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Congressional Access to Executive Branch Information: Legislative Tools

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Summary

Presidents and scholars identify a variety of constitutional principles and practices to justify the withholding of documents and papers from Congress. No doubt reasonable grounds may be presented for withholding these materials and for preventing some executive officials from testifying before congressional committees. However, these executive arguments are subject to legal and political limits. Executive claims can be offset by equally persuasive arguments that Congress needs access to information to fulfill its constitutional duties. In many cases, legal and constitutional principles are overridden by the politics of the moment and practical considerations. Efforts to discover enduring and enforceable norms in this area invariably fall short.

This report begins by reviewing the precedents established during the Washington Administration for withholding documents from Congress. Close examination reveals that the scope of presidential privilege is often exaggerated. Congress had access to more documentation than is commonly believed and might have had more had it pressed for it. Subsequent sections focus on various forms of congressional leverage: the power of the purse, the power to impeach, issuing congressional subpoenas, holding executive officials in contempt, House resolutions of inquiry, GAO investigations, and blocking nominations, all of which may force executive officials to release documents they would otherwise want to keep private and confidential. Even if Presidents announce perfectly plausible grounds for withholding documents, they may have to comply with the congressional will to achieve other more important goals.

For a comprehensive CRS study of different techniques and authorities used by Congress to oversee executive branch activities, see “Congressional Oversight Manual,” CRS Report RL30240 (June 25, 1999). Legal and historical analysis on these issues is covered by Morton Rosenberg, “Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments,” CRS Report RS30319 (September 21, 1999).

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This report begins by reviewing the precedents established during the Washington administration for withholding documents from Congress. Close examination reveals that the scope of presidential privilege is often exaggerated. Congress had access to more documentation than is commonly believed and could have had more had it pressed for it. Subsequent sections focus on various forms of congressional leverage: the power of the purse, the power to impeach, issuing subpoenas, holding executive officials in contempt, House resolutions on inquiry, GAO investigations, and blocking nominations, all of which may force executive officials to release documents they would otherwise want to keep private and confidential. Even if Presidents announce perfectly plausible grounds for withholding documents, they may have to comply with the congressional will to achieve other more important goals.

Establishing Constitutional Principles

The Constitution makes no specific reference to a presidential power to withhold documents from Congress, nor does it specifically recognize a congressional need for information to legislate. Yet it is now routine to consider both powers implied in the operation of the executive and legislative branches. Long before the Supreme Court acknowledged that fact,¹ the political branches had already reached a rough understanding and worked out accommodations. When these two implied powers collide, which should give way? No magic formula yields a ready and reliable answer, for too much depends on individual circumstances and political considerations.

¹ E.g., *McGrain v. Daugherty*, 272 U.S. 135, 175 (1927) (a legislative body “cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change”); *United States v. Nixon*, 418 U.S. 683, 711 (1974) (to the extent the President’s interest in withholding information for the purpose of confidentiality “relates to the effective discharge of a President’s powers, it is constitutionally based”).

What informs the process of congressional access to executive branch information is the constitutional structure of separation of powers and the system of checks and balances. Neither political branch has incontrovertible authority to withhold information or force its disgorgement, while the message from the courts is for elected officials to fight it out until a satisfactory compromise emerges. But Congress can win most of the time—if it has the will—because its broad-ranging political tools have the greatest leverage.

Robert Morris Inquiry

In 1790, the House established an important precedent by insisting that investigation within the executive branch merited congressional, not presidential, action. The House debated a request from Robert Morris to investigate his conduct as Superintendent of Finance under the Articles of Confederation.² The matter was referred to a select committee consisting of James Madison, Theodore Sedgwick, and Roger Sherman.³ The House learned a day later that the Senate had passed a resolution empowering President Washington to appoint three commissioners to inquire into the receipts and expenditures of public moneys during Morris's administration.⁴

The select committee of Madison, Sedgwick, and Sherman issued a report, recommending that a committee of five be appointed to examine Morris's performance in office. John Laurance and William Smith were added to the three already in place.⁵ Elbridge Gerry objected that the House was pretending it still had the power of the Continental Congress, when it possessed both legislative and executive powers. He said that the President was “the only competent authority to take cognizance of the conduct of officers in the Executive Department; if we pursue the proposed plan of appointing committees, we destroy the responsibility of Executive officers, and divest the House of a great and essential privilege, that of impeaching our Executive offices for maladministration.”⁶ Gerry favored the Senate's approach of appointing three commissioners to do the job.⁷ Theodorick Bland opposed the appointment of commissioners “as creating an unnecessary expense.”⁸ Madison supported the five-man committee, arguing that the House “should possess itself of the fullest information in order to doing justice [sic] to the country and to public officers.”⁹ The committee was appointed and issued a report on February 16, 1791.¹⁰

² 1 Annals of Cong. 1168 (February 8, 1790).

