<sup>34</sup>See Annals, June 18, 1798, 1972-73; also DeConde, Quasi-War, pp. 92-93.

<sup>35</sup>Even the wife of Britain's minister in America was astonished by the violence of language; see DeConde, Quasi-War, p. 75.

both houses of Congress and put the nation on a war basis by the end of May 1798. The Alien and Sedition laws followed -- an attempt in the midst of wartime hysteria to crush domestic dissent and with it the opposition political party. On the sea there were increasingly hostile actions. Nevertheless, the extremist Federalists who wanted war were never able to obtain an outright declaration. Most members of Congress, whatever their party affiliation, undoubtedly still hoped for a peaceful outcome; for France, seemingly preparing an invasion of England, appeared an extremely dangerous and powerful foe. Also, fortunately, President Adams refused to recommend war to Congress. He detested Hamilton's pretensions to military glory, and he was becoming aware of his department heads' disloyalty. At long last John Marshall returned to the United States, and, although belligerent in public, privately he informed his government that the Directory did not want all-out war. This convinced Adams that he was correct in not requesting a declaration of war. His party's ultras believed a declaration was necessary to keep the Republicans from regaining political strength, but they were thwarted by the President and in Congress by less bellicose colleagues. Therefore, the "quasi-war" remained undeclared, naval, and essentially defensive in nature.<sup>36</sup>

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<sup>36</sup>See DeConde, Quasi-War, pp. 95-106; Miller, Federalist Decade, pp. 214-15. Cf. Kaplan, Colonies into Nation, pp. 276, 279-82, 288-89.

In France the Directory was rapidly backing away from its belligerent posture. Talleyrand knew that France had all to lose and nothing to gain from warfare with America. It would needlessly endanger her new-world empire, stop commerce in American goods, and seriously threaten the economic stability of France's Dutch satellite, the Batavian Republic. By midsummer the members of the Directory had changed their minds too; they were eager to patch up relations with the United States. This attitude was communicated to Americans who were able to inform their government. William Vans Murray at the Hague, key pin in a circle of diplomatic activity, received assurances that a new American mission would be fairly and respectfully treated. Elbridge Gerry, upon his return from France, reinforced the prospect of a resumption of negotiation by his report of his own experiences in France.<sup>37</sup> At the same time the American public had the good sense to withdraw support from the war-hawks when it felt the pinch of new tax measures and realized peace with France was possible. Prompted by all this, Adams nominated Vans Murray in February 1799 to begin new negotiations with France. The nomination, because of the necessity of compromise with the party's unreconstructible wing, was expanded into another three man commission by joining Oliver Ellsworth and William Davie with Murray.<sup>38</sup> By the time they

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<sup>37</sup>DeConde, Quasi-War, pp. 140-43, 147-54, 159-60.

<sup>38</sup>Ibid., pp. 184-85, 187.

finally arrived Napoleon was in power, but he also was interested in ending hostilities. For strategic reasons he wanted the United States returned to the company of neutral maritime nations. The commissioners on their part realized that an altered European situation entailed the discard of their instructions blocking a settlement. As a result both parties reached agreement, and the Convention of 1800, or as it was commonly named, the Treaty of Mortefontaine, was signed October 3, 1800.<sup>39</sup>

When the President sent the Convention to the Senate for their advice and consent, Federalist Senators immediately saw it was controversial. Some of them thought it worked against a proper European balance of power because it could be used as a diplomatic weapon against Great Britain. These same Senators also realized that public opinion would not permit them to reject the Convention without destroying political prospects for the Federalist party.<sup>40</sup> Thus, in the beginning, they were not certain just how to deal with it. Initially the Convention failed to attract two-thirds of the Senators' support, but it was reconsidered shortly thereafter, under a new rule for reconsideration, and ratified with significant reservations. Thrown into the hands of Jefferson, the new President, it

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<sup>39</sup>For a detailed discussion of the negotiations, see ibid., Chap. VII, pp. 223-58.

<sup>40</sup>Ibid., pp. 289-90; Hayden, Senate and Treaties, p. 126.

was satisfactorily concluded in 1801 after some additional work by Vans Murray.

The profound debate over the Convention led the Senate to develop its first standing rules for procedure while considering treaties. As finally formulated, the new guidelines for conduct included a rule of secrecy:

All confidential communications made by the President of the United States to the Senate, shall be, by the members thereof, kept inviolably secret; and that all treaties which may hereafter be laid before the Senate, shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy.<sup>41</sup>

Some Republicans objected to this particular decision, evidently, but it is difficult to tell how extensive and resolute their opposition was. They seem to have disliked the timing of the rule's inclusion because it might reflect pejoratively on the Senate's behavior to close the galleries without a special presidential request. Obviously, they believed secrecy should be enjoined only upon the President's recommendation.<sup>42</sup> In any case, a rule of secrecy with respect to treaties was added to the Senate's standing procedure. In the future, treaties would be handled confidentially regardless of the President's instructions. Nominations were not included along with treaties in this

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<sup>41</sup>Journal of the Executive Proceedings of the Senate, I, 361. See also Hayden, Senate and Treaties, pp. 126-27.

<sup>42</sup>(Washington) National Intelligencer, December 19, 1800; (New York) The Spectator, December 27, 1800. Cf. Swanstrom, "United States Senate," pp. 191-92.

standing rule until January 1820, although from the beginning Senators had examined proposed appointments in closed executive sessions.<sup>43</sup>

The Jeffersonians in Office Face a Troubled West

By the time a lame-duck Senate had devised the procedure for considering treaties, Jeffersonians had triumphed at the polls in overwhelming numbers, bringing control of the Administration and both houses of Congress to the party. The victors came to office with a reputation and a philosophy that gave assurances of more open government. Besides expecting to reduce executive influence, they hoped to keep legislators intimately in touch with their constituents. They recognized that this close relationship depended upon a full interchange of sentiments and thus a candid display of information about government policy. One member of a prominent Republican family phrased this clearly, if in an involved manner, when the party prepared itself to govern: Representatives were wholly responsible to the

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<sup>43</sup>Annals of Congress, 16th Cong., 1st sess., January 3, 1820, 52. The Congressional Quarterly's Guide to the Congress of the United States: Origins, History and Procedure (Washington, D. C.: Congressional Quarterly Service, 1971), p. 63, provides a brief history of the rule. Its wording today is identical with that of 1820, although the practice has changed completely. The Senate closes its doors at times, but nominations and treaties are normally considered in open sessions. See, for the present wording, rule XXXVI, sec. 3, of the Standing Rules of the Senate. Treaties were first considered in open session in 1888. In 1929 rule XXXVIII was amended to open all Executive Sessions unless closed by prior majority vote, thereby vacating the original significance of rule XXXVI, sec. 3.

people, he said, and "it was necessary, to give efficacy to this responsibility, that the people, who were to judge, should possess the purest information, as to not only the acts, but the motives of the public agents."<sup>44</sup>

If their philosophy suggested openness, for a time the Republicans' words and actions did the same. During the last years of Federalist controlled Congresses, they identified their cause with the interests of the congressional reporters. Although members of both political parties by and large supported the wide circulation of congressional debates, as we have seen, Republicans claimed to be the reporters' most faithful friends.<sup>45</sup> Jefferson, when he first became part of the national government, in 1790, declared that candor was a fundamental part of his creed. He wrote Madame d'Enville: "I have but one system of ethics for men and for nations. To be grateful, to be faithful to all engagements and under all circumstances, to be open and generous. . . ." When he accepted the Presidency, in his

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<sup>44</sup>John Nicholas on the House floor, Annals of Congress, 6th Cong., 2nd sess., December 9, 1800, 806. Jefferson wrote a virtual treatise on the subject in his petition to the Virginia House of Delegates; see Writings of Jefferson (Ford), VII, 158-64.

<sup>45</sup>See, e. g., (Washington, D. C.) National Intelligencer, December 19, 1800; [George Hay], Essay on the Liberty of the Press; Sullivan, A Dissertation Upon the Constitutional Freedom of the Press; Tunis Wortman, Treatise Concerning Political Enquiry. Wortman's work was discussed in the first chapter. It was a comprehensive, rationalistic inquiry into the significance of society's common judgment for representative government, as well as an advanced statement in favor of freedom of the press.

inaugural address, he promised "the diffusion of information and arraignment of all abuses at the bar of the public reason," and in his first message to Congress he ended with the words, "Nothing shall be wanting on my part to inform, as far as in my power, the legislative judgement. . . ."<sup>46</sup> As it turned out, however, the promise was soon adjusted to the practical problem of complex foreign negotiations over the Florida and Louisiana territories, and then to problems posed by a spreading world war.

All questions about governmental secrecy eventually come down to the one concerning the proper and delicate balance between the privacy governmental officials desire and the publicity needed for public debate and informed judgment. The Jeffersonians, while in power, tipped the balance of secrecy and publicity slightly towards the former and away from a position marked off by their ideals. This happened initially because of the crisis engendered by the retrocession of Louisiana. French accession of the Louisiana territory, and more fundamentally, the early stirring of Americans' sense of Manifest Destiny, forced the new President into critical diplomacy that he managed well but with less than complete candor.

The Administration was aware of the retrocession of Louisiana by May 1801; by the fall of that year Jefferson had absolute confirmation from the American minister to

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<sup>46</sup>Letter dated April 2, 1790, Papers of Jefferson (Boyd), XVI, 291. Richardson, Messages I, 322, 331-32.

Britain, Rufus King. The following year he moved quietly to block the cession; and if that were not possible, to secure navigation down the Mississippi by acquiring New Orleans and part of Florida. If need be he was willing to apply the threat of a British alliance for leverage. He never revealed this drastic course to anyone but his minister in France and his informal agent, Samuel Dupont; and he kept his other maneuvers from the public as long as was necessary to his purposes, not making any statement on the subject until his message to Congress of December 15, 1802. Then he simply alluded to a "change in the aspect of our foreign relations" if the cession of Louisiana to France should take place.<sup>47</sup> The negotiations were subtle and at the time their direction was unclear; thus Jefferson wanted as little as possible disclosed. The difficulty of this policy of silence was increased in 1802 by rumors of the retrocession and by the Spanish intendent at New Orleans' denial of deposit rights. The difficulty was further compounded by Federalist efforts to gain political advantage in the West by criticizing the Administration for not protecting Western interests in the navigation of the Mississippi and the disposition of adjacent

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<sup>47</sup>Jefferson to R. R. Livingston, April 18, 1802, Writings of Jefferson (Ford), VIII, 145; Dumas Malone, Jefferson the President, First Term, 1801-1805, vol. IV: Jefferson and His Time (Boston: Little, Brown, 1970), pp. 248-51; Marshall Smelser, The Democratic Republic, pp. 86-87. Annals of Congress, 7th Cong., 2nd sess., 12-15.

territory.

Federalists in the Senate challenged the standing rules for secrecy, and in the House on two separate occasions they called for diplomatic documents and correspondence connected with Spain's cession of Louisiana to France. Their actions were completely partisan. In fact, the arguments on both sides of the legislative chambers were formed to score debaters' points, were lacking in sincerity though often ingenious, and were intended to serve the current interests of the party rather than to elucidate matters of principle. But in their negative way they unveiled a great deal about prevalent views of secrecy, and these were profoundly ambivalent. Unquestionably American politicians of the day thought that government ought to be as open as possible, but they also felt that openness was foolishly impractical, at least in foreign policy; and considering the prevalent inclination to, even glorification of, the practical, and, considering the attention existing exigencies were receiving, they were not inclined to make many immediate concessions to a morally prescriptive "ought."

Pennsylvania's Federalist Senator, James Ross, tried to capitalize on the western crisis by offering seven wordy resolutions that, briefly summarized, amounted to giving the President war powers in order to gain navigation of the Mississippi and a depository at New Orleans. When he arose to present his view he was temporarily stopped by an application of the Senate's new rule on secrecy, formulated

during consideration of the Convention of 1800, and by its old rule (rule twenty-eight) permitting the gallery to be cleared upon a Senator's motion and a second.<sup>48</sup> At this point Vice President Aaron Burr chose to question the fitness of rule twenty-eight. He thought the principle of publicity, incorporated in the original resolution that opened the Senate doors, was virtually negated by a provision that the doors might be closed on the wish of merely two Senators. Irritated, Republicans retorted that it was Burr's duty as Vice-President to expound the laws of procedure, not to question their merit. They said the doors could undoubtedly be shut at a Senator's request and they ought to be shut at this time. Interestingly enough, Abraham Baldwin, an old champion of open government, spoke at length in defense of the rule. He said it was reasonable, especially in relation to the antedated practice of wholly concealed deliberations.<sup>49</sup>

Why did Aaron Burr offer doubts about the fitness of rule twenty-eight? By the beginning of the session of Congress, in December 1802, Burr was a man without a party. Republicans believed that he was guilty of courting the Federalists, and Thomas Jefferson now classified him as an opponent.<sup>50</sup> In this case -- Ross's attempt to play on

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<sup>48</sup>Annals, February 14-16, 1803, 88-89, 95.

<sup>49</sup>Annals, February 23, 1803, 105-108.

<sup>50</sup>See Herbert S. Parmet and Marie B. Hecht, Aaron Burr, Portrait of an Ambitious Man (New York: Macmillan, 1967), pp. 168-93.

western fears for the benefit of the Federalists -- Burr's question about the rule of secrecy was surely awkward for the Republicans. As one of their number said, "The object of gentlemen is plain enough, they wish to impose an opinion upon the public, that we are afraid or ashamed to let what we are doing be known to the people."<sup>51</sup>

Federalists in the House tried to create the same impression. They advocated that the House call upon the President and State Department for information on Louisiana, and after the United States agreed to purchase the territory, they again asked for information on the original deed of cession between Spain and France.<sup>52</sup> They claimed that much fuller explanations from the Executive were in order if the House was to appropriate funds. Federalist politicians made countless references to the stand their opponents had taken when the Jay Treaty appropriations were before the House. The Republicans countered with the same reference and the same charge of inconsistency.<sup>53</sup> The majority's

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<sup>51</sup>William Cocke (Tenn.), Annals of Congress, February 23, 1803, 107.

<sup>52</sup>The principal discussion of these resolutions can be seen in the Annals, 7th Cong., 2nd sess., January 4-7, 1803, 312-42; January 11, 1803, 352-68; 8th Cong., 1st sess., October 24, 1803, 385-420.

<sup>53</sup>See, e. g., comments by Republicans Samuel Smith and John Smilie, Annals, 7th Cong., 2nd sess., January 5, 1803, 316, 318, 320; January 11, 1803, 356; 8th Cong., 1st sess., October 24, 1803, 391-92; and by Federalists Benjamin Huger, Roger Griswold, and Samuel Dana, Annals, 7th Cong., 2nd sess., January 5, 1803, 318, 319; January 11, 1803, 359.

leaders, with John Randolph of Roanoke in the forefront, forced the motion calling for information to be considered by the House behind closed doors. The aim was to avoid public discussion of the western crisis in the midst of negotiations. As Randolph said, his party was reluctant to consider a call for information about the Mississippi River's blockage because it was a "delicate and momentous subject." He thought the motion was "only calculated to retard and to embarrass."<sup>54</sup> Federalists in their turn wanted to know why the motion itself could not be discussed openly. They opposed its referral to a Committee of the Whole House sitting in seclusion, and they took this tactic to be primary evidence for their contention that the Administration was too Francophile to be trusted to deal effectively with France. Withholding information from the public, they declared, covered failure. Republicans, on the other hand, expressed confidence in the President. He alone could properly handle the sensitive question of France's threat to western commerce through the Gulf, and public debate at the time would be demagogic interference in his domain. To give the point emphasis, they passed a resolution which asked Congress to rely "with perfect confidence on the vigilance and wisdom of the Executive" and to await "the issue of such measures as that department of the Government shall have pursued. ..." Federalists of course

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<sup>54</sup>Annals, 7th Cong., 2nd sess., January 6, 1803, 329.

claimed that they had no confidence in the Executive. Sarcastically, they noted that the refusal to grant a request for information "cannot be on the ground of secrecy, required by the state of affairs, for we have been often told that a Government like ours ought to have no secrets."<sup>55</sup> Always equal to the challenge, John Randolph sought to impeach the sincerity of Federalist worries about the West by giving the House lengthy details of the Jay-Gardoqui agreement.

Debates went this way both before and after the Louisiana Purchase: they were ill-tempered and above all partisan. Nevertheless, some Republicans could not repress a vestigial commitment to open government. When Federalist Roger Griswold requested that the Administration transmit the treaty of San Ildefonso, or rather any deed of cession given to France by Spain, the vote on his resolution was very close.<sup>56</sup> Many Republican Representatives supported the demand for more information, though none of their party offered any arguments in its favor.

The Administration had been uninformative, providing Federalists with an opportunity to raise doubts about its credibility; yet Jefferson's diplomatic devices depended upon privacy. The two-year campaign to solve the crisis in

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<sup>55</sup>Annals, 7th Cong., 2nd sess., January 7, 1803, 340; January 11, 1803, 366.

<sup>56</sup>Annals 8th Cong., 1st sess., October 24, 1803, 419-20.

the West certainly required patience; and it also seemed to require the President to keep his own counsel -- at least to the extent of avoiding public discussion of his moves and alternatives. As a modern biographer writes, "In the Louisiana crisis Jefferson played the game to perfection."<sup>57</sup> And in playing, to continue the metaphor, he held his cards close to his chest. It might not have worked out as well otherwise, but this manner of proceeding meant putting aside at least for a moment a democratic creed. This proved to be relatively easy because no one really believed that the public should be involved in the evolution of an international agreement. By and large, politicians who said that it should, were arguing from political interest, not deeply-felt principle.

The balance between minimum secrecy and firm trust in the public may have been lost. Perhaps this is the significance of the exceptionally close vote on the resolution requesting information about the Treaty of San Ildefonso. It came at a time when all but the most fanatical Federalists were pleased with the acquisition of Louisiana, so the explanation may be that many Republicans thought it was time for the Administration to open up. Some may also have remembered a party intellectual's axiomatic faith expressed only three years before that it was in the

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<sup>57</sup>Merrill D. Peterson, Thomas Jefferson and the New Nation, A Biography (New York, Oxford Univ. Press, 1970), pp. 761-62.

interest of true republican government to solicit rather than elude observation.<sup>58</sup>

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<sup>58</sup>Wortman, Treatise Concerning Political Enquiry, p. 35.

## Chapter VIII

Federalist Attitudes Toward Governmental Secrecy  
in the Age of Jefferson

Federalism would be buried never to rise again, President Jefferson told his Attorney General, "by a steady pursuit of economy and peace, and by the establishment of republican principles in substance and in form."<sup>1</sup> Jefferson and his successors in the White House did crush the Federalist party, but not under the weight of pure republicanism. It was buried by the absorption of its program, if not all its essential ideas and ideals, as the Jeffersonians moved to promote a balanced self-sufficient economy, economic expansion, and regional unity and harmony. Federalist nationalism was fairly matched and then surpassed following the War of 1812.

The Federalist party began fading immediately after 1801 because its cohesiveness depended to a large degree upon control of the national government. The party's philosophy was not readily adjustable to the status of systematic opposition. Paradoxically, however, the Federalists' identification with opposition to the War of 1812, regarded as treasonous by the postwar generation of Americans, ended the job of killing the party. The members

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<sup>1</sup>Letter to Levi Lincoln, October 25, 1802, The Writings of Thomas Jefferson, ed. Lipscomb & Bergh (Washington, D. C., Thomas Jefferson Memorial Assn., 1903), X, 339.

had finally managed to make themselves into an opposition group countering the ruling Republicans, but this course in wartime finished them politically. Federalists either dropped out of public life or moved over into the Republican ranks.

If in one sense the Federalist party began collapsing the moment Thomas Jefferson took office, in another sense it grew as the nation's newly organized political opposition. The metamorphosis took place over the years preceding America's second war with England. At this time a number of the party's members were able to become active, virulent, and sometimes effective critics of the Republican administrations.<sup>2</sup> In the process they found themselves faced with governmental secrecy, or covert policy and procedures, now viewed on their part from a new perspective. The perspective of a party out of power but anxious to govern made them reconsider the principle that republican governments should not have secrets.

This ideal, of course, had been before the nation's politicians from the beginning. The range and propriety of concealed processes had been a regular if sporadic issue, but, as it turned out, the most protracted struggle over the balance between secrecy and publicity occurred during the Jeffersonian era when the United States became entangled in

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<sup>2</sup>The history of this development is the theme of David Hackett Fischer's work, Revolution of American Conservatism.

European war. In this struggle it is ironic that the attack on secrecy did not come from the more popularly based political party but from the party traditionally associated with aristocratic principles -- the Federalists. Furthermore, whatever one may think of Federalist motives or of their ideas on the balance of power and the merits of the War of 1812 with England, this minority party, allied with a few dissident Republicans, asked important questions about secrecy in government which were not satisfactorily answered. These questions, raised in political heat, were often ill-founded; still, they continued to point up anomalies in public procedure under republican forms, anomalies associated with expanding pressures from world conflict and increasing fears of United States involvement.

Differing assessments of the proper balance between secrecy and publicity developed as Federalists and followers of the ex-Republican House leader, John Randolph of Roanoke, became irritated by an increasing number of closed congressional sessions that obscured issues of immense public interest. Secret debate and proceedings, they reiterated, were clearly contrary to the fundamentals of self-government. The ruling Republican party had demonstrated its lack of confidence in an informed public opinion. "It is now reduced to a system," the editor of one Federalist weekly wrote in June 1812,

that all debate which is disagreeable to the ministerial party in Congress, is at an end. By the means of closed doors, the previous question,

and the Speaker's disregard of all rule and decency, every man's mouth may be stopped on any occasion. The freedom of speech is destroyed, and all opposition to cabinet tyranny, oppression, wickedness, or folly, put to silence, and the people are as completely at the mercy of their Administration as the slaves of France are at the sovereign will and pleasure of his Imperial and Royal Majesty.<sup>3</sup>

At precisely the time this editorial appeared, Federalist members of the House, joined by two Republicans, prepared an address to the public. They began their widely published dissent from the declaration of war against Great Britain by noting:

A Republic has for its basis the capacity and right of the people to govern themselves. A main principle of a Representative Republic is the responsibility of the Representatives to their constituents. Freedom and publicity of debate are essential to the preservation of such forms of Government. Every arbitrary abridgment of the right of speech in Representatives, is a direct infringement of the liberty of the people. Every unnecessary concealment of their proceedings, an approximation towards tyranny. When, by systematic rules, a majority takes to itself the right, at its pleasure, of limiting speech, or denying it altogether; when secret sessions multiply; and in proportion to the importance of questions, is the studious concealment of debate, a people may be assured that, such practices continuing, their freedom is but short-lived.<sup>4</sup>

This expression of general principles marked the failure of Federalists to prevent war with England and the apex of

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<sup>3</sup>(Hartford) Connecticut Mirror, June 22, 1812.

<sup>4</sup>"Address of the Minority to Their Constituents," Annals of Congress, 12th Cong., 1st sess., Appendix, 2196-2221. The "Address" appeared in pamphlet form and in Federalist-sponsored newspapers. The (Washington, D. C.) National Intelligencer, which devoted three issues to a refutation of the "Address," did not print it because it had been "diffusely circulated" throughout the country. See issue of July 18, 1812.

their decade-long struggle against an increasing reliance by the majority upon shrouded legislative processes.

Concealment of the legislative process in Jefferson's and Madison's administrations had taken the form of closed congressional sessions. There were precedents, however, during the early years of the Republic. As we have seen, despite an implicit commitment to open congressional debate, the Senate remained entirely closed to all but members and clerks until December 12, 1795, and even after that held closed executive meetings during large portions of every session. In the House, although the original set of written rules contained no provision at all for handling confidential material, the public galleries were cleared of reporters and spectators from time to time.<sup>5</sup> The Speaker's practice had preceded the rule adopted in December 1793, when procedures were formulated concerning secrecy. The public could be barred from the Representatives' chamber, as the rules then specified, either at the Speaker's proposal or on a member's unseconded motion as well as upon the receipt of confidential messages from the Executive. Ultimately, after examination of the message's substance or after passage of legislation related to it, a majority might

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<sup>5</sup>The House doors were closed for the first time January 12 and 13, 1790; see Annals, 1st Cong., 2nd sess., 1055, 1059. They were closed at a member's request, February 1, 1791; Annals, 1st Cong., 3rd sess., 1944. During the next Congress, the doors were closed at the President's request, December 6, 1792, probably December 10 and 11 as well, and on January 5, 1793; see Annals, 2nd Cong., 2nd sess., 738-41, 792.

determine the merits and extent of the injunction of secrecy, but in actuality, the injunction's propriety was seldom questioned.<sup>6</sup> Nevertheless, nonpublic meetings were rare until the Fifth Congress (May 1797 to March 1799), as the members' confusion at that time concerning the rule's proper application confirms.<sup>7</sup> In fact, excepting the period of the undeclared naval war with France, 1798-1800, the House sat secretly in relatively few instances until the winter of 1805-6. During that session the House held eight closed meetings, then twenty-one over the years of the embargo debates, to reach a total of secret sessions for all or part of twenty-three days in the first half of the Twelfth Congress (November 1811 to July 1812).

The reaction of Federalists and their friends to this trend developed as early as the year of Jefferson's Embargo. It is not difficult to imagine Federalist congressmen's exasperation at the secrecy surrounding the initial Embargo bill of 1807. A New York member, writing for newspaper publication, said, "I am not permitted to inform you either what the President has communicated to us, or what we have done in consequence of it. But I may be

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<sup>6</sup>For rules, see Annals, 1st Cong., 1st sess., 98-102, 121-23, 450, 671-72; 3rd Cong., 2nd sess., 880.

<sup>7</sup>See, e. g., Annals, 5th Cong., 1st sess., June 3, 1797, 238. The Speaker of the House had to clarify the rule for William Loughton Smith and John Nicholas, both old hands from the earliest days of Congress. Samuel Sitgreaves had similar difficulties with the rule on secrecy six months later; ibid., 2nd sess., 672.

permitted to tell you we are doing no good. . . . In my opinion," he concluded, Congress is "violating the great right of the people, by sitting at this moment with closed doors." The New Yorker could think of no other reason for secret legislative sessions than the fear that pervading French influence would be publicly exposed.<sup>8</sup>

Whether from conviction or for shock effect, Federalist politicians at home and in Congress stressed the idea that administration policy suited Napoleon's wishes. Congressman Taggart wrote a close friend in Deerfield that the House members were legislating in the dark. Then two days later he wrote, "Last night precisely at eleven o'clock we closed a session which had been held for three days in secret. Should I say that the die is cast, that my country is no longer independent; we have been legislating under an imperial decree of the Emperor of France, . . . it would be saying no more than I fear will be realized." This charge was repeated in Boston's principal Federalist newspaper by "Anti Gallicus," who called the Jeffersonian's hatred of Great Britain "no ordinary hate."<sup>9</sup>

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<sup>8</sup>New York Evening Post, December 22, 1807. The letter was read into the record of the House by an angry Republican member, December 29, 1807; see Annals, 10th Cong., 1st sess., 1251-52. Republicans attributed the letter to Barent Gardenier, which seems reasonable.

<sup>9</sup>Samuel Taggart to Rev. John Taylor, December 20 and 22, 1807, "Letters of Samuel Taggart," ed. George H. Haynes, in Proc. American Antiquarian Soc., n. s., XXXIII (1923), 221, 223. (Boston) Columbian Centinel, December 30, 1807.

The opponents of the Embargo were certain they had not received the whole story and that the truth would not bear light. The Republican mode of action in fact encouraged this view. Jefferson's message to the Senate proposing the Embargo expressed indifference about the message's concealment but asked that the accompanying letters between the United States Minister to Napoleon's court, General John Armstrong, and the French Foreign Minister remain unpublished and be returned immediately. The Senate leaders decided to sit in secret, push their bill through as rapidly as possible, and transmit it to the House confidentially. In the House the bill finally passed behind closed doors. There was thus no forewarning of the contents of the Embargo Act, and when brought into the open it was a surprise to the nation.<sup>10</sup>

A threat to the safety of American merchantmen had spurred the decision of Jefferson and his Cabinet to ask for the Embargo, but administrative reserve hid the Administration's reasons from the public. Armstrong's letters had warned of Napoleon's intention of including the United States in his paper blockade of the British Isles. American traffic with the English would become lawful prizes for the

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<sup>10</sup>Annals, 10th Cong., 1st sess., 50, 1216-23. See also John Q. Adams's diary entry for December 18, 1807, Memoirs (C. F. Adams), I, 491. Bradford Perkins, Prologue to War: England and the United States, 1805-1812 (Berkeley: Univ. of California Press, 1968), p. 156. The conjectures of the major newspapers I examined were wide of the mark, supposing either non-importation or some sort of warfare.

French. At the same time newspapers and letters from England hinted that the British would soon increase impressment and intensify their blockade.<sup>11</sup> However, Administration motives for prohibiting virtually all sea-borne commerce with foreign nations remained unpublicized; and as a result, Federalists were able to press their claims of French influence. Taking advantage of a defeated request in the House for Minister Armstrong's correspondence, and of Jefferson's silence on his policy, they insinuated that the President acted either from fear of Napoleon or out of sympathy for the French.<sup>12</sup>

From one standpoint, as Bradford Perkins has said, the behavior of the Federalists was unscrupulous opportunism.<sup>13</sup> Their accusation of French influence was quite incorrect. On the other hand, secrecy bred suspicion of conspiracy. Federalist fear of the government's excessive Francophilia was not inspired by political partisanship alone; it was stimulated by poor communication and lack of credibility.

The Evening Post's Washington correspondent asserted that "the minority were left to find their way in the dark as well as they could." When, after passage of the

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<sup>11</sup>See Henry Adams, History of the United States of America, IV (New York: Scribner, 1890), 166, 168-70. Perkins, Prologue to War, p. 153.

<sup>12</sup>Perkins, Prologue to War, pp. 156-57.

<sup>13</sup>Ibid., p. 157.

Embargo, the secret journals of the House were published, but with the omission of both Jefferson's message and the motion requesting the submission of Armstrong's correspondence, Federalist suspicions of sinister policy would not be quelled.<sup>14</sup> "All these extraordinary circumstances combined may well excite peculiar solicitude," remarked the Post. Both the Post and the Hartford Courant warned, "When public documents are suppressed or obliterated, it is as a fraud committed against the nation."<sup>15</sup>

Brutal economic warfare in Europe, America's position as the foremost neutral maritime nation, belligerent countermeasures and consequent depredations upon American merchantmen led to the Embargo. As threats to United States sovereignty crowded in, the government hoped that the Embargo would disperse them; if not, war was likely. Both Federalists and Jeffersonians envisioned American loneliness in a hostile world, but they evaluated the European balance of power differently. Jeffersonians were most fearful of England's naval might, Federalists of France's continental aggrandizement. The latter party, observing Napoleon's bid

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<sup>14</sup>New York Evening Post, December 31, 1807, letter dated December 28, 1807; editorial, December 29, 1807. Annals of Congress, 10th Cong., 1st sess., 1239-40. See also (Washington, D. C.) National Intelligencer, December 30, 1807.

<sup>15</sup>New York Evening Post, January 2, 1808; December 31, 1807. (Hartford) Connecticut Courant, January 6, 1808. An unnamed congressman told the (Boston) Columbian Centinel, January 6, 1808, that the debates had been "uncommonly animated and interesting," but the majority "resolved themselves into a dumb junto."

for world domination, thought the English were fighting America's battles. They were convinced that leaders and most members of the majority party were partial to France, not an unreasonable assumption since the Embargo affected the two warring nations unevenly by bringing the United States into Napoleon's Continental System. Much less reasonably, they thought they saw direct French control of American policy. Thus, throughout Jefferson's last presidential years as well as during Madison's term, Federalist legislators asked for more information on foreign relations, and when it was denied, their theories of conspiracy became more deeply rooted.

Besides fears of treachery to national interests, worries about inadequately restrained executive power were also basic to the controversy about the President's control over the flow of information concerning foreign affairs. This is evident from Federalist reactions to frustrated attempts to elicit presidential reports about foreign conditions.

By this time everyone agreed that the President possessed ultimate discretion over whatever information was submitted from the State Department to Congress. This executive power had been established early, firmly secured during the debates over the Jay Treaty, and exercised thereafter from time to time. On the other hand, congressional requests for informative documents were also an accepted practice, ordinarily fulfilled; and during Jefferson's

presidency, Federalists complained that resolutions regarding information, couched in the normally respectful manner, were being cut off by the majority party in the House of Representatives.<sup>16</sup> Upon one such call, in February 1808, a Virginia Republican told the members that resolutions requesting information from the President displayed wrongful mistrust of his willingness to discharge his constitutional duties. "Whenever the public good requires," he said, "a disclosure will be made." James Elliott, Federalist from Vermont and later a newspaper publisher, replied, "We are told, because the President has said that nothing shall be wanting on his part, that it is not proper to call for information. This is, to me, a very strange argument; and nothing can be more hostile to the principle of a free Government than the deliberate assumption of such a position. Is our Government, indeed, a Government of confidence? It may not, indeed, be as it has been called, a Government of suspicion, but it is certainly not a Government of unlimited confidence."<sup>17</sup>

Elliott was emphasizing an original source of the revolutionary governmental checks, distrust of the executive; and in so doing, he had pointed to pressures working to break down this distrust. Crisis conditions, brought on by European war, had weakened normally sceptical

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<sup>16</sup>See, e. g., Josiah Quincy's remarks, Annals of Congress, 10th Cong., 1st sess., 1830.