³ Id. at 1204 (February 10, 1790).

⁴ Id. at 1233 (February 11, 1790).

⁵ 2 Annals of Cong. 1514 (March 19, 1790). The Annals uses the spelling of John Lawrence.

⁶ Id. at 1515.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id. at 2017.

This committee investigation did not produce a total collision between Congress and the Washington administration because the area of inquiry concerned activities that occurred during the previous Continental Congress. Nevertheless, Congress ended up debating which branch of government—legislative or executive—was the proper party for investigating executive matters. The House decided, as Madison noted, that it was necessary for Congress to acquire the necessary information in order to “do justice” to the country and to public officers.

St. Clair Investigation

Two years later, on March 27, 1792, the House appointed a committee to inquire into the heavy military losses suffered by the troops of Major General Arthur St. Clair during his 1791 campaign against Indian tribes in Ohio. Out of 1,400 troops, 657 were killed and another 271 wounded.¹¹ The House committee was empowered “to call for such persons, papers, and records, as may be necessary to assist their inquiries.”¹² William Giles, regarding the inquiry as “indispensable” and “strictly proper,” concluded that the House is “the proper source, as the immediate guardians of the public interest.”¹³ Similar to the Morris inquiry, some Members of the House thought the investigation should be conducted by President Washington. A motion to that effect was rejected 21 to 35, after which the House inquiry was supported 44 to 10.¹⁴

According to the account of Thomas Jefferson, President Washington convened his Cabinet to consider the extent to which the House could call for papers and persons. The Cabinet considered and agreed,

first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.¹⁵

The Cabinet concluded that “there was not a paper which might not be properly produced.”¹⁶ President Washington instructed Secretary of War Henry Knox to “lay before the House of Representatives such papers from your Department, as are

¹¹ George C. Chalou, “St. Clair’s Defeat, 1792,” in *Congress Investigates, 1792-1974*, at 7 (Arthur M. Schlesinger, Jr. & Roger Bruns eds. 1975).

¹² 3 *Annals of Cong.* 493 (March 27, 1792).

¹³ *Id.* at 490.

¹⁴ *Id.* at 493.

¹⁵ 1 *The Writings of Thomas Jefferson* 304 (Washington, D.C.: Thomas Jefferson Memorial Association, Albert Ellery Bergh, ed. 1903).

¹⁶ *Id.* at 305.

requested by the enclosed Resolution.”¹⁷ Washington also thought it appropriate for St. Clair, who had expressed an interest in retiring, to make himself fully available to the House: “I should hope an opportunity would thereby be afforded you, of explaining your conduct, in a manner satisfactory to the public and yourself.”¹⁸ The House committee examined papers furnished by the executive branch, listened to explanations from department heads and other witnesses, and received a written statement from General St. Clair.¹⁹ The general principle of executive privilege had been established because the President could refuse papers “the disclosure of which would injure the public.” The language here is significant. The President was concerned about injury to the *public*, not to himself or his associates. From this evolved the principle that Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal improper or illegal activities.

Diplomatic Correspondence with France

In 1794, the Senate adopted a resolution requesting President Washington to submit certain diplomatic correspondence concerning U.S. policy with France.²⁰ At a Cabinet meeting he received advice from Secretary of War Henry Knox that “no part of the correspondence should be sent to the Senate.” Secretary of the Treasury Alexander Hamilton agreed with Knox, adding that “the principle is safe, by excepting such parts as the President may choose to withhold.” Attorney General Edmund Randolph, about to become Secretary of State, said that “all the correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the President thinks improper, should not be sent.”²¹ William Bradford, replacing Randolph as Attorney General, was of the opinion that “it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.”²²

Washington, carving out some room, notified the Senate that he had directed copies and translations to be made “except in those particulars which, in my judgment, for public considerations, ought not to be communicated.”²³ Apparently the Senate accepted this arrangement, but had Senators wanted to press the matter they might have forced the release of more material. As noted by Abraham Sofaer, “nothing would have prevented a majority from demanding the material, especially in

¹⁷ 32 The Writings of George Washington 15 (Washington, D.C.: Government Printing Office, John C. Fitzpatrick, ed. 1939).