<sup>17</sup>Annals, 1640-43.

legislative observation of executive policy. At the same time nationalism inspired conformity to presidential wishes. Consequently, by way of counteraction, Elliott's Federalist associates, in the past preoccupied with strengthening the Executive branch, now sought to reverse these trends by shoring up the old, traditional checks. In the process of shifting roles, they had shifted course.

The House refused to consider either the generalized call for information that provoked the exchange between Elliott and the Administration's supporters, or a more specific request Josiah Quincy offered a month later. Quincy placed before his colleagues a resolution asking for General Armstrong's dispatches on neutral commerce written to the State Department over the previous year. The young Massachusetts Representative also noted that Jefferson had omitted discussion of relations with France in his annual messages to Congress. Beginning with the Fifth Congress, December 1805, Quincy said, the quality of information communicated to Congress by the President had diminished, and he implied that this change was ominous.<sup>18</sup>

Quincy was essentially correct: after assuming the presidency, Jefferson said nothing about France in his annual messages until October 27, 1807, when he referred indirectly to a French decree. Yet his special Embargo message just three weeks later focused on Napoleon's Berlin

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<sup>18</sup>Annals, 1830-32, 1838.

Decree, and three of four documents presented at the time concerned French violations of neutral commerce -- altogether a misleading balance of information which the Federalists might properly criticize.<sup>19</sup> As Jabez Upham declared, "The order of the day ... seems to be Executive confidence! Why not Representative confidence? Why not place some confidence in the Representatives of the people?"<sup>20</sup>

Goaded by the innuendo accompanying Federalist requests for information and desiring to support his Secretary of State, Jefferson finally responded by forwarding to the House chamber all important correspondence between French and American governments. The Representatives remained in secret session for the whole or better part of seven days reading the immense package of papers.<sup>21</sup>

Although Congress recognized the President's discretionary powers over information from his departments, and procedural rules in both houses provided methods for following his directions concerning messages, the range of his power to bind the legislature in confidence was still much open to question. Under the tension of the prewar

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<sup>19</sup>See Lawrence S. Kaplan, Jefferson and France: An Essay on Politics and Political Ideas (New Haven: Yale Univ. Press, 1967), p. 124. Richardson, Messages, I.

<sup>20</sup>Annals of Congress, 10th Cong., 1st sess., 1867.

<sup>21</sup>Annals, 1869-73. Cf. Irving Brant, James Madison, Secretary of State, 1800-1809 (Indianapolis: Bobbs-Merrill, 1953), pp. 440, 443-44. Smelser, The Democratic Republic, p. 183.

years, this too became a point of contention between the majority Republicans and minority Federalists aided by a small but vociferous coterie of Randolphites. The dispute first arose after publication of the secret journals of the House that covered enactment of the Two Million bill, passed February 1806.

The Two Million bill resulted from Jefferson's expectation that the French could persuade Spanish authorities to accept American purchase of their nation's Gulf Coast territory. Success in such an indirect transaction, Jefferson understood, depended upon secret diplomacy and resolute gestures. So, in a public message to Congress, the President spoke belligerently of Spanish aggressions and obstruction in the south; in a confidential message delivered three days later behind closed doors, he requested an appropriation of two million dollars to insure French good offices. To the world outside, Congress would seem to be preparing American military defenses, while within the chambers, funds for negotiation would be known to be the true objective.<sup>22</sup>

The effort to acquire Spanish Florida for the United States with French help completed John Randolph's break with his own party. The long-time Republican leader told his fellow members in the House that the appropriation of two million dollars to facilitate the sale of Florida

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<sup>22</sup>See Peterson, Thomas Jefferson, pp. 812-17. Annals, 9th Cong., 1st sess., 18-19, 266, 970.

was "a base prostration of the national character." It involved the excitation of "one nation by money to bully another nation out of its property." Consequently, he said, his confidence in the Secretary of State "died never to live again."<sup>23</sup> Randolph's confidence in Jefferson's administration had probably died much earlier, but the Two Million bill gave him an appropriate opportunity to shift into opposition. An erratic but uncompromising political purist, Randolph objected to what he regarded as two different policies: one public and yet deceptive, the other covert but real.<sup>24</sup> Harsh in his denunciations, he carried only a few admirers with him from the party, but he also received support from Federalist members in Congress. These men no doubt wished to embarrass the administration, but they also wanted the public to be aware of the government's actions.

Slightly more than a month after passage of the Two Million Act, the injunction of secrecy was removed and the journals were published. However, Jefferson's confidential message leading to the adoption of the bill and a few letters from the War Department were omitted. Infuriated,

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<sup>23</sup>Annals, April 5, 1806, 947.

<sup>24</sup>Annals, April 7, 1806, 959, 982. Cf. Peterson, Thomas Jefferson, p. 818; Henry Adams, History of the United States, III (New York: Scribner, 1890), 115-16. For Randolph's character and break with party, see Peterson, Thomas Jefferson, pp. 817-22; Risjord, The Old Republicans, pp. 33-39; Dangerfield, The Era of Good Feelings, pp. 354-55; Henry Adams, John Randolph (Boston: Houghton, Mifflin, 1890) and Russell Kirk, Randolph of Roanoke, A Study in Conservative Thought (Chicago: Univ. of Chicago Press, 1951).

John Randolph warned the House that he would submit a resolution to amend the journals so as to include these key documents. Debates over this resolution exhibited extremes of personal bitterness as members of the same party fell out over different recollections of the originally closed proceedings.<sup>25</sup> Randolph took the lead, arguing that public understanding would be incomplete without publication of the President's words. Counter arguments emphasized publicity as a breach of faith and an act unfavorable to the nation's interests.<sup>26</sup> Often degenerating into invective, the speeches followed these lines until the House converged upon the fundamental question of the limits of presidential power to withhold documents from the public. Samuel Dana claimed that constitutionally as well as formally, and according to its own rules, the House had command over disclosure of documents in its possession.<sup>27</sup> Republicans disputed this. The national interest, they believed, required that the President have complete control of the public flow of information when premature publication might defeat his purposes. Furthermore, confidence between branches of government would collapse, since, if the House members were not constitutionally bound to keep confidential communications from the Executive secret, they were at least honor-bound. Surely,

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<sup>25</sup>See, e. g., John G. Jackson's and James Sloan's speeches, Annals, 9th Cong., 1st sess., 987-92, 1107-15.

<sup>26</sup>Annals, 946-55.

<sup>27</sup>Annals, 957-58.

it was said, such messages ought not to be published without prior sanction. There might be extraordinary cases when Congress was justified in disclosing material confidentially acquired, as John G. Jackson admitted, but these would be rare -- at moments when the Constitution itself was endangered.<sup>28</sup>

Randolph's role in raising the question of responsibility for secret memoranda, and his choice of words, which were scarifying if logical, elicited angry charges of misconduct at the session's close.<sup>29</sup> Randolph's resolution to publish the presidential message and documents submitted to the House was defeated, but the debate had not settled the main problem. Exactly where the House's powers over secret material stood was not clear to all the members. The President, in the meantime, retained control over public disclosure. The legitimacy of this control became an issue in regard to the continued effort to snatch the Floridas out of the European conflict -- this time under a new administration.

Jefferson had hoped that diplomacy would bring West Florida into the United States, but by the summer of 1810, President Madison and his Secretary of State, Robert Smith, had come to believe the area's discontented population offered the best approach to acquisition. They resolved to

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<sup>28</sup>Annals, 958-73, 989-90.

<sup>29</sup>See James Sloan's remarks on appointment of standing committees, Annals, 1107-15.

support revolution in West Florida, supposing that timely American intervention would achieve the final goal. When, in due course, a rebellion occurred, Madison issued a proclamation on October 27th directing officials of the Orleans and Mississippi territories to take possession.<sup>30</sup> Madison was well aware his authority was doubtful and that Congress might obstruct his action, so he successfully suppressed news of the proclamation, as well as of the action it prescribed, until he delivered his message to Congress in December.<sup>31</sup>

In the Senate, Outerbridge Horsey headed the attack on the President's policy. Rising the day following introduction of a bill for the establishment of civil order in the lands west of the Perdido River, Horsey asserted that Madison had not a shadow of a right for his action. His proclamation amounted not only to legislation, Horsey said,

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<sup>30</sup>Charles C. Tansill, "Robert Smith," American Secretaries of State and Their Diplomacy, ed. Samuel F. Bemis (New York: Knopf, 1928), III, 182-87. Richard W. Van Alstyne, American Diplomacy in Action, 2nd ed. rev. (Palo Alto: Stanford Univ. Press, 1947), pp. 535-38. Irving Brant, James Madison, President, 1809-1812 (Indianapolis: Bobbs-Merrill, 1956), pp. 175-85.

<sup>31</sup>Madison wrote Jefferson, October 19, 1810, "The crisis in West Florida, as you will see, has come home to our feelings and our interest. It presents at the same time serious questions as to the authority of the Executive, and the adequacy of the existing laws of the United States for territorial administration. And the near approach of Congress might subject any intermediate interposition of the Executive to the charge of being premature and disrespectful, if not of being illegal." Presidential Papers, James Madison, microfilm, ser. 1, reel 12, DLC. See also Brant, James Madison, President, pp. 183, 186, 189.

but to war as well. Thus, Madison had exceeded his constitutional powers, and in so doing, had departed from the country's pacific policy.<sup>32</sup> The Administration's case depended upon the assertion that West Florida was already United States territory and that it had been ceded to this country as part of Louisiana. Popular disorder there, it was alleged, forced the government to affirm the fact.<sup>33</sup> The opposition denied this interpretation of the Louisiana Purchase. Supporting the denial, Federalist Senator Timothy Pickering read a letter of Talleyrand that had been communicated confidentially to the Senate by Jefferson seven years earlier. Maryland's Samuel Smith immediately noted that the galleries were now open and that the letter Pickering read had been secret; the debate therefore moved from Florida to a question of proper proceedings and a motion to censure the hated Federalist veteran.<sup>34</sup> In effect, the Senate embarked on an early declassification case, and the result was not favorable to open government.

Federalist Senators thought the resolution

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<sup>32</sup>Annals of Congress, 11th Cong., 3rd sess., December 28, 1810, 44-54.

<sup>33</sup>Annals, 37-38, 61; see speeches by John Pope and Henry Clay.

<sup>34</sup>Annals, 65-66. A brief summary of these debates can be found in Richard Hildreth's History of the United States (New York: Harper, 1880), VI, 224-25. For typical New England Republican opinion of Mr. Pickering, see the (Boston) Independent Chronicle, January 10, 1811. I have relied heavily upon David H. Fischer's biographical sketches of Federalist politicians in his Revolution of American Conservatism, pp. 227-412.

censuring Pickering was ridiculous. The letter was many years old and had already appeared in the press. Samuel Dana of Massachusetts, new to the Senate, presumed that no mortal, not even the President, had the authority "to lock our lips in eternal silence." The Senate, he said, could not be bound to secrecy without its consent. If the rules were not sufficiently clear on the matter, rather than deciding about a censure resolution, the rules should be examined and amended.<sup>35</sup> Samuel Smith, piqued at the lecture from a new Senator, was not disposed to argue beyond pointing out that a rule existed which should be obeyed. Again honor and confidence were mentioned, but the rule was stressed. Republicans said that Senators did not have the full independence of judgment, regardless of executive wishes, claimed by the junior Massachusetts Senator.<sup>36</sup> Chauncey Goodrich, Christopher Champlin, and Pickering too, pleaded that no reason for concealment existed. No negotiations were in process. The letter was years old. On the other hand, the question of American occupation of West Florida was one of peace or war, thus information involving the title of the United States to the territory should be placed before the public. This reasoning did not prevail; Timothy Pickering's censure stood on Senate vote.<sup>37</sup>

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<sup>35</sup>See comments by Pickering, James Lloyd, and Dana, Annals, 66-79.

<sup>36</sup>Annals, 71, 73-74.

<sup>37</sup>Annals, 76, 78, 82-83.

Press reaction was surprisingly negligible.

Perhaps because Mr. Pickering was a man not easily defended, or because they felt the subject spoke for itself, Federalist-sponsored papers simply noted the censure along side the printed text of Talleyrand's letter. The larger problem of the public's right to know about essential materials influencing their government's policy was not seriously discussed, although under the name "Jonathan" the New York Evening Post ran some heavy handed satire of secret sessions.<sup>38</sup> Jonathan lamented the newspaper's inability to fill its pages with news from Washington and said he would supply an account of congressional proceedings taken in neither short nor long hand but received by word of mouth from a descendant of one of the witches hanged at Salem. "It was some time before I could persuade her to mount her broom-stick, and ride through one of the sky-lights into the capitol," Jonathan confided. "She was afraid that she, like her ancestors, might have her neck put out of joint by some very pious Christians. But I satisfied her on this point, by convincing her that her master had now a majority in the world, and and when the majority are with one there is no danger of detection or punishment." Boston's Republican Independent Chronicle, not seeing any humor at all in this affair, thought Pickering's actions were "gross" and "perfectly characteristic" of the man. He "had broken every principle

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<sup>38</sup>January 11, 1811.

of honor and delicacy" by reading to the Senators "documents heretofore communicated to them confidentially by the President" and "in respect to which the injunction of secrecy had not been removed." The paper neglected to tell its readers which President had submitted the document and how many years ago.<sup>39</sup> The embarrassment caused by Pickering's disclosure of the letter was the real outrage he committed against decency.

Violation of House-imposed secrecy had occurred before, and leakage to the press of a closed meeting's import was common, but as the nation moved towards war, sensitivity on the subject increased. Just a year and three months after Pickering's censure, rumors that Congress, in secret session, was about to lock merchant ships to their wharves by another embargo spread throughout the commercial ports, enabling many to set sail prior to official notice of the act. As a result, the House appointed a special committee to look into the affair and determine the source of the leak.<sup>40</sup> The committee found that Nathaniel Rounsavell, an editor of the Alexandria Herald, had supplied his own paper and the Georgetown Spirit of Seventy-six with

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<sup>39</sup>Independent Chronicle, January 10, 1811.

<sup>40</sup>(Boston) Columbian Centinel, April 11. The editor, while noting the House investigation of the manner in which the secret proceedings were communicated to two newspapers, applauded the fact that so many ships were able to load and clear Boston and New York. See also New York Evening Post, April 4, 1812; Annals of Congress, 12th Cong., 1st sess., 1600.

information about the secret proceedings on the embargo. Shortly thereafter, the House discovered that Rounsavell gained his information by eavesdropping. He had listened in on Representative John Smilie's conversation with a colleague who had been absent from the floor. Smilie, a Pennsylvania Republican, brought this out himself during the investigation. The House also learned that John C. Calhoun, of the Foreign Relations Committee, having heard John Randolph's refusal to be held to secrecy, had deliberately informed seaboard Representatives of the prospective embargo.<sup>41</sup> They in turn had quickly relayed the news by post to their seaport papers. The matter, therefore, was quietly dropped; Smilie's disclosure had been inadvertent, and Calhoun's action was in response to a fellow committee-man's declared intentions. John Randolph would not acknowledge injunctions of secrecy imposed by a committee, and he was supported in this position by another anti-nationalist Old Republican, the respected Nathaniel Macon.<sup>42</sup>

Federalist members of the House and their partner in opposition, John Randolph, came to regard parliamentary rules limiting debate as another means employed by the majority leaders to shroud public business. Although the connection between concealed proceedings and procedures

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<sup>41</sup>Annals, 1617-19, 1263-64.

<sup>42</sup>Annals, 1264-66. Cf. Risjord, Old Republicans, p. 141; for resistance to nationalism of Republican conservatives, see pp. 4, 6, et passim.

governing debate is not readily apparent, the minority definitely joined the two together in the same context. During the congressional sessions in January 1810 and December 1811, before the passage of Madison's embargo and the declaration of war, they attempted to have the rules changed to liberalize debate. They believed that the Republican's use of the motion for the previous question unnecessarily choked debate, and, in combination with closed sessions, prevented a public hearing for their side. As interpretation of the previous question had evolved in Congress, the motion, when carried in the affirmative, closed the subject to further amendment or even discussion. Federalists thought this was a distortion of the rule's true intent. Therefore, they tried to strike it out altogether and, failing this, to alter the debate-restricting aspects of this call for votes on the main question.<sup>43</sup> Their effort definitely anticipated future demands for war by either Congress or Administration.<sup>44</sup>

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<sup>43</sup>See Annals, 11th Cong., 2nd sess., 1153-54, 1156; 12th Cong., 1st sess., 570. For a full expression of the Federalists' attitude concerning the previous question, from the perspective of a time a few years after the War of 1812, as well as for a history of the rule's evolution, see William Gaston's speech in the House, January 19, 1816, Annals, 14th Cong., 1st sess., 699-718.

<sup>44</sup>Roger H. Brown, a close student of the development of the war, asserts that most Americans doubted the Administration's will to make war: Republic in Peril: 1812 (New York: Columbia Univ. Press, 1964), p. 103 et passim. Federalists prepared for such an eventuality, however; and the liberalization of debate was to be one of their weapons. E. g., on January 5, 1810, Federalist congressmen said that the House rule on the motion for the previous question,

Two years earlier, in Jefferson's last year as President, the time of the first embargo, John Randolph had tried but failed to change the rules concerning motions so that debate on them could be extended. Endless speechmaking could be a nuisance, he observed, but it was not "from the very nature of our Government, possible that it can act with the celerity of one wielded by despotism," a small sacrifice, he added, for the blessings of discussion and deliberation.<sup>45</sup> Other Republican members, suspecting a covert interest in obstructive tactics, reminded the House that the rules made it possible to transact public business in the public's interest without wasting time. It was its same fear of filibuster that prompted the majority's reaction to later Federalist efforts to eliminate the previous question.<sup>46</sup> In a lengthy speech, War Hawk Peter B. Porter explained that the minority, under the rules as they stood, could keep the assembled Representatives almost endlessly tied up in debate. Thus the proposal to discard the previous question was simply one "to invest the minority with a power which they may abuse so as to subvert all law and place the country in a state of anarchy." Porter concluded that "A dumb legislature ... would be infinitely preferable ... to a mere talking

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"at the present time particularly, ought not to be adopted, as the House might shortly have to decide the question of peace or war, on which much deliberation undoubtedly would be requisite." Annals, 11th Cong., 2nd sess., 1155.

<sup>45</sup>Annals, 10th Cong., 1st sess., April 1, 1808, 1889-90.

<sup>46</sup>Annals, 1892-93; 11th Cong., 2nd sess., 1155.

assembly. The one, it is true, might alarm our fears, but it would, as a legislature ought to do, command our respect. The other would excite our contempt."<sup>47</sup>

As Federalists and Randolph-Republicans dreaded, cloture eased Madison's embargo through Congress, and though secret sessions failed to keep the subject hidden as expected, they at least obscured votes from the public eye. The minority had moved for open galleries, but of course the needed votes were lacking.<sup>48</sup> Some congressmen worried that Americans would not detect the nearness of war. One wrote to a Boston paper: "We are approaching fast towards WAR, and it is necessary that people should be informed, and not amuse themselves any longer with the expectation that our rulers intend peace." He closed by saying, "As the injunction of secrecy is not taken off I cannot give you the information I wish, and what every man in the U. S. ought to be fully apprized of -- You can hardly conjecture affairs to be in so bad a situation as they are."<sup>49</sup>

As war loomed closer, the opposition again attempted

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<sup>47</sup>Annals, 11th Cong., 2nd sess., 1214-15.

<sup>48</sup>For motions on removal of the injunction of secrecy and for use of the previous question, ending debates, see Annals, 12th Cong., 1st sess., 1595, 1612-13. John Randolph noted that secret sessions negated the intent of the constitutional provision prescribing a recorded vote at the insistence of one-fifth of the members present. See (Washington, D. C.) National Intelligencer, July 8, 1812; rpt. in Annals, 12th Cong., 1st sess., 1478.

<sup>49</sup>(Boston) New England Palladium, April 10, 1812. The letter is unsigned. Internal evidence indicates the congressman was from a state other than Massachusetts.

to make the debate public. When President Madison's war message was reported out of committee, Josiah Quincy, John Randolph, and James Milnor moved successively to open the House doors. Unsuccessful each time, they and other members of the opposition resolved to sit in silence.<sup>50</sup> This gesture did not affect the outcome. War or peace, at the very last, was in the hands of a British Cabinet which acted too slowly.<sup>51</sup> Nevertheless, the closed sessions -- which led to minority's unwillingness to debate and its eventual decision to publicize the issues in an address to the people -- disgusted New England Federalists and decidedly reinforced their feelings of conspiracy. Some thought suppression of opposition views had been reduced to a system. Congressman Taggart of Massachusetts believed that open discussion venting the opposition's criticism would have brought petitions in such numbers from all sections of the nation that war would never have been declared. The response of the Federalist press was uniformly angry, almost as disparaging of the secret sessions as of the result, for opposition to secrecy had been an important element in the Federalist reaction to the drift towards war. It intensified

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<sup>50</sup>Annals of Congress, 12th Cong., 1st sess., 1630-31, 1633. "The minority used every exertion to have the doors opened but in vain, when they could not effect this they were silent and refused to say a single word in debate." Taggart to Taylor, June 5, 1812, "Letters of Samuel Taggart" (Haynes), p. 402.

<sup>51</sup>For the British government's responsibility, see Perkins, Prologue to War, pp. 300-301, 309-10, 322-41.

their assurance of its wrongfulness. "In our paper of yesterday we expressed an expectation that the message which it was supposed the President would send to Congress on Monday would be read in that body in open day," wrote the Evening Post's editors. "But our readers will perceive by the sketch of Monday's proceedings, that we are disappointed. The message was read in conclave. From this circumstance we shall be justified in saying, the thing will not bear the light."<sup>52</sup> In Boston it was said, "On Wednesday last, the House was again in secret session four hours. The subject before them, of course unknown; but also of course, something like the progeny of past conclave meetings -- none of which have been good for the people." After news of war: "The Hydra which was conceived in secret is now exposed to the glare of day in all its brazen ugliness."<sup>53</sup> The closed national legislature gave Federalist pamphleteer John Lowell a point of departure in his call for continued resistance: "What is this doctrine that an insulted people hear? Why, that a measure big with the fate of seven million of people passed in secret conclave ... is not only to be binding upon them as a law ... but its justice, its wisdom, its expediency must not be questioned."<sup>54</sup> Few party members were so

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<sup>52</sup> (Hartford) Connecticut Mirror, June 22, 1812. "Letters of Samuel Taggart" (Haynes), p. 402. New York Evening Post, June 4, 1812.

<sup>53</sup> (Boston) Columbian Centinel, June 17, 1812; June 24, 1812.

<sup>54</sup> Mr. Madison's War. ... By a New England Farmer (Boston: Russell & Cutler, 1812), p. 60.

intransigent as Lowell -- Madison was leader of the "French party" to him -- but the secrecy surrounding the final steps to war left a bad taste that lent credence to extreme accusations.

Key personnel of the Federalist party, its representatives in the House, presented their case against the war in a signed Address of the Minority to their Constituents. It opened with the statement that unlimited public debate was essential to republican government. But practice, they said, had become subversive of the principle: House rules were interpreted to restrict debate, and the paramount issue of war was decided in secret meetings. This was apparently done to prevent public discussion from influencing public opinion. "The doors of Congress were shut upon the people. They have been carefully kept in ignorance of the progress of measures, until the purposes of Administration were consummated, and the fate of the country sealed."<sup>55</sup>

The main body of the Address attempted to refute the declared grounds for fighting Great Britain. Angered by it, Madison prompted editorial answers filling three issues

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<sup>55</sup>Annals of Congress, 12th Cong., 1st sess., Appendix, 2196-97. Samuel Taggart wrote, June 23, 1812, "A remonstrance against the war will be published in a few days as the joint act of the minority. A committee was chosen nearly three weeks ago to prepare one, consisting of Messrs. Key, Emott, Quincy, Milnor, and Pitkin. It is ready I understand for our signatures and a meeting will be held this evening for that purpose." "Letters of Samuel Taggart" (Haynes), p. 405.

of the National Intelligencer.<sup>56</sup> Their deviation from traditional Republican maxims was extraordinary, which may account for their want of historical notice. The preamble of the first editorial locked horns with the Address's philosophy of government. Ridiculing the minority signatories' statement, "A Republic has for its basis the capacity and right of the people to govern themselves," the editorial said,

The true basis of a republic, is the happiness of the people. The general capacity of the people is fully competent to appreciate their happiness; and it is this capacity of appreciating their own happiness that constitutes them the sovereign judges of rulers in a government instituted solely of popular benefit. Here lies the true cause of responsibility on the part of their representatives; who, in doing any thing contrary to the people's happiness, are made to answer for it. In this, and in nothing else, we see the saving principle of free government. ...

It is therefore, obvious that the happiness of the people being the real basis of a republican form of government, the representatives of the people are responsible only for such acts of theirs as infringe that happiness; and unless the federal gentlemen can demonstrate that the abridgment of the right of speech in representatives renders the people unhappy, they will go but little way to prove that the restraining their tongues [sic] from too great license, is contrary to the fundamental principle of a republic. ...

The right of speech is nothing in itself: it is the proper use, or the abuse of it, that makes it valuable or otherwise. ...<sup>57</sup>

Here was certainly a departure from the importance

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<sup>56</sup>Irving Brant, James Madison, Commander-in-Chief, 1812-1836 (Indianapolis: Bobbs-Merrill, 1961), p. 29. (Washington, D. C.) National Intelligencer, July 18, 23, and August 1, 1812.

<sup>57</sup>July 18, 1812.

Jeffersonians once placed on an informed public. Now the point was obscured, wrapped in rhetoric about the "happiness" principle. Time and tensions had altered the priority of an earlier outlook. Governmental practice and difficult foreign relations had encouraged concealed policy and hidden legislative sessions. Republicans did not desire the change; Federalists were not hypocritical in condemning it.

The thrust of this conclusion and the overall tone of my development of the era's history runs somewhat at variance with the currently accepted appraisal of the Federalists' role. Although he broaches the subject only in passing, David Hackett Fischer thinks Federalist reproval of secrecy was merely another among many insincere reversals in their attitude after Jefferson gained office. Hankering for lost political power, the more flexible members of the party suppressed its basically elitist position. Then they imitated Republican techniques and tried appealing uncharacteristically to the voting populace. Eventually this new style became a habit of the mind. Accordingly, it is Fischer's opinion that the Federalist assertion: "In republics there should be no secrets," illustrates nothing more fundamental than a "swift about-face."<sup>58</sup>

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<sup>58</sup>See Revolution of American Conservatism, p. 161, et passim. Most modern students of the era regard Federalist wartime opposition to have been wholly opportunistic -- motivated by feelings no more rational than hatred for everything Jeffersonian. See, e. g., Smelser, Democratic Republic, pp. 218, 287, 285-99, esp. 296; Brown, Republic in Peril, pp. 158, 160, 166ff; Peterson, Thomas Jefferson, pp. 895-97.

Probably one cannot be certain one way or another. It is true that, before their ascendancy, Jeffersonians promoted greater legislative publicity, and Federalists as a rule were then wary of such efforts; although, as I have indicated, representatives of each party may be found on both sides of issues of secrecy during the Constitution's first decade. Still, it seems less credible to me that such a bedrock question would merely be a means to office than that it would be a genuine concern. Out of office for the first time, Federalists discovered publicity's importance to an opposition, as well as to the general public. Their discovery was not a hypocritical "about-face" but rather a new awareness, and evidently, in the Federalists' case, their understanding was governed not only by their position as a minority political party but also by an ideal inherent in the American experiment in representative government.

## Chapter IX

## Ideas about Secrecy in the Era of One-Party Rule

Wartime Political Opposition

Federalists continued their opposition to the government after the declaration of war, a line of conduct which, notwithstanding their resurgent strength in New England, eventually proved fatal to the party. Josiah Quincy's plan of supporting the war effort and letting Madison's administration make a fool of itself was rejected in favor of uncompromising defiance.<sup>1</sup> This was a direct but imprudent course. Organized opposition to governmental measures in peacetime was not yet fully accepted as legitimate; in wartime it was anathema. Americans everywhere considered it to be treasonous.<sup>2</sup>

In Congress, since the experience of mobilization was new, the function of the nation's representatives in the war was confused and uncertain. There was understandable interest in keeping informed; hence committees blossomed and investigations multiplied. On the whole, government strategy was well known by key congressmen, and military operations were extraordinarily out in the open. This was not Madison's policy, but many details of the war were

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<sup>1</sup>William Ray Barlow, "Congress During the War of 1812" (Ph. D. diss., Ohio State Univ., 1961), pp. 13-15.

<sup>2</sup>E. G., Felix Grundy's statements, Annals of Congress, 13th Cong., 1st sess., June 18, 1813, 225; see also Joseph Pearson, ibid., 286.

naturally available to the Congress because so many members were actively involved in the fighting.<sup>3</sup> When facts were otherwise lacking, investigations by both select and standing committees attempted to add to the fund of congressional information about the hostilities. Therefore, the picture one gains at first is that of seemingly unrestrained congressional snooping into the Executive's conduct of military activities. Nevertheless, the work of a student of the wartime congresses and my own research leave the impression that investigations likely to embarrass the Administration were stopped within the halls of Congress or handled discreetly by the Republican dominated committees.<sup>4</sup> Antiwar Representatives, however, were able to use their resolutions requesting information as a means to publicize their objections to the war and their skepticism about the motives behind its continuation.

Alexander Hanson, for example, asked the State Department for a certain letter written in June of 1809 by General Louis Marie Turreau, who at the time was French minister to the United States. Hanson had a copy in his

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<sup>3</sup>W. R. Barlow, "Congress During the War," pp. 26, 29, 193-94.

<sup>4</sup>See W. R. Barlow, pp. 214-23. William Lowndes of South Carolina wrote, "In appointing committees the precaution is always used, and it is very necessary that it should be, of securing a majority of each in favour of the Cabinet. ..." Letter dated December 13, 1812, in Mrs. St. Julien Ravenel, Life and Times of William Lowndes of South Carolina, 1782-1822 (Boston: Houghton Mifflin & Co., 1901), p. 118.

possession, and he printed it in his own newspaper in order to display its remarkably insulting and threatening tone. The letter's tenor and the inability of the State Department to submit an original enabled Hanson and his politically extremist friends to make the accusation that a secret treaty existed between France and the United States at the expense of Great Britain. Opposition to Hanson's request then permitted his followers to claim that the House was shielding the Executive from investigation.<sup>5</sup> Actually Hanson's copy of Turreau's letter had been a translation made for Robert Smith, then Secretary of State; Turreau having been forced to retract the original, which explained its absence from the files.<sup>6</sup> Although he would have wished otherwise, Hanson was unable to belabor the matter further, because a good many Federalists would not support his obviously meaningless efforts.<sup>7</sup> They preferred to concentrate upon the reasons for declaring war, and here they focused their attacks on the bogus French decree of April 28, 1811, repealing the oppressive Berlin and Milan decrees. They asked, if the United States government had

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<sup>5</sup>Annals of Congress, 13th Cong., 2nd sess., January 12, 1814, 902, 904-05, 919.

<sup>6</sup>Brant, James Madison, President, pp. 62-63.

<sup>7</sup>The entire congressional discussion can be read in Annals of Congress, 13th Cong., 2nd sess., January 10-12, 1814, 824-927. See also W. R. Barlow, "Congress During the War," p. 253.

known of the decree in 1811, as the French Foreign Minister asserted, why had it waited until November 1812 to inform Congress, unless to insure the onset of war against the British? Newly elected Congressman Daniel Webster made it his business to put forth resolutions requesting information on this subject. Webster's resolutions questioned how and when the Administration had received news of the edict purporting to repeal the Berlin and Milan decrees. Did Jonathan Russell, who had been the American representative in France at the time, ever affirm or deny the Duke of Bassano's assertion that the French government had communicated the decree of 1811 to him? Did the French chargé in the United States speak about the decree? Finally they asked if the State Department had required an explanation from the French, assuming the decree had been concealed from United States officials for so long.<sup>8</sup>

The debate centered upon the right of the House to make such inquiries. Eventually, as their colleague Felix Grundy recommended, in order to weaken the argument that the Administration hoped to suppress information, most Republicans voted in favor of the resolution, but they at first offered objections and reservations. Some said the inquiries had no useful purpose. They were intended only

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<sup>8</sup>Annals of Congress, 13th Cong., 1st sess., June 10, 1813, 150-51. Although the decree was a fraud, Henry Adams could see no purpose in Webster's actions other than a desire to annoy and embarrass Madison. History of the United States of America, VII, 55.

to obstruct congressional activity, because Congress had declared war a year before, and now it certainly was not Congress's duty to question the decision. The most common reaction was similar to the one expressed by Thomas Telfair of Georgia: "the question of the policy, the justice, or necessity of a declaration of war is not the one now before the nation -- it is idle to spend time in debating it -- the special and important objects of this session will not sanction the discussion of it. ... Is every effort of the Government in prosecuting the war to be clogged by details of the causes which produced it?"<sup>9</sup> For a positive argument to couple with the negative one of denouncing obstruction by politicians in wartime, the majority attempted to shift the emphasis among the stated causes for the war away from the British Orders-in-Council. By downgrading the importance of the Orders-in-Council and by stressing the injustice of the continued impressment of American seamen, the significance of the French decrees was vacated. The British impressment of Americans, not maritime spoliation, the majority charged, was the paramount violation of the nation's independence that forced the decision to fight the English again. Thus, whether or not Napoleon repealed the French decrees was irrelevant.