¹⁸ *Id.* at 16.

¹⁹ 3 Annals of Cong. 1106-13 and Appendix (1052-59, 1310-17).

²⁰ 4 Annals of Cong. 38 (January 24, 1794).

²¹ 4 The Works of Alexander Hamilton 505-06 (New York: C.S. Francis & Co., John C. Hamilton ed., 1851).

²² *Id.* at 494-95.

²³ 4 Annals of Cong. 56 (February 26, 1794).

confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge.”²⁴

The Appropriations Power

Presidents may have to surrender documents they consider sensitive or confidential in order to obtain funds from Congress to implement programs important to the executive branch. This congressional leverage is evident in a number of early executive-legislative confrontations.

The Jay Treaty

An executive-legislative collision occurred in 1796 after President Washington informed Congress that the Jay Treaty had been ratified. His message was sent on March 1, 1796.²⁵ On the very next day, Congressman Edward Livingston stated that “it was very desirable, therefore, that every document which might tend to throw light on the subject should be before the House.”²⁶ He offered a resolution that President Washington “be requested to lay before this House a copy of the instructions given to the Minister of the United States who negotiated the Treaty with Great Britain, . . . together with the correspondence and other documents relative to the said Treaty.”²⁷

Recognizing that some of the negotiations were probably unfinished, Livingston modified his resolution by adding this language: “Excepting such of said papers as any existing negotiation may render improper to be disclosed.”²⁸ Explaining the role of the House in the treaty process, Livingston said that the House possessed “a discretionary power of carrying the Treaty into effect, or refusing it their sanction.”²⁹ Without the papers, the House might decide to withhold appropriations needed to implement the treaty. Congressman Albert Gallatin agreed that the House did not have to acquiesce in decisions agreed to by the President and the Senate if a treaty encroached upon powers expressly reserved to the House, such as the regulation of trade.³⁰

After weeks of debate, the House supported the Livingston resolution by a margin of 62 to 37.³¹ Importantly, some of the documents had already been shared with the House. Livingston, as chairman of the House Committee on American Seamen, “together with the whole committee, had been allowed access to these papers, and had

²⁴ Abraham D. Sofaer, “Executive Privilege: An Historical Note,” 75 *Colum. L. Rev.* 1318, 1321 (1975).

²⁵ *Annals of Cong.*, 4th Cong., 1st sess. 394 (March 1, 1796).

²⁶ *Id.* at 400.

²⁷ *Id.* at 400-01.

²⁸ *Id.* at 426.

²⁹ *Id.* at 427-28.

³⁰ *Id.* at 437, 466-74.

³¹ *Id.* at 759.

inspected them. The same privilege, he doubted not, would be given to any member of that House who would request it.”³² It was during this period that Congress passed legislation to provide for the relief and protection of American seamen, many of them having been impressed by Great Britain.³³ One Member of the House said that with respect to the papers on the Jay Treaty, “he did not think there were any secrets in them. He believed he had seen them all.”³⁴ He remarked that for “the space of ten weeks any member of that House might have seen them.”³⁵ Another Member of the House noted that his colleagues could have walked over to the office of the Secretary of the Senate to see the papers, but why, he said, “depend upon the courtesy of the Clerk for information which might as well be obtained in a more direct channel?”³⁶

Madison, who voted for Livingston’s resolution, elaborated on his views regarding executive-legislative struggles over information. He began with the “utmost respect to the decorum and dignity of the House, with a proper delicacy to the other departments of Government, and, at the same time, with fidelity and responsibility, for our constituents.”³⁷ He wanted the resolution drafted in such a form “as not to bear even the appearance of encroaching on the Constitutional rights of the Executive.”³⁸ Livingston’s amendment to his resolution, Madison felt, went a long way toward removing constitutional objections.³⁹ Madison proposed the following language to further ease the tensions between the branches: “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.”⁴⁰ Madison’s amendment failed by the vote of 37 to 47.⁴¹

In denying the House request for papers, Washington cited a number of reasons, including the need for caution and secrecy in foreign negotiations as well as the exclusive role of the Senate to participate as a member of the legislative branch in treaty matters.⁴² Washington said that the only ground on which the House might request documents regarding treaty instructions and negotiations would be impeachment, “which the resolution has not expressed.”⁴³ It would be incorrect to regard Washington’s decision to withhold documents from the House as an exercise of executive privilege to keep documents from Congress. He acknowledged that “all

³² Id. at 461 (remarks of Rep. Harper).

³³ Id. at 802-19.

³⁴ Id. at 642 (remarks of Cong. Williams).

³⁵ Id.

³⁶ Id. at 588 (remarks of Rep. Freeman).

³⁷ Id. at 437.

³⁸ Id. at 438.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id. at 759.

⁴³ Id.

the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated to their consideration and advice.”⁴⁴

Washington’s message to the House could be faulted on several grounds. First, the House was not requesting documents as part of the treaty process. That stage was complete. The treaty had been negotiated, approved by the Senate, and ratified. The House was requesting documents as part of the *post-treaty* process: the appropriation of funds needed to implement the treaty. The House decided it had a right to whatever papers it needed to make an informed legislative judgment. Second, Washington seemed to understand that right, because a letter from Hamilton to Washington implies that Washington had initially considered giving the House the papers it requested:

The course you suggest has some obvious advantages & merits careful consideration. I am not however without fears that there are things in the *instructions* to Mr. Jay which good policy, considering the matter *externally* as well as *internally*, would render it inexpedient to communicate. This I shall ascertain to day. A middle course is under consideration—that of not communicating the papers to the house but of declaring that the Secretary of State is directed to permit them to be read by the members individually.⁴⁵

In other words, because Washington seemed prepared to submit the papers to the House, Hamilton was offering an intermediate position of retaining the papers in the custody of the Secretary of State while allowing Members of the House to come and read them in his presence. The editor of Hamilton’s papers concludes that Washington’s letter to Hamilton “apparently suggested that he planned to comply with the request in Livingston’s resolution.”⁴⁶

Hamilton, no longer in the administration, advised President Washington to deny the House the documents it requested on the Jay Treaty. He thought that production of the papers “cannot fail to start [a] new and unpleasant Game—it will be fatal to the Negotiating Power of the Government if it is to be a matter of course for a call of either House of Congress to bring forth all the communication however confidential.”⁴⁷ Having taken a hard line, Hamilton cautioned Washington not to appear too abrupt or imperious when communicating to the House: “a too peremptory and unqualified refusal might be liable to just criticism.”⁴⁸

Shortly after Washington’s message to the House on the papers, Congressman Thomas Blount introduced two resolutions (both adopted 57 to 35), stating that the House of Representatives did not claim any agency in making treaties,

⁴⁴ *Id.* at 761.

⁴⁵ 20 Papers of Alexander Hamilton 81-82 (New York: Columbia University Press, Harold C. Syrett ed., 1974) (emphasis in original).

⁴⁶ *Id.* at 66.

⁴⁷ *Id.* at 69.

⁴⁸ *Id.*

but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.⁴⁹

Madison, supporting the Blount resolutions, said that the House “must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure.” Madison was “as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time.”⁵⁰ Yet Madison expressed some misgivings about Washington’s message to the House:

[The message] implied that the Executive was not only to judge of the proper objects and functions of the Executive department, but, also, of the objects and functions of the House. He was not only to decide how far the Executive trust would permit a disclosure of information, but how far the Legislative trust could derive advantage from it. It belonged, he said, to such department to judge for itself. If the Executive conceived that, in relation to his own department, papers could 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.⁵¹

The House had driven home its point: if a treaty entered into by the President and the Senate required legislation and appropriations to be carried out, the House would be strongly positioned to insist on whatever papers and documentation it needed to judge the merits of the treaty. Denied such information, it could threaten to block implementation. It might easily tell the President: “Sorry, without additional documents supplied by you, we have inadequate grounds to pass the necessary legislation.”

Precisely those conditions prevailed in 1796: President Washington needed the support of both Houses to pass an appropriation of \$90,000 to implement the Jay Treaty.⁵² Congressman Samuel Maclay cut to the quick by noting that Members of the House, having been denied the papers they requested, “were left to take their measures

⁴⁹ Annals of Cong., 4th Cong., 1st sess. 771 (1796). For the votes, see id. at 782-83.

⁵⁰ Id. at 773.

⁵¹ Id.