Although historians have usually treated Federalist opposition with contempt, the questions raised by the party's

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<sup>9</sup>Annals, June 18, 1813, 270.

members seem perfectly reasonable.<sup>10</sup> It should have been expected that opponents of the war would try to dismiss the stated causes, as a normal first step to instigating attempts to conclude peace. In that vein then, Federalists pressed for investigations and repeated their doubts concerning the objectivity of the Administration and the justice of the war. This was a logical direction for their thought, consistent with their appraisal of the government's policy and methods prior to the war's outbreak and their certainty that England championed human freedom. This was also proper tactics, unless one assumes criticism in wartime must be placed solely on limited, practical grounds, and must be what it cannot possibly be -- free of emotion, charged rhetoric, and sometimes exaggerated perceptions.

"Will the gentleman say there is no cause of suspicion against the President?" asked a Federalist from New York. He said he could not rid himself of doubts. He had felt something was wrong ever since the day Madison had

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<sup>10</sup>Marshall Smelser's Democratic Republic is a prime example, in a recent work, of antipathy to antiwar Federalism. See p. 296ff., et passim. Others include Brown, Republic in Peril, pp. 158, 160-61, 166ff.; Peterson, Thomas Jefferson, 895-97; Brant, James Madison, President, pp. 482-83; Ralph L. Ketchum, James Madison, A Biography (New York: Macmillan, 1971), p. 561. Although both parties were highly unified by the onset of the war (see Ronald L. Hatzenbuchler, "Party Unity and the Decision for War in the House of Representatives, 1812." William & Mary Qtly., 3rd Ser., XXIX [July, 1972], 367-90), Federalist unity in opposition has been appraised as opportunistic and somehow quite reprehensible. This interpretation stems, I believe, from not taking the party's wartime dissent seriously -- viewing it as just another facet of Federalist distaste for anything to do with Jeffersonians.

announced the repeal of the French decrees in the winter of 1810. The French proclamation turned out to be false, he said, and Madison, having been cheated, was too proud to admit it. Like other members of his party, this Federalist congressman believed the public had not been properly informed about French spoliations, but that the Administration had gone into a "frenzy" over the least slight from England. An administration so inclined, he concluded, would be apt to conceal papers which, if publicized, would set aside every pretext for war.<sup>11</sup>

Following Felix Grundy's practically minded lead, the House Republicans decided it was best to let Webster's resolutions go through to the Executive. Madison responded with a complete exhibition of all the diplomatic correspondence connected with the spurious decree of April 28, 1811. Although the decree had been part of Bonaparte's audacious efforts to confuse American leaders, the correspondence refuted the opposition's most serious charges. As for the Duke of Bassano's lies, Republicans fell back on the position that they were inconsequential. War was still

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<sup>11</sup>Annals of Congress, 13th Cong., 1st sess., June 18, 1813, 233-34. For another expression of the same sentiments, see Thomas Grosvenor, *ibid.*, June 17, 1813, 201. He said "I have not the slightest doubt that to this constant habit of Executive secrecy, to the garbled extracts of letters from and to the French Government, which deform our journals and deceive the public; to the deep darkness which shrouds our intercourse with the arch tyrant; more than to any other cause, may be imputed all our present dangers and calamities."

necessary to defend American rights.<sup>12</sup>

When military operations were brought to an end with the agreement signed at Ghent, the end also came for the national Federalist party. Even though New England secessionist sentiment was vastly overblown and largely mythical, and the Hartford Convention shunned political extremism, the Federalist organization could not survive the odium attached to its wartime dissent.<sup>13</sup> The nation as a consequence came under one-party, or no-party rule. This unique and short-lived era, the two terms of James Monroe's presidency, has been misnamed with an appellation of unflinching survival power, "the Era of Good Feelings." If, instead, it was an era of unfriendly sectional attitudes and bitter frictions, it was, nevertheless, marked by the absence of formal party strife.

#### Era of Good Feelings

Unquestionably the disappearance of struggles for power between political parties lessened temptations to disguise administrative and legislative activity. It also removed a contrapuntal interest in exposure of disguised

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<sup>12</sup>Annals, June 19, 1813, 286-87, 293-94, 301. For the documents, see appendix, 2061-83. Also see W. R. Barlow, "Congress During the War," pp. 258-59.

<sup>13</sup>See Samuel Eliot Morison, "Dissent in the War of 1812," in Dissent in Three Wars (Cambridge, Mass.: Harvard Univ. Press, 1970), p. 27; *idem*, Harrison Gray Otis. Cf. Smelser, Democratic Republic, pp. 294, 298-99, and also Dangerfield, Era of Good Feelings, pp. 88-89.

operations. The doors of the House of Representatives were never closed during Monroe's presidential terms. Sessions remained open to the public view from the Fourteenth Congress to the second half of the Eighteenth, December 1815 to February 1825. Foreign affairs were also conducted in a comparatively open manner. John Quincy Adams, always sensitive to the prerogatives of the executive offices, complained that he was forced to operate his State Department in about as much privacy as a "public square."<sup>14</sup> This was largely the product of Henry Clay's innovation, the expansion of Congress's committee system, which originated as a move to promote greater legislative efficiency. The use of committees for much of the preliminary work was theoretically less democratic than exploring all important issues in the Committee of the Whole, but its initial effect was to promote closer scrutiny of government operations.

The members of new committees, having no staff, made frequent demands upon executive departments for information.<sup>15</sup> Therefore, it was important to have friends of the

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<sup>14</sup>Memoirs (C. F. Adams), V, April 26, 1820, 77.

<sup>15</sup>Ralph V. Harlow, The History of Legislative Methods in the Period Before 1825 (New Haven: Yale Univ. Press, 1917), pp. 228-29; J. Franklin Jameson, "The Origin of the Standing Committee System in American Legislative Bodies," American Historical Association Report for the Year 1893 (Washington, D. C., 1894), 393-99; Lauros G. McConachie, Congressional Committees: A Study of the Origins and Development of Our National and Local Legislative Methods (New York: Thomas Y. Crowell, 1898); Mason, "Congressional Demands Upon the Executive for Information," pp. 367-78.

Administration and persons who were thought to be circumspect heading the committees. In the sensitive field of foreign affairs this was regarded as essential. The Chairman of the Committee of Foreign Relations was treated as a quasi-cabinet member and, in consequence of his position, expected to preserve the Administration's confidences; the intimate relationship would break down if the chairman were hostile or members of the committee unreliable. This occurred, as John Quincy Adams reported, when John Randolph was placed on the committee in the winter of 1819. Randolph felt that all requests for secrecy must give way to the public interest; but Adams considered this to be unworkable, and he ceased to lay important communications before the committee.<sup>16</sup> For different reasons a similar situation arose three years later. The infighting surrounding the succession to Monroe led to the unexpected election of an anti-nationalist Old Republican as Speaker, and as a result John Quincy Adams again found himself facing a Foreign Relations Committee that he could not trust.<sup>17</sup>

In spite of the normally confidential relationship between the Executive and congressional committees on foreign

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<sup>16</sup>See Memoirs (C. F. Adams), IV, December 26, 1817, 31; March 22, 1818, 65. For problems with John Randolph, see ibid., December 13, 1819, 478; also Harlow, History of Legislative Methods, pp. 242-43.

<sup>17</sup>Memoirs (C. F. Adams), V, January 2, 1822, 474. The House elected Philip P. Barbour (Va.) Speaker after twelve ballots; Annals of Congress, 17th Cong., 1st sess., December 3, 1821, 516.

affairs, the growing number of committees at this time tended to draw the people closer to their government. Contrary to modern experience, the system worked as a link connecting the nation to Congress through printed reports and direct public contact with committeemen.

The Era of Good Feelings then was a period without immediate controversy about secrecy. But this does not mean that there was no discussion of the subject among politicians. There was; it merely tended to be more abstract -- although political interests seem to have lurked beneath some of the philosophical positions. Later, as the Republicans split into factions, this decidedly was the case, and it impeded a serious exchange of ideas.

After the War of 1812 Spain's disintegrating empire became the leading foreign relations problem for Monroe. Nearly all the President's important decisions were connected with it, and one decision made during the winter of 1817, inadvertently exposed hidden legislation of the past. The loosening of Spanish control had brought on another American invasion of East Florida. The latest occupation by federal troops was an extension of Jefferson's and Madison's policy, but it was generally more open than earlier efforts under Madison. This time congressional discussion was not hidden from the public. In fact there were no closed meetings of the House of Representatives at all. Nevertheless, an act passed secretly seven years before was the Administration's legal grounds for the occupation, and this act had

never been published until Monroe chose it to support the legality of his military attack against one hundred and fifty freebooting invaders of Spanish territory (Amelia Island) in December 1817. Hence the legacy of a tense, more fearful era, its policy concerning the Floridas and its legislation passed in camera, impinged upon President Monroe's actions.

In his annual message of December 2, 1817, Monroe reported the capture of Amelia Island by persons claiming allegiance to some of Spain's rebelling South American colonies. These people actually seemed to have acted privately in their own interest. Their force had attracted United States fugitives and runaway slaves, and they appeared to be bent on piracy and illegal slaving activities.<sup>18</sup> The day following Monroe's message, the House appointed a special committee to study and recommend future action concerning the establishment on the island. After the chairman, Henry Middleton, had consulted with John Quincy Adams, the committee indicated to the House that executive action suppressing the islanders' illicit plans had already been initiated. It was based on the anti-slave trade legislation of 1807 and a secret Resolution and Act of January 15, 1811, which granted contingent authority for military action in Spanish Florida.<sup>19</sup> Three days later

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<sup>18</sup>Annals of Congress, 15th Cong., 1st sess., 14.

<sup>19</sup>Annals, January 10, 1818, 646-50; American State Papers, Foreign Affairs, IV, 133. An earlier draft of the

Monroe sent a joint message containing the news that United States forces had taken possession of Amelia Island without casualties on either side. Again he referred to the law of 1811. "The path of duty was plain from commencement," he said, "but it was painful to enter upon it while the obligation could be resisted. The law of 1811, lately published, and which it is therefore proper now to mention, was considered applicable to the case from the moment that the proclamation of the chief of the enterprise was seen. . . ." He ended by saying that the Amelia Island establishment had brought together adventurers from several countries, among them a few from the Spanish colonies, and that all of them intended to engage in activities injurious to the United States, including the importation of contraband and slaves.<sup>20</sup>

Henry Clay may have stared coldly at Henry Middleton, annoyed by his commendation of Monroe's course of action; yet otherwise there was little congressional disagreement.<sup>21</sup> Good feelings and good times had submerged cantankerous

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committee's report, sent to John Quincy Adams on December 31, 1817, can be seen in Writings of John Quincy Adams, ed. Worthington C. Ford (New York: Macmillan, 1913-17), VI, 286-88; see also John Q. Adams, Memoirs (C. F. Adams), IV, 32-34, and Henry Middleton to John Q. Adams, January 1, 7, and 11, 1818, Adams Papers, Letters Received and Other Loose Papers, microfilm, reel 442, MHi.

<sup>20</sup>Richardson, Messages, II, 23-24.

<sup>21</sup>J. Q. Adams, Memoirs (C. F. Adams), IV, January 13, 1818, 40.

opposition. A few persons were disturbed by an executive-originated occupation of foreign territory. Committed supporters of the South American revolutionaries were dissatisfied. Most congressmen, however, felt that Spain's inability to police her lands made the action of the United States necessary.<sup>22</sup> There was some unfavorable comment in the press, however, and portions of it concentrated upon the secret act of 1811.<sup>23</sup>

At the time of his discussion with the chairman of the select committee on the Amelia Island affair, John Quincy Adams said there were four secret laws and one secret resolution passed in connection with the Floridas during Madison's presidency. One of the laws, that of June 25, 1812, was so secret, Adams stated, that it could not be found among his department's rolls.<sup>24</sup> Adams's deprecatory humor was certainly well placed, yet just as certainly he was mistaken about the number of secret acts. There were actually only three laws. He had referred to a bill authorizing the Executive to take possession of West Florida that passed the House, June 25, 1812, but did not become law until Senate passage in the next session. This was the last of a package of three pieces of legislation, enacted during the Eleventh

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<sup>22</sup>John Q. Adams to Albert Gallatin, May 19, 1818, in Writings of J. Q. Adams (Ford), VI, 314. Ammon, James Monroe, p. 418.

<sup>23</sup>See below p. 242 and note 34.

<sup>24</sup>J. Q. Adams, Memoirs (C. F. Adams), IV, December 30, 1817, 32.

and Twelfth Congresses, that gave the President discretionary control over their publication, and power to initiate military action in Florida.<sup>25</sup>

The key resolution and act provided the President with authority and funds permitting him to occupy East Florida in the event of either one of two contingencies: a request for American intervention on the part of the Spanish authorities, or occupation of all or a part of the area by a foreign power. The President was given free choice of personnel and government, either military or civilian, until such time as Congress would make permanent provisions. This act passed on January 15, 1811. It embodied the congressional opinion that Florida's passage into the hands of a nation other than Spain would seriously threaten the security of United States citizens and commerce.

Shortly afterwards Congress passed a second act in response to combined Federalist and Quid efforts to remove the injunction of secrecy. The Senate proposed this legislation in the form of a joint resolve that provided the President with total discretion concerning the publication

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<sup>25</sup>Although they were not published, the paths of the various acts can be traced by their titles in the Annals of Congress, 11th Cong., 3rd sess., 377, 1142, 1144-45; 12th Cong., 1st sess., 1684-85, 1694; 12th Cong., 2nd sess., 132-33. For the published resolution and acts, see Annals, 15th Cong., 1st sess., 2601-04. The bill John Q. Adams mistakenly took for an enrolled act passed the House near the end of the first session of the Twelfth Congress. It was held over in the Senate until the next session, where it was finally passed February 2, 1813, and signed into law February 12.

of the declaration and act of January 15. On March 3, 1812, the House transformed the resolution into an act of legislation amended to place a time limit upon the President's discretionary power. As passed and approved, it provided that the act authorizing the President to take possession of lands west of the Perdido River was not to be printed or published until the end of the next session of Congress, unless directed by the President of the United States. In the interest of national security Congress had legislated a precedent for temporarily elevating the chief executive above law and practice. The third act, approved February 12, 1813, authorized the President to secure and hold the remaining portions of West Florida not already under American control.<sup>26</sup> As it turned out, none of this legislative output on the Floridas was publicized until January 1818.

Monroe's biographer asserts that the Act of January 15, 1811, was well known; but this was probably not the case.<sup>27</sup> When he was Secretary of State, James Monroe did tell his peace commissioners to keep the legislation in mind should Great Britain accept the Tsar's mediation offer, but this was more than a year before serious negotiations began, and by then the point the secret act might underscore

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<sup>26</sup>For the proceedings, see Annals, 11th Cong., 3rd sess., 1117-48. For the acts, see Annals, 15th Cong., 1st sess., 2601-04.

<sup>27</sup>See Ammon, James Monroe, p. 306.

was irrelevant.<sup>28</sup> Most probably the intelligence went no further than the commissioners. John Q. Adams's careful tutelage of Middleton indicates that the act was not known, and some of the newspaper reaction points in the same direction.<sup>29</sup>

The acts were not published, in fact, until needed by President Monroe. Why this happened this way is difficult to understand, for the supplementary legislation prescribed a time limit on presidential discretion: publication by July 1812. Then, too, Joseph Anderson's motion to remove the injunction of secrecy on the entire congressional proceedings passed January 31, 1813. Still not a line about the legislation appeared in the National Intelligencer. Perhaps mere carelessness or wartime conditions prevented it. The secret enactments had been directed against the British, inasmuch as President Madison secured congressional action by raising fears of English designs for Spain's outpost in North America.<sup>30</sup> Therefore, it is entirely probable

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<sup>28</sup>For Monroe's description of the legislation to the American commissioners, see letter dated April 27, 1813, Writings of Albert Gallatin, ed. Henry Adams (Philadelphia: J. B. Lippincott, 1879), I, 539.

<sup>29</sup>New York Evening Post, January 12, 1818, stated that the law of 1811 had been "kept a profound secret since its passage."