⁵² Id. at 991.

in the dark; or, in other words, they were called upon to act without information.”⁵³ He proposed the following preamble and resolution:

The House . . . are of opinion that [the treaty] is in many respects highly injurious to the interests of the United States; yet, were they possessed of any information which could justify the great sacrifices contained in the Treaty, their sincere desire to cherish harmony and amicable intercourse with all nations, and their earnest wish to co-operate in hastening a final adjustment of the differences subsisting between the United States and Great Britain, might have induced them to waive their objection to the Treaty; . . . Therefore,

Resolved, That, under the circumstances aforesaid, and with such information as the House possess, it is not expedient at this time to concur in passing the laws necessary for carrying the said Treaty into effect.⁵⁴

The House never voted on Maclay’s language. After a lengthy debate, the bill to appropriate funds to implement the treaty passed by the narrow margin of 51 to 48.⁵⁵ James Madison voted against the bill. An earlier test vote showed the House divided 49 to 49, with the Speaker willing to break the tie to support the treaty.⁵⁶ The appropriation was enacted into law.⁵⁷ Given the closeness of the vote, had the opposition maintained a narrow margin it seems reasonable that President Washington would have shared with the House—or with a few selected opponents—the documents needed to swing the necessary votes.

The Louisiana Purchase

In 1803, after President Jefferson entered into negotiations with France for the Louisiana Purchase, he had considerable doubts about the legality of what he had done. On the basis of a provisional appropriation of \$2 million to be applied toward the purchase of New Orleans and the Floridas, the Jefferson administration entered into an agreement with France to buy the whole of the Louisiana territory. Jefferson thought that the executive officials who had negotiated the terms “have done an act beyond the Constitution.”⁵⁸ Because Congress would have to “ratify and pay for it,”⁵⁹ the treaty “must of course be laid before both Houses, because both have important functions to exercise respecting it.”⁶⁰

⁵³ Id. at 970.

⁵⁴ Id. at 971.

⁵⁵ Id. at 1291.

⁵⁶ Id. at 1280.

⁵⁷ 1 Stat. 459 (1796).

⁵⁸ 10 The Writings of Thomas Jefferson 411 (Bergh ed. 1903).

⁵⁹ Id.

⁶⁰ Id. at 410.

Jefferson sent copies of the ratified treaty both to the House of Representatives and the Senate, explaining: “You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay.”⁶¹ The House debated at length a resolution asking Jefferson to submit certain papers and documents relating to the treaty. Some portions of the resolution were adopted, others rejected. The resolution as a whole went down to defeat, 57 to 59.⁶² With or without the resolution, there is little doubt that the administration was willing to provide the House with whatever documents it needed to support the treaty. The House subsequently joined the Senate in passing legislation to enable Jefferson to take possession of the Louisiana Territory.⁶³

Subsequent Treaty Disputes

On other occasions the House has opposed treaties that required appropriations, two examples being the Gadsden purchase treaty with Mexico in 1853 and the Alaskan purchase treaty with Russia in 1867. In such disputes the House raises itself to coequal status with the Senate and strengthens its position for obtaining information from the executive branch.

The need to have support from both Houses for certain treaties was recognized in a reciprocity treaty with the Hawaiian Islands in 1876. A proviso made the treaty dependent on legislative consent by both Houses.⁶⁴ A commercial treaty with Mexico in 1883 contained a clause making its validity dependent on action by both Houses. The House Ways and Means Committee interpreted the language to mean that the House had a right to a voice in treaties affecting revenue. Although additional conventions were entered into to extend the time available for congressional approval, the House did not support the treaty and it did not take effect.⁶⁵ The prerogatives of the House in matters of foreign commerce, tariffs, and revenues have been protected by the use of statutes that authorize reciprocal trade agreements.⁶⁶

The House continues to make its will felt in matters of treaties. Although the Ford Administration believed that it could enter into an executive agreement with regard to Spanish bases, the Senate insisted that it be done by treaty. Later, Members of both Houses objected to language in the treaty that appeared to make appropriations mandatory over a five-year period. In the end, the prerogatives of the appropriations

⁶¹ 1 A Compilation of Messages and Papers of the Presidents 350-51 (New York: Bureau of National Literature, James D. Richardson, ed.) (October 21, 1803) (hereafter “Richardson”).

⁶² Annals of Cong., 8th Cong., 1st sess. 385-419 (1803).

⁶³ 2 Stat. 245, 247 (1803).

⁶⁴ Chalfant Robinson, “The Treaty-Making Power of the House of Representatives,” 12 Yale Rev. 191 (1903). See also Ivan M. Stone, “The House of Representatives and the Treaty-Making Power,” 17 Ky. L. J. 217 (1929).

⁶⁵ 24 Stat. 975 (1883); 25 Stat. 1370 (1885); 24 Stat. 1018 (1886); 2 Hinds’ Precedents §§ 1526-28.