<sup>30</sup>For implication of British interference in Florida, see Madison's message to Congress, January 3, 1811, Annals of Congress, 11th Cong., 3rd sess., 369-70. See also Smelser, Democratic Republic, p. 108; Richard W. Van Alstyne, American Diplomacy in Action, 2nd ed. rev. (Palo Alto: Stanford Univ. Press, 1947), p. 538.

that the acts were looked upon in purely military terms vis-a-vis an overt enemy. Then, by the time the war ended, Congress had forgotten about them. In any event, whatever the reason for past neglect, the secret acts first appeared in the Intelligencer on January 5, 1818. Heading this disclosure, the editors wrote, "the injunction of secrecy under which the following Resolution and Laws were passed, having been long since removed by the enacting authority, it is deemed unnecessary that they should be longer withheld from the public eye. They are now, therefore, published."<sup>31</sup>

Despite possibilities of war with Spain over the Amelia Island affair, there was little public criticism of the President's performance.<sup>32</sup> In Congress it was generally applauded, as has been noted, and among the press there were few critics.<sup>33</sup> With the exception of the New York Evening Post, the old Federalist newspapers approved and showed no interest at all in the secret acts. The Post, in notable contrast to the general pattern, was exceedingly critical. The editors stated that Monroe's conduct was high-handed and dangerous. What is more, the use of military force was

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<sup>31</sup>(Washington, D. C.) National Intelligencer, January 5, 1818. I examined all issues of the Intelligencer from 1811 to this date, and found no earlier publication.

<sup>32</sup>Monroe and some cabinet members were for a short time quite worried about the possibility of war; see J. Q. Adams, Memoirs (C. F. Adams), IV, January 19, 20, and 21, 1818, 44, 51.

<sup>33</sup>J. Q. Adams wrote Albert Gallatin that public opinion had been favorable nationwide; see Writings of J. Q. Adams (Ford), VI, May 19, 1818, 314.

justified by "a law passed in secret sessions more than six years ago, by those who declare that a republic should have no secrets, and kept a profound secret ever since." The Post editors thought it mortifying that the press had not condemned this course.<sup>34</sup> On the other hand, Niles' Register believed the President had placed entirely too much before Congress and the public.<sup>35</sup> Another paper, published in the capital, printed several editorials on the action at Amelia Island that are especially interesting because they disapproved of the Administration's chosen justification but defended the secrecy of the legislation. The publisher, John Elliot, found no fault with the secretiveness of the acts but said they did not in fact support the action taken since they applied only to foreign powers, and the freebooters represented no country or persons but themselves. The suppression of this group was completely proper, he thought, but the Administration should not have publicized the acts because of the adverse impression they would probably produce abroad. It should have kept the acts secret and justified the military expedition in the name of publicly known revenue laws and laws prohibiting the

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<sup>34</sup>January 12, 1818. The editors singled out the (New York) National Advocate for special condemnation. Until August 1815 the paper had been edited by "Citizen" Henry Weaton. It was an outspoken supporter of the Administration during the War of 1812, and was also considered exceptionally Francophile.

<sup>35</sup>Niles' Weekly Register, XIII, January 3, 1818, 304.

import of slaves.<sup>36</sup>

Elliot's reasoning provides a perfect illustration of why not only foreign discourse but also policy might be concealed from the public. He repeated the well-fixed idea that, whatever the dedication to open government, at times the conduct of foreign relations necessitated secrecy, and neglect of this fact would place the United States at a disadvantage within the international community. The objectives of legislation outlining policy under various contingencies could be defeated if exposed to the view of other nations. Therefore officials sometimes had to conceal measures simply to insure their success. The thoughts of this one newspaper publisher were archetypal. In one quarter of one editorial he compressed the mainstream of the age's ideas on government secrecy:

In monarchies -- that of Great Britain, for example -- the king can act without a previous parliamentary consent, and is therefore enabled to proceed in great affairs, even to the making war, in a manner not to betray his government until the last moment. But our President can adopt no plan of operation, which may possibly lead to hostilities, until the congress has sanctioned it by a law. The law is declaratory of the intention; and the successful execution of the intention may entirely depend upon secrecy. Hence we justify secrecy in affairs touching our foreign relations; although we should be among the foremost to oppose a secret law which should have reference to the interior concerns of the country.<sup>37</sup>

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<sup>36</sup>The editorials were extensive, appearing in the City of Washington (D. C.) Gazette, January 12, 13, and 16, 1818.

<sup>37</sup>Ibid, January 12, 1818.

Here is the dilemma posed as in variations it has been ever since. How can a self-governing, republican nation keep all its processes open in a hostile world -- in a world whose governments would take advantage of the very artless ingenuousness a democratic people wish to cultivate? Elliot's answer, the same as given by most Americans, was to separate foreign affairs from domestic. At home the government's practice must be simple and candid; abroad in international relations it must adhere to traditional methods and weapons. In practice, however, this dichotomy was always difficult to sustain.

John Q. Adams pondered over the same dilemma and ended in grasping its horns. Secret laws, he admitted, were an absurdity, inconsistent with the system. But they developed from the constitutional error of including legislative activities with the Executive. In his opinion it would be better to have the President control all that related to foreign nations and thus all that required secrecy. For example, declaring war, he said, was strictly an executive act, yet the Constitution made it legislative. Hence, "whenever secrecy is necessary for an operation of the Executive, involving the question of peace and war, Congress must pass a secret law to give the President power."<sup>38</sup> Fundamentally, Adams rejected as structurally unsound the Founders' attempt to introduce a degree of

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<sup>38</sup>J. Q. Adams, Memoirs (C. F. Adams), IV, 32.

popular control over foreign policy. The modern course for our country has often been the way Adams thought best, yet knew to be a republican anomaly. Congress has acceded to legislation that permitted Presidents to operate aggressively abroad in a profoundly secretive manner.

#### Publication of the Journals of the Old Congress

A congressional proposal, dated March 27, 1818, to publish the legislative journals and foreign correspondence in the secret journals of the Continental Congress up to the Treaty of Paris, brought forth, while the Missouri controversy churned in 1820, a recommendation to extend the publication beyond 1783 and to include the secret journals of that period. A relatively philosophical discussion of governmental secrecy ensued. The politicians' positions on the subject were significant, for, on the surface at least, their thoughts seem quite pure. But even in this matter, so isolated from the days' concerns, the tensions resulting from sectional antagonism influenced the points of debate. Some of the congressmen feared that the journals' publication would exacerbate sectional feelings. Their worries about this were definitely stimulated by the ongoing conflict over Missouri's admission to the union.<sup>39</sup> It also seems likely, although impossible to prove, that a number of the

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<sup>39</sup>See, e. g., the comments of Henry Baldwin (Pa.) and Henry A. Storrs (N. Y.); cf. John Randolph's remarks, Annals of Congress, 16th Cong., 1st sess., February 3, 1820, 1055, 1056-58, 1059.

persons favoring full publication did so primarily because they resented the antislavery position of some of the restrictionists and hoped to avenge their own feelings of injury. So they wished to humiliate northeastern members of Congress -- as John Adams observing from his home in Quincy guessed -- by again exposing their predecessors' lack of concern for the West. Only this supposition could explain Charles Pinckney's curious choice of the Jay-Gardoqui agreement as an illustration of what the journals of 1783 to 1789 would reveal.<sup>40</sup> With these exceptions, the members' arguments were in other respects closely linked to prevalent opinions about the balance that should be sustained between privacy and secrecy in a republican nation.

While the House considered the motion proposing extended publication of the Old Congress's journals, it was learned that Monroe and his Secretary of State had interpreted the resolution of the previous Congress to

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<sup>40</sup>Annals, March 10, 1820, 1628-29. In a letter to Mrs. John Q. Adams, March 3, 1820, John Adams wrote, "There seems some design or desire to render unpopular some individual character but I cannot conjecture who they are . . . . I presume it cannot be Mr. Jay alone who is aimed at -- can it be Mr. King -- or who else." Adams Papers, Letters Received and Other Loose Papers, microfilm, reel 449, MHi. James Monroe wrote to Jefferson on February 7, 1820, "The same men, in some instances, who were parties to the project in 1786, for closing the mouth of the Mississippi for 25 years, may be considered as the Authors of this (prohibition of slavery in Missouri.)" Writings of James Monroe (Hamilton), VI, 114.

include all the journals, even those dated after 1783.<sup>41</sup> If the Representatives had known this sooner, George French Strother would not have felt compelled to propose printing the secret journals, and we would have missed an engaging debate. By their choice of words the opposing sides gave the impression of intense sentiments about the subject. Those opposed to publishing the secret journals generally relied on the argument that it was unwise to bring to view what, in the interest of the country, probably should be kept hidden where it was recorded. Who could determine how much damage might be done? That the journals would be damaging in some degree or manner was accepted as fairly certain. They would reveal to potential enemies the nation's weaknesses, where the union was most susceptible to attack, and what interests could be exploited. To the younger generation at home they probably would show things about their fathers it ought never to see.<sup>42</sup>

These were the salient arguments of those who believed the secret journals should remain unpublished, and they demonstrate that unless there is some automatic timetable for revelation there will always be reasons enough to

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<sup>41</sup>Annals, February 3, 1820, 1062n. Despite this knowledge the resolution was carried to an unrecorded vote; ibid., March 10, 1820, 1629. The secret journals appeared: [U. S. Congress] Secret Journals of the Acts and Proceedings of Congress, from the First Meeting Thereof to the Dissolution of the Confederation, by Adoption of the Constitution of the United States, 4 vols. (Boston, 1820-1821).

<sup>42</sup>Annals, February 3, 1820, 1054, 1055, 1056-58, 1061-62.

keep state secrets concealed. At the time, those on the other side of the issue did not realize this. They simply thought it was advisable to complete the printing in order to avoid a partial view of the government's proceedings under the Articles of Confederation. If it were proper to publish the Continental Congress's journals during the Revolutionary War years, it seemed to them that there could be no good reason to suppress those recorded after the peace. As a young Federalist from Maryland, one of the few remaining of his party and a future Clay supporter, told the members, secret proceedings "might be advocated and maintained under some Governments," but they were "altogether incompatible with the spirit and genius of Republicanism."<sup>43</sup>

The burden of the debate in favor of full disclosure of the journals was carried by the resolution's proposer, George Strother. Yet he took an absolutist position that must have been exceptional even among those supporting him. He said there should be no state secrets, diplomatic or otherwise; they went against the most fundamental theory of the government, for "it stood on the virtue and intelligence of the people." Strother offered some points based on practical considerations too. He said that secrecy bred suspicions of public men. It was destructive of the principles taught to the young to honor them only

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<sup>43</sup>Annals, 1063.

in the breach. He also said that tranquil relations between the country's regions, a condition those opposed to publication desired, could only be founded on full, correct information. In short, Strother opposed governmental secrecy for any reason and in any area, foreign or domestic. Throughout his several efforts to answer his critics on the floor he relied upon populist rhetoric. His speeches were studded with references to old Southern agrarian idols: "hardy yeomanry" and "virtuous statesmen."<sup>44</sup> Significantly, perhaps, his terms were ridiculed by the lone Representative from Illinois, Daniel P. Cook, a pioneering western newspaperman, politician, and judge. Cook thought that the "hardy yeomanry" would prefer to leave the seclusion of the old records undisturbed.<sup>45</sup>

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<sup>44</sup>Annals, 1052-53, 1055-56, 1059-61.

<sup>45</sup>Annals, 1062. Biogr. Dir. of the Members of Congress.

## Chapter X

Issues about Secrecy Raised at the Time of the  
Election of 1824 and the Panama Congress DebateThe Election of 1824

Although there was still only one political party, it existed in name alone. Good political feelings had turned bitter in the factional contest preceding the presidential election of 1824. Revived fears of centralized power split the Republicans and created a struggle that destroyed the hopes of John Quincy Adams. He had wanted to suppress party and sectional divisions in a desire to institutionalize the unity and harmony that seemed to have characterized Monroe's administrations.<sup>1</sup> The nationalism of his program as President produced a reaction, however, and by the next election in 1828, a new party had been formed, and two well-developed political organizations worked for their candidates. In the midst of this reorganization of national politics, discussions of open government became mired in practical politics and partisan loyalties.

Because political considerations were paramount, it is difficult to filter out essential thoughts on secrecy; nevertheless, for the purposes of this study of mental habits, two events in the period before the triumph of the Jacksonians are worthy of note. In chronological order,

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<sup>1</sup>See Peterson, The Jefferson Image, pp. 17-20.

the first was a controversy in the House of Representatives over the procedure for handling the stalemated presidential election of 1824. The second was the political attack, fully engineered and manipulated by the Jacksonians, on Adams's administration -- the debate over a mission to the Panama Congress.

The election of 1824 became a struggle between four candidates for President, none of whom obtained a majority of the electoral college. On February 9, 1825, with members of both legislative branches present, the President of the Senate, standing in the House of Representatives, formally announced this result after opening the envelope containing New Hampshire's votes. Then the Senators left and the members of the House proceeded to ballot by state for President. Having Henry Clay's support, John Quincy Adams won on the initial ballot. He was the first President of the United States elected with less than a majority of the popular vote. When the outcome was declared by Daniel Webster and John Randolph, pompously repeating each other's phrases in succession, the spectators in the gallery burst out in noisy shouts and hisses. Reacting quickly, the Speaker cleared the gallery and closed the House to the public.<sup>2</sup> This was the first time the doors had been shut during a session since March, 1815.

The House would have been closed to the public from

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<sup>2</sup>Annals of Congress, 18th Cong., 2nd sess., 525-27.

the outset if the members had followed the precedent set in 1801, and if they had accepted the advice of their select committee on rules. The House had been closed in 1801 when the tie between Jefferson and Burr was resolved; and the special rule at that time was unqualified: it provided for no exceptions to the members' seclusion.<sup>3</sup> This time the committee charged with formulating procedural rules for the House vote in the presidential election recommended exclusion of the public should any one state delegation request it.<sup>4</sup> The question before the members then, in considering their committee's counsel, was whether to adopt a rule that provided for closed doors at the wish of one delegation, or instead to continue to operate on the regular House rules which left control of the galleries to the Speaker's judgment. This minor decision, which Daniel Webster thought to be absolutely inconsequential, surprisingly started a wide-ranging philosophical debate.<sup>5</sup> The discussion touched on

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<sup>3</sup>See rule 5, Annals, 6th Cong., 2nd sess., February 9, 1801, 1009. The rule read, "The doors of the House shall be closed during the balloting, except against the officers of the House." An objection was entered against it, but no debate was recorded. The division on an attempt to reject it, however, shows Republicans wanted the rule discarded; Federalists favored it.

<sup>4</sup>Annals, 18th Cong., 2nd sess., 362.

<sup>5</sup>For Webster's astonishment at the controversy, see Annals, February 2, 1825, 424, 433. Many of the nation's major newspapers commented on the debates over the rule, but only in the most abstract manner. The words of the editors of the (Washington, D. C.) National Intelligencer, February 5, 1825, were typical: "The tone of the debate of yesterday was free, bold, and manly: but we do not know that any thing occurred in the debate which could give

the significance of open government, revealed fears of demagoguery, and ended in long discourses about theories of representation. Uppermost for our interest, it showed an underlying, elementary reluctance to obscure domestic issues from the public eye in any way. This contrasted sharply with the prevailing sentiments about issues connected with external relations.

Although a large number of members contributed to the debate that after several days ended in the rule's rejection and open galleries for the presidential balloting, the principal supporters of the committee's suggestion were John C. Wright, an Adams-man from Ohio, Louis McLane from Delaware, and Willie P. Mangum from North Carolina. Prominent among those opposed to the rule were several antinationalist Southerners. Arguing that the public should under no circumstances be excluded from observing the balloting were John Floyd of Virginia and the future 'fire-eaters' from South Carolina, James Hamilton, Jr., and George McDuffie.<sup>6</sup> But, other than an unbalanced sectional orientation, it is difficult to discern a pattern in either of the two sides. Jackson supporters seem to have favored open galleries. The Radicals, who had hoped for a deadlock between Adams and Jackson to renew their candidate

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serious cause of regret to the intelligent admirer of our institutions."

<sup>6</sup>The entire debate can be examined in Annals, February 2, 1825, 420-34; February 3, 1825, 444-61; and February 7, 1825, 490-515.

William Crawford's chances, appear to have also wanted the public's attendance. Perhaps they thought this would produce a bandwagon effect if the opportunity presented itself. Still, Mangum was a Crawfordite, and he argued at length for the special rule; therefore, if political factors were inextricably part of the debate, there was also some independent thinking. Although several congressmen spoke as if the appearance of secretiveness and mystery was the primary objection to the rule, probably general conceptions of the relationship between congressmen and constituents, as well as ideas about the special function of the House in the unusual circumstances of being final arbiter of a popular election, were behind attitudes towards the proposed rule's worth.

Whether the Representatives were to reflect the popular will or to act independently of it was the difficult choice before the members. That is, were they to vote as the districts they represented had polled in 1824, or were they to develop a fresh consensus by exercising their own judgment about the best man among the three candidates?<sup>7</sup> Jacksonians often argued for the former view because their man led the popular vote; Adams and Crawford supporters were inclined to defend the latter position. The members' stand

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<sup>7</sup>E. G., see speeches by McLane and Hamilton, Annals, February 2, 1825, 421-22, 428, 429; by McDuffie and Mangum, ibid., February 3, 1825, 448, 456-57; and by John S. Barbour, ibid., February 7, 493-95. Also see commentary in (Boston) Columbian Centinel, February 5, 1825, and the (New York) National Advocate, February 7, 1825.

as to whether they were to exercise their own judgment or to act as mere delegates of their constituents related directly to how they viewed the matter of public attendance. Those who saw themselves as umpires deciding an election the public could not complete tended to approve of the likelihood of closed doors; those who felt they must do no more than vote their constituents' wishes wanted the galleries open as normal. The former group, however, felt the need for the conventions of the old colonial councils because they conceived their role at the moment to be a sort of council for the nation. Consequently, some of their opinions looked backward to the reasoning behind the Senate's original seclusion. They said that councillors were to work in conditions free from popular tumult and conducive to independent judgment. Louis McLane in particular developed this theory thoroughly.<sup>8</sup> The opposite side, argued at greatest length by Hamilton and McDuffie, claimed to be proponents of the people's cause. These men ridiculed fears of popular tumult and insisted that the public should witness all processes vital to their interests. In this case, the House election of a President, the voting should be viva voce rather than by ballot. If the voting should

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<sup>8</sup>See *Annals*, February 2 and 7, 1825, 421-22, 429, 499. In justification of his support for Adams, Henry Clay espoused principles identical to McLane's in his "Address to His Constituents on the Presidential Election of 1825. March 26, 1825," in Life and Speeches of the Hon. Henry Clay, ed. Daniel Mallory (Hartford, Conn.: Silas Andrus & Son, 1855), I, 542-62.

not be conducted in this manner, the galleries must at least be open.<sup>9</sup>

These contrary suppositions were intriguing, unresolved in the timeless puzzle about the range of a congressman's personal judgment. The majority decision, however, was for open doors, and it is clear from the tenor of the debates that protagonists of either position felt that publicity was on the whole vital to domestic affairs. This is shown by the fact that those who argued in favor of closed doors were forced to stress the unique nature of the case. They had to make an exception of an election staged in the House.

#### The Panama Congress

The controversy over John Quincy Adams's mission to a congress of revolutionary Spanish-American states to be held in Panama was Martin Van Buren's first chance to

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<sup>9</sup>Both Hamilton and McDuffie continually indulged in populist rhetoric. Willie Mangum called them "people's men." Mangum's own position was primarily pragmatic, anti-doctrinaire (Annals, February 3, 1825, 456-59). Interestingly, McDuffie's theory contained a profoundly aristocratic doctrine: the people were more capable of choosing leaders than appraising legislative action. Legislation required expertise associated with men of affairs who had experience in government, but the choice of leaders required an intuitive perception most acute among the ordinary people. For the occasion, McDuffie had managed to come up with an odd interpretation of republican doctrine; ibid., 448-49. McDuffie and Hamilton were well able to pervert the fundamental concepts of popular government to their own ends. For illustration of their demagoguery in the cause of a privileged minority, see William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836 (New York: Harper, 1965), pp. 144-47, 150-51.

fashion his Jacksonian coalition. He chose the opportunity to drop all neutrality and to bring Southern states-righters, original Jacksonians, and discordant northern Jeffersonians into political partnership.<sup>10</sup> Discussion of the propriety of the mission made it possible for Van Buren to stress the Administration's apostasy from old Jeffersonianism and to raise fears of an active, powerful government.

President Adams might have avoided trouble and saved time if he had chosen to send Executive Agents to the Congress at Panama, but he decided to announce his intentions in his message to Congress of December 6, 1825, and to nominate the prospective representatives to the Senate for confirmation.<sup>11</sup> In fact, in a later message to the Senate, he claimed the constitutional power to act on his own; but, he had presented the mission to both branches of Congress, he said, in order to gain their concurrence in his estimation of the project's value.<sup>12</sup> This effort to obtain harmonious

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<sup>10</sup>John Q. Adams, Memoirs (C. F. Adams), VII, January 31, 1826, 111; Robert V. Remini, Martin Van Buren and the Making of the Democratic Party (New York: Columbia Univ. Press, 1959), pp. 104-106; idem, The Election of Andrew Jackson (New York: J. B. Lippincott, 1963), p. 40; Samuel F. Bemis, John Quincy Adams and the Union (New York: Knopf, 1956), pp. 76-77; Henry Adams, John Randolph (Boston: Houghton Mifflin, 1890), p. 287; Elbert B. Smith, Magnificent Missourian, the Life of Thomas Hart Benton (New York: J. B. Lippincott, 1958), pp. 95-96.

<sup>11</sup>Register of Debates, 19th Cong., 1st sess., Appendix, 2-8. See also Arthur P. Whitaker, The United States and the Independence of Latin America, 1800-1830 (1941; rpt. New York: Russell & Russell, 1962), pp. 578-79.

<sup>12</sup>Register of Debates, December 26, 1825, 43; also in American State Papers, Foreign Affairs, V, 834-35. Adams

support fitted Adams's political philosophy; yet, so also did his presumption of wide executive powers. His approach, at any rate, led to a political attack on his foreign policy in both the Senate and the House. Because this attack was a milestone in the formation of the Democratic party, historians of the United States have examined the congressional debates within that context. Nevertheless, despite their clearly partisan character, the debates developed some interesting side issues. Taking both legislative houses into account, discussions ranged over the suitable use of special agents, confidence in the President and his powers of initiative, control of the war-making power, fears of slave rebellion, and the nature of communications between Executive and Congress. The catalyst quickening these issues, besides political party formation, was the potential formation of a league of new Latin American states, with its implications for American relations with Spain and the Holy Alliance, for the Monroe Doctrine, and for the international slave trade.<sup>13</sup>

In the Senate Martin Van Buren was personally able to shoulder the work of bringing together a national

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admitted to himself that his approach provided an excellent opportunity for his opposition; Memoirs (C. F. Adams), VII, 99.

<sup>13</sup>See Joseph B. Lockey, Pan-Americanism: Its Beginnings (New York: Macmillan, 1920), pp. 327-28; "The Autobiography of Martin Van Buren," ed. John C. Fitzpatrick, Annual Report of the American Historical Association for the Year 1918 (Washington, D. C.: GPO, 1920), II, 200.

opposition to the Administration. He began by attempting to publicize the Senate's executive sessions that had before them Adams's nominations to Panama. His resolution to open the galleries to the public and reporters passed, with the sole restriction that the Senate would be closed when it appeared that the publication of a document could be prejudicial to current negotiations. A second part of the motion not only asked the President to designate what documents, if any, which were related to the mission to the Panama Congress, should be perused in seclusion, but also asked him to give reasons for his selection.<sup>14</sup> This was of course unprecedented, and Adams would have none of it. He rejected the notion, encompassed in the first half of Van Buren's resolution, that any part of the question of United States representation at Panama could be debated in open executive sessions of the Senate; and in making his point that he had submitted the documents on the Congress in confidence, he lectured the Senators on established usage. All communications upon executive business were by nature confidential, he said in his message, and should be handled according to customary practice, in nonpublic meetings. Privately to himself, he noted in his diary that the part of Van Buren's motion which required the country's chief executive officer to specify the probable effects produced by the publication of particular documents was "delicate

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<sup>14</sup>Register of Debates, 19th Cong., 1st sess., February 15, 1826, 142.

and ensnaring." It would, he supposed, pit individual Senators' judgment against the President's. Moreover, he concluded, once the precedent of opening executive business to the public had been set, there would be no possibility of secluding it ever again.<sup>15</sup>

President Adams's prediction has proven to be only partially correct. Executive sessions, opened in 1929 by amendment to the rules, are normally public; however, Senators close their chamber often enough when the business has military significance, and a high proportion of the work is done by committees in private meetings.<sup>16</sup> But Adams really considered all communications between the President and Senate about issues of foreign affairs and about persons nominated for office to be essentially confidential. Therefore the conflict here, and the one to come in the House, touched on what we would today call "executive privilege." The controversy marked a continuation of the one initiated by the House of Representatives' call for John Jay's instructions, and the result followed the established pattern: the President retained full control over information supplied to Congress.

At this time the Senators gave in to President Adams's wish to keep the executive sessions nonpublic, but reasserted their right to use their own judgment in the

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<sup>15</sup>Register, February 22, 1826, 145; John Q. Adams, Memoirs (C. F. Adams), VII, 117.

<sup>16</sup>See above, Ch. VII, n. 43.

matter.<sup>17</sup> The true aim of the Administration's critics was delay, not matters of principle, and they succeeded in keeping the Senate worrying over the nominations for a month, long enough to prevent the American representatives from ever reaching the Latin American congress.<sup>18</sup>

Although Secretary of State Henry Clay declared he would have been happy to have the Senate sessions open in order to expose the weakness of his opponents' argument against participation, it was the opposition's hope to open the meetings to the outside so that it could turn the people against a proposal that seemed innately popular.<sup>19</sup> They expressed indignation at the arbitrariness of the President, but their chief ploy was to play on Southern fears for the security of their slave labor. They would have liked their point on this matter publicized for its shock appeal; yet they counted on the later publication, following the close of executive sessions, to produce the

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<sup>17</sup>Register of Debates, February 23, 1826, 147.

<sup>18</sup>Lockey, Pan-Americanism, pp. 313-15; Remini, Martin Van Buren, p. 106. The debate about the nominations continued from February 15 to March 14, 1826; Register of Debates, 142-52.

<sup>19</sup>Clay's remark (to Porter B. Porter) quoted in Remini, Martin Van Buren, p. 108. For the opposition view, see Van Buren, "Autobiography," pp. 200-201; Thomas Hart Benton, Thirty Years' View; or a History of the Working of the American Government for Thirty Years, From 1820 to 1850 (New York: D. Appleton & Co., 1854-56), I, 65-66; also Mahlon Dickerson's statement in the Senate corroborating Benton's recollection; Register of Debates, 295.

same effect.<sup>20</sup>

It was stressed that the South American republics were talking seriously about human rights, about the sort of values expressed in the Declaration of Independence, and this was dangerous.<sup>21</sup> It meant possible slave rebellion or even emancipation, and it would not do for United States representatives to be associated with it. Robert Y. Hayne led off with this sort of argument, but it was echoed everywhere in the halls of Congress by southern Senators. John Berrien said, "The safety of the Southern position of this Union must not be sacrificed to a passion for diplomacy."<sup>22</sup>

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<sup>20</sup>In his comprehensive work, Hermann E. von Holst, a nineteenth-century German liberal with strong antislavery feelings, viewed the controversy over the Panama Congress as a prime example of the effect of slavery upon the issues, even when politicians hoped to shun the subject. He concluded that the opposition's principal motive was fear for the security of the institution. The Constitutional and Political History of the United States, trans. J. J. Lalor, A. B. Mason, and Paul Shorey (Chicago: Callaghan & Co., 1876-92), I, 409-11, 426-27. Today this interpretation is considered unbalanced, owing to personal bias (e. g., see the annotated bibliography in Allan Nevins, The Emergence of Lincoln [New York: Scribner, 1950], II, 499). Nevertheless, my examination of the congressional debates indicates von Holst was close to the truth. Comments on slavery pervaded the entire, long controversy. For another nineteenth-century historian with a similar view, see John B. Moore, "Henry Clay and Pan-Americanism." Columbia University Qrtly, XVII (September, 1915), 356.

<sup>21</sup>See, e. g., John Randolph's unrelenting criticism of egalitarian ideology in support of his resolution, March 2, 1826, asking for information about the principles and practices of the Spanish American states with regard to Negro slavery. Register of Debates, 19th Cong., 1st sess., 115-31.

<sup>22</sup>Register, 285.

Andrew Jackson's old friend Hugh Lawson White made the point directly and explicitly: "If slavery is an affliction, all the Southern and Western States have it, and with it, their peculiar modes of thinking upon all subjects connected with it. In these new Latin American States, some of them have put it down in their fundamental law, 'that whoever owns a slave shall cease to be a citizen.' Is it then fit that the United States should disturb the quiet of the Southern and Western States, by a discussion and agreement with the new States upon any subject connected with slavery? I think not."<sup>23</sup> Besides libertarian rhetoric on the evils of slavery from the Latin American politicians, the prospect that abolition of the slave trade would be on the Panama Congress's agenda excited these remarks. The congressmen were further inflamed by the expectation that the gathering of revolutionary states would call for servile insurrections to promote separation of the West Indies islands from Spain.<sup>24</sup> In a desperate effort to defend the mission, Edward Livingston in the House tried to turn the exploitation of Southern apprehensions against the critics of the Panama Congress. He depicted as vividly as possible the ferocity of slave uprisings, but then argued that attendance

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<sup>23</sup>Register, 207.

<sup>24</sup>See Mississippi's Thomas B. Reed's ruminations on the subject. They reveal that the security of Negro slavery was his principal, haunting concern. Register, 342-43.

at the congress would prevent them.<sup>25</sup> The predominant view in both houses, however, was voiced by Hayne. "I consider our rights in that species of property as not even open to discussion, either here or elsewhere," he said; "and in respect to our duties, (imposed by our situation) we are not to be taught them by fanatics, religious or political."<sup>26</sup>

The idealism some persons attached to the meeting at Panama worried Southerners.<sup>27</sup> Therefore, in the House as well as the Senate, attention became fixed on the instructions to the commissioners. In the Senate, the adversaries of the Administration stated that the persons nominated should not be confirmed without fuller information concerning their directions from the Department of State. In the House, their anti-Administration colleagues requested more information prior to a vote on appropriations for the mission.<sup>28</sup> The President's power to control the amount and variety of information about foreign affairs his office communicated

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<sup>25</sup>Register, 2215.

<sup>26</sup>Register, 165.

<sup>27</sup>For the idealistic attitudes repugnant to the opposition, see the words of Charles Miner (Pa.) and Silas Wood (N. Y.), in the Register, January 25 and February 2, 1826, 1117, 1238-40. Miner said to the members of the House, "The Holy Alliance of the Old World have their Congresses, to put down, and keep down, liberal principles. ... Republican nations of the New World, whose Governments were based on a recognition of the equal rights of man, should meet, by their Representatives, in Congress, to consult for the general good." See South Carolina's William Drayton's reaction to this viewpoint, ibid., January 31, 1826, 1216-17.

<sup>28</sup>Register, Senate, 295-300; House, December 16, 1825, 817-19.

to Congress was once again an issue. Besides talks pro and con on the merits of attending the Panama Congress, the Representatives discussed the propriety of the resolution requesting all documents and correspondence related to the meeting. Some members wanted to exclude from the resolution the long-established wording that permitted the President to have discretion over what documents should be submitted, and what should be withheld.<sup>29</sup> Those who supported the customary discretionary clause seemed to have little notion of the possibility of a commitment by the Executive that might place the nation in an undesired position. Those who wanted to break with established practice and repudiate the discretionary clause saw this. They distrusted the Executive, but hardly on liberal grounds: they feared the influence of the South Americans' revolutionary appeal to egalitarian sentiments. The former group, those favoring presidential discretion, were preoccupied with the danger of placing all the Executive's objectives before the legislature. As Henry R. Storrs said, "No prudent Government could wish to have them disclosed to the world."<sup>30</sup> The latter group was obsessed with concern about executive power, and this overrode doubts about practicability. In fact Sam Houston thought the House should receive all

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<sup>29</sup>For the resolutions and the many variations in wording offered, see Register, December 16, 1825, January 25, and February 2 and 3, 1826, 817, 1117, 1241, 1250, 1252, 1253, 1261, 1262.

<sup>30</sup>Register, February 3, 1826, 1269.

information on foreign relations, as did the Senate.<sup>31</sup> In the context, however, the view seems shorn of its liberal-democratic tone. It fitted the self-interest of a special class -- slaveholders who feared strong government.

The underlying issue was executive privilege. The most interesting exchange over it occurred between Daniel Webster and John Forsyth, who would later fill the post of Secretary of State under both Andrew Jackson and Martin Van Buren. Webster believed that to strike out the clause which left it to the President's judgment how many documents could be communicated would be more than an insult to Adams, it would be a fundamental mistake. The President's power was in Webster's words a "Constitutional discretion."<sup>32</sup> Taking the other side, John Forsyth argued that the usual phraseology in requests for information was nothing more than a courtesy; the President had no right to withhold information, the House had every right to demand it. "By the Constitution," he said, "the President is the organ, by which information of exterior interest is obtained -- not for his use only, but for that of the Senate and of the House of Representatives. Whenever, in the exercise of our

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<sup>31</sup>Register, February 2, 1826, 1260-61.