⁶⁶ For the development of reciprocal trade legislation, see Louis Fisher, *President and Congress 133-55* (New York: The Free Press, 1972).

and authorization committees were respected. The Senate Resolution of Advice and Consent contained a declaration that the sums referred to in the Spanish treaty “shall be made available for obligation through the normal procedures of the Congress, including the process of prior authorization and annual appropriations.” Congress enacted legislation in 1976 to authorize the appropriation of funds needed to implement the Spanish treaty.⁶⁷

The Spanish Bases Treaty was replaced by an executive agreement in 1982, but congressional interests were again protected. The agreement stipulated that the supply of defense articles and services are subject to “the annual authorizations and appropriations contained in United States security assistance legislation.” Although the agreement promised support “in the highest amounts, the most favorable terms, and the widest variety of forms,” it also conditioned such support on what “may be lawful and feasible.”⁶⁸ In blunter terms: Spain would get what Congress decided.

The role of the House in international agreements was debated again in 1994 when President Clinton submitted the Uruguay Round Agreements to Congress as a bill rather than as a treaty. The purpose of the bill was to implement the worldwide General Agreements on Tariffs and Trade (GATT). Professor Laurence H. Tribe testified that certain features of the bill would so alter the dynamics of state-federal relations that ratification of a treaty by two-thirds of the Senate was necessary, given the Senate’s special role in representing the states as political units.⁶⁹ However, there are no clear constitutional guidelines on the types of national policy that must be included only in a treaty and not in a statute. The subject matter of NAFTA and GATT—international trade—is certainly within the jurisdiction of Congress as a whole to “regulate Commerce with foreign Nations” and therefore justifies action by both Houses through the regular statutory process.⁷⁰

Exquisite legal and constitutional arguments offered by the executive branch may have to play second fiddle to the political leverage that Congress can assert. As previously mentioned, this may involve the simple act of having to appropriate funds to implement a treaty, elevating the House to equal partnership with the Senate. Either House may decide to roll out heavy artillery to get the Administration’s attention: unleashing the impeachment power or holding an executive official in contempt of Congress. On other occasions the Administration may reluctantly agree to release sensitive papers and documents because that is the only way to move along the confirmation process.

⁶⁷ 90 Stat. 765, § 507; 90 Stat. 2498.

⁶⁸ “Agreement on Friendship, Defense, and Cooperation Between the United States of America and the Kingdom of Spain,” Complementary Agreement Three, Article 2 (signed July 2, 1982).

⁶⁹ “S. 2467, GATT Implementing Legislation,” Hearings before the Senate Committee on Commerce, Science, and Transportation, 103rd Cong., 2nd sess. 302-12 (1994).

⁷⁰ Bruce Ackerman and David Golove, “Is NAFTA Constitutional?,” 108 Harv. L. Rev. 799 (1995); Laurence H. Tribe, “Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,” 108 Harv. L. Rev. 1223 (1995).

The Impeachment Power

When President Washington denied the House the papers it requested regarding the Jay Treaty, he said that the only ground on which the House might have legitimately requested the documents was impeachment, “which the resolution has not expressed.”⁷¹ The power of impeachment, said President Polk, gives to the House of Representatives

the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Department. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge.⁷²

Even short of impeachment, executive privilege is inappropriate when there are serious charges of administrative malfeasance. President Jackson, a jealous defender of executive prerogatives, told Congress that if it could “point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose.”⁷³ The Supreme Court has noted that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”⁷⁴

While defending a broad theory of executive privilege, Attorney General William French Smith in 1982 admitted that he would not try “to shield documents [from Congress] which contain evidence of criminal or unethical conduct by agency officials from proper review.”⁷⁵ During a news conference in 1983, President Reagan said, “We will never invoke executive privilege to cover up wrongdoing.”⁷⁶

After the Iran-Contra story broke in November 1986, he permitted his two former national security advisers (Robert McFarlane and John Poindexter) to testify before Congress, allowed his Cabinet officials (including Secretary of State George Shultz and Secretary of Defense Caspar Weinberger) to discuss with Congress their conversations with the President, and made available to Congress thousands of sensitive, classified

⁷¹ Annals of Cong., 4th Cong., 1st sess. 759 (1796).

⁷² 5 Richardson 2284 (April 20, 1846).

⁷³ Cong. Debates, 24th Cong., 2nd sess., vol. 13, part 2, Appendix, at 202, but see entire discussion