<sup>32</sup>Responding to Thomas R. Mitchell of South Carolina, Webster said, "Well, sir, on the ground of principle, then, I consider it as of importance that this House, when it calls at all for papers, should make the call with the usual reference to the Constitutional discretion, which belongs to the President of the United States, and subject to the limitation which that discretion may dictate." Register, February 3, 1826, 1279.

Constitutional authority, any thing is wanted from the President, we have the right to demand, and the power to compel the production of it."<sup>33</sup> Having said this, Forsyth had to address himself to George Washington's refusal to transmit the Jay Treaty correspondence. To add credibility to his position he gave too narrow an interpretation to the precedent. Forsyth asserted that Washington refused the papers, not because the House lacked authority to see them, but because no stated purpose related to the Representatives' constitutional powers accompanied the demand.

This was clever but incomplete reasoning which omitted the sum total of Washington's position. As we have seen, he believed the House of Representatives had no right to papers related to foreign negotiation, unless they were called for in connection with impeachment, and he stated that it was entirely within the President's prerogative to decide what papers the House might examine.<sup>34</sup> Forsyth did not refer at all to another prominent controversy and exemplary case, probably because it decidedly contradicted his interpretation. In February 1806 Congress had secretly appropriated two million dollars as a preliminary step to negotiations for the purchase of Spanish Florida. As has been discussed, when the Representatives removed the injunction of secrecy and published the journals, John Randolph

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<sup>33</sup>Register, 1278; for the entire speech, ibid, 1275-79, 1291-92.

<sup>34</sup>See my discussion above, Ch. VI.

disputed the exclusion of a number of executive documents relating to the Two Million Act. At the time, Samuel Dana claimed that the House had full command over disclosure, but the Republican majority resolutely opposed this view. By vote, the House rejected publication of the documents. This decision and the practice afterwards actually ran counter to John Forsyth's assertion. Webster was much closer to the truth and perfectly in agreement with majority opinion.

In the argument over the House request to President Adams for documents relative to the Panama Congress of 1826, the final verdict of the members was a request for information that went out in the usual form. The resolution included the standard qualifying phrase that granted to the President, in the national interest, full discretionary power over the submission of papers.<sup>35</sup> In the end, although the debate passed over several constitutional issues, nothing changed. All was sound and fury. As Thomas Hart

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<sup>35</sup>The House request in 1792 for information about St. Clair's defeat asked the Executive for all "public papers," and otherwise provided no qualification. The call for the Jay Treaty papers in 1796 permitted the withholding of material concerning current foreign negotiations, but the more permissive wording preferred by James Madison became with minor variation the formula for the future. Madison's amendment, rejected then by the House, asked that the President transmit all documents, "except so much of said papers as, in his judgment, it may not be consistent with the interest of the United States, at this time to disclose." See Papers of Hamilton (Syrett and Cooke), XI, 252n; Annals of Congress, 2nd Cong., 1st sess., March 27, 1792, 490-93; 4th Cong., 1st sess., March 7, 1796, 426, 438.

Benton wrote, "No question, in its day, excited more heat and intemperate discussion, ... and no question ever cooled off and died out so suddenly and completely."<sup>36</sup> Congress continued to maintain that it was entitled to information when requested, but in practice the President retained full control over what was transmitted from the executive departments. The Jacksonians in no way altered this longstanding relationship.

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<sup>36</sup>Thirty Years' View, I, 69.

## Chapter XI

## Conclusions

Although the wording of the Constitution provided no mandate for openness and the tradition and past practice of local and national governments actually told against it, the nation's potential for open government after the separation from Britain was great. The revolution in sovereignty, which Americans achieved by their popular establishment of new governments, implied a commitment to public procedures. The reality of the commitment was enhanced by the close relationship of legislators to constituents that existed throughout the system, and by the development in time of a tradition of thorough reportage. On the other hand, American politicians generally agreed that governments must have secrets, and this gave rise to an issue regarding the proper balance between the evolving tendency toward openness and the administrators' sense of a need for secrecy. Faced with conflicting tendencies and priorities, Americans ended in accepting secrecy as unavoidable.

By the Jacksonian Age a number of practices and presuppositions had weakened the original promise of open political process and had prepared the way to our modern era's complex difficulties with governmental secrecy. Partisan politics led to subterfuge. The public was sometimes excluded from observation of governmental

procedures for reasons of state or, even at times, for the benefit of an administration's image. At the insistence of the members or the Executive, Congress's galleries could be cleared and the press barred from hearing exchanges among the representatives. As a result, the reasoning and differences of opinion of the members were irretrievably lost to the contemporary public. Long after the fact, when and if the secret journals of Congress were published, Americans could gain only a bare hint of what happened in closed sessions. More fundamentally, however, the revolution in sovereignty had not brought with it a widely felt confidence in popular judgment about abstruse matters, especially in foreign relations, which was recognized as requiring specialized knowledge. In this field practical politicians believed the public's "right to know" had to be confined for the public's own benefit. Also, these same politicians considered secrecy to be often necessary vis-a-vis other countries. It was one of the weapons in the national arsenal. As a result, the President, because of his developing leadership and his unique sources of knowledge, was permitted full control over executive information available in his departments. This primary tradition has not been overthrown. The President's virtually unrestrained power of censorship, or so-called executive privilege, is the brute fact of the nation's current bout with secrecy; and executive privilege has its roots extended as far back as Washington's administration -- in the

attitudes of that era's politicians towards executive functions, in their nationalism, and in their uneasiness about popular participation in the process of government.

Nevertheless, although politicians in early national times assented to presidential control over the stream of information flowing between executive departments and Congress, and ultimately to the public, Congress refused to relinquish its claim to a power of inquiry reaching into executive business. As an outcome of this dialogue a vague and ephemeral construct of fundamental law was conceived. Executive privilege opposed legislative privilege -- a conflict resulting from the ever-prevalent opinion that secrecy was essential to dealings with foreign nations, but illegitimate in dealings with the internal affairs of the republic.

The latter half of this equation may have received especially zealous expression in antimasonry. Arthur Schlesinger, Jr., has suggested that the growing democracy of the era which brought Andrew Jackson to the presidency altered popular attitudes toward secrecy, casting it in an increasingly mischevious light. "Half a century after independence there even appeared the first political party in the history of the world dedicated to the abolition of secrecy."<sup>1</sup> The reference is to the Anti-Masons -- complex in composition, divergent in interests, and opportunistic

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<sup>1</sup>Imperial Presidency, p. 334.

in leadership. Perhaps the movement they initially represented, moreover, was principally irrational.<sup>2</sup> However, the possibility that grass-roots disgust with secret ritual had deeper ramifications than mere jealousy of a seemingly privileged social fraternity deserves study.

At all events, at the nation's capital, the overlapping prerogatives of legislature and Executive were irreconcilable, and they were accommodated only by an outright surrender, in fact if not in principle, of Congress's right to demand information of the Executive. It was a pragmatic adjustment: congressional requests for information were phrased to grant the President independent authority over matters communicated from his office.<sup>3</sup> As a result the President's position came to the forefront while Congress's receded.

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<sup>2</sup>See Whitney R. Cross, The Burned-over District: The Social and Intellectual History of Enthusiastic Religion in Western New York, 1800-1850 (1950; rpt. New York: Harper Torchbook, 1965), p. 120; Edward Pessen, Jacksonian America: Society, Personality, and Politics (Homewood, Ill.: Dorsey Press, 1969), pp. 276-285.

<sup>3</sup>Raoul Berger in his Executive Privilege: A Constitutional Myth (Cambridge, Mass.: Harvard University Press, 1974) arrives at a divergent conclusion: demands for executive privilege are supported merely by nineteenth-century-developed myth. Professor Berger marshals a strong case for considering the investigative power of the House as superior to Executive claims of privilege. His work, however, by its nature ignores the attitude and practice of congressmen in the early years. Our differing approaches lead to different judgments. It seems apparent in my view that Congress, especially in the face of foreign relations and national security questions, subordinated its tradition as the nation's "inquest" to permit the President unquestioned discretion in matters of disclosure of information.

This development was distinctly illustrated during Aaron Burr's conspiracy. After President Jefferson reported in his annual message to Congress of December 2, 1806, that he had taken measures to suppress Burr's illegal project, John Randolph moved a request for more information.

Randolph's action encountered considerable congressional resistance, but his resolution passed by a narrow majority. The disapproving minority believed it intruded on executive functions and reflected unfairly on the President, implying that he had not been completely candid with Congress.<sup>4</sup>

Jefferson responded to the call for information with a message declaring Aaron Burr guilty "beyond question." But he also said that the bits and pieces of evidence in his hands, being in the form of rumors, conjectures, and suspicions, could be misleading. Hence, the exercise of his discretionary powers to withhold the materials was best for the safety and reputation of the individuals involved.<sup>5</sup>

As is well known, Jefferson also parried Justice John Marshall's subpoena to testify at Burr's trial for treason.<sup>6</sup> Jefferson was willing to comply with Aaron Burr's

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<sup>4</sup>Annals of Congress, 9th Cong., 2nd sess., December 2, 1806, 12-13; January 16, 1807, 334-36, 341-42, 344-45, 352-353, 357. For the vote, see ibid., 358-59.

<sup>5</sup>Annals, January 22, 1807, 39-43.

<sup>6</sup>Francis F. Beirne, Shout Treason: The Trial of Aaron Burr (New York: Hastings House, 1959), 96-100; Parmet and Hecht, Aaron Burr, pp. 290-291; Dumas Malone, Jefferson the President, Second Term, 1805-1809, vol. V: Jefferson and His Time (Boston: Little, Brown & Co., 1974), pp. 320-325.

request for letters he thought would aid his defense. Jefferson also agreed to make available to the court any information that would insure justice. He would not, however, surrender his discretionary control over the material in his hands, firmly reasserting his right and duty to withhold, according to his own judgment, documents in the public interest. He reinforced his statement by concluding that his right to suppress information was a constitutional power.<sup>7</sup> This argument was false; the power was constitutional only in the English meaning of the term -- that is, in the sense of being a long-established practice -- and only by a most liberal interpretation of implied powers.

Every President since Washington has reaffirmed the sort of control over executive intelligence that Jefferson asserted during the Burr conspiracy case.<sup>8</sup>

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<sup>7</sup>On June 17, 1807, Jefferson wrote to the United States District Attorney for Virginia (George Hay): "All nations have found it necessary, that for the advantageous conduct of their affairs, some of these [executive] proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication." For another expression of these sentiments, see Jefferson to Hay, June 12, 1807, both in Writings of Jefferson (Ford), IX, 55-57.

<sup>8</sup>The prosecution's position, as expressed by George Hay, that "we had always denied the principle of secrecy" in relation to the President's office does not contravene my assertion. Jefferson's claim of presidential privilege remained intact. The Burr trial, and the prosecution's course with regard to the subpoena from Marshall, is irrelevant to executive privilege in the sense of the term as denoting a relationship between Congress and President. Cf. the exchange between Dumas Malone and

Political opinion has strongly supported the exercise of that control, for the belief was carried forward from the nation's beginning that the President, to be effective, must be permitted to retain complete command over informative materials within his domain. It is a tradition that resists alteration. The counter-efforts of two major pieces of post-World War II legislation that attempted to ease access to governmental records have come virtually to nothing because of it.<sup>9</sup>

Governmental secrecy may not have been quite as Herman Kahn says: "American as apple pie," but it is at least true that the attitudes and practices of the formative years provided ample justification, practical if not constitutional, for executive privilege as a part of the political process.<sup>10</sup> Moreover, there is no evidence that the early politicians believed that the President could not withhold information from Congress without congressional

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Garry Wills, "Executive Privilege: Jefferson and Burr and Nixon and Ehrlichman," New York Review of Books, July 18, 1974, pp. 36-40, esp. 37.

<sup>9</sup>Barker and Fox, Classified Files, pp. 8-9, 17-18, 25-52. The acts are: Administrative Procedure Act of 1946, and the Freedom of Information Act of 1966. See also Robert L. Saloschin, "Administration of the Freedom of Information Act: An Insider's View" and Harrison Wellford, "Rights of People: The Freedom of Information Act," in None of Your Business (Dorsen and Gillers), pp. 183-211.

<sup>10</sup>For Kahn's statement, see None of Your Business (Dorsen and Gillers), p. 50.

consent, as some scholars have suggested.<sup>11</sup> The climate of opinion in the nation's first decades was quite to the contrary, even though actual presidential claims of privilege were modest in comparison to modern experience.

In addition to radically altered circumstances, however, there are two striking differences between the early and modern eras that should be noted. First, except in a limited context of uncertain import during the Burr trial, executive privilege as a factor in the judicial process was not put to the test. Secondly, Congress's access to information during impeachment proceedings never came up and virtually never was discussed. During the debate over the request for the Jay Treaty papers, grounds for impeachment were mentioned as a legitimate reason for calls on the Executive for information; but such grounds were not claimed, arguments on the point were not advanced, and Washington's response was not addressed to the subject.

Indeed, the history of the country's early period indicates that our modern problems with secrecy are to some degree due to a lack of consistent, systematic thought on the subject. Admittedly, it was exceptionally difficult to foresee all of the possibilities, but the new nation's political thinkers failed to examine any of secrecy's many sides and to lay down guidelines. As a consequence,

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<sup>11</sup>See Norman Dorsen and John H. F. Shattuck, "Executive Privilege: The President Won't Tell," ibid., p. 29.

exemptions from publicity were broad and amorphous, a natural opening for the Executive's firm hand. It is surprising that more about governmental secrecy did not come from the pens of political theoreticians -- although perhaps this reaction is unfair, stemming, as it may, from modern experience. In any case, the philosopher-statesmen of these years had little to say about secrecy in government, other than to point out its sheer necessity. They were absorbed on the theoretical level with exploring the proper basis for legitimate authority and defining the menace of concentrated power; but, although they defended First-Amendment freedoms, they were not especially sensitive to the illegitimate coercion which secrecy innately represented.<sup>12</sup> The rigorous political thinkers of the day worried about a free play of ideas, not about the amount or quality of information available to form opinions. They had little doubt that information would be sufficient for the practical purposes of self-government.

The Federal government itself was initiated in rigid secrecy; the decisions of the Constitutional Convention were successfully concealed from Americans until the finished product was published. Ruling this approach was an upper-class Whig repudiation of the idea that legislatures represent various interests and popular pressures.

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<sup>12</sup>For an able current discussion of this aspect of secrecy, see Thomas I. Emerson, "The Danger of State Secrecy," Nation, March 30, 1974, pp. 395-99.

Instead, the body at the convention substituted the idea that high-minded men, who understood the dictates of natural law, could act in the interest of the general good. This expectation became a guiding principle for many Federal politicians of the first generation. Almost immediately, however, the principle gave way to the concept of legislation as the product of mixed interests and opinions. As a result, American political leaders soon laid the groundwork for open government. After some recalcitrance, the Senate unbarred its doors during legislative sessions, and with House debates already public, the country's citizens gained access to the center of the legislative process. This access was strengthened by improved reportorial work at the capital. But at this point the trend in the direction of more open government ceased to evolve. In a very broad way the movement for a strong executive was responsible. The assumptions that foreign affairs were principally an area for executive expertise, that democratic methods would fail in international areas, led to acquiescence in state secrets. George Washington's administration and its successors established the idea of executive privilege, which, though undefined as it remains today, was assumed to be a means of protecting the public interest, especially in foreign competition. For this reason congressmen accepted -- without endorsing -- virtually unlimited presidential discretion over communications from his branch. Congress never repudiated its right to inquire into all subjects,

but it habitually deferred to the President's wishes.

The Republicans viewed their election as a revolution; in reality, the resolution of the stalemated election of 1800 and the peaceful transfer of power assured political stability. Less elitist than the Federalists, the Republicans came into office promising more open government. But the potentiality passed away when the party's leaders retrograded under the threat of war. As the government struggled to keep the American nation out of the European fighting and yet at the same time sought to gain territorial and commercial advantages from it, procedure and policy became increasingly concealed. Viewing this from the outer edges of the political establishment, the Federalists and some disaffected Republicans found themselves dissenting from conventional views on the place of secrecy. They championed open republican government.

I have argued that they were sincere in their recognition of the merit of open government; nevertheless, more mundane desires to expose bungled foreign relations undoubtedly also stimulated some of their efforts to get increased information out to the public. The majority leadership reacted against these attempts, and wartime patriotism blackened the motives behind them. By the end of the War of 1812 the customary exercise of executive control over the amount of information furnished to the public was all but universally accepted as necessary and proper. In the process, the task of determining whether

secrecy was required in the national interest had been assigned to the executive branch. This is a prerogative no other division of the government, or non-governmental group, successfully contested before the investigation of the Watergate affair.

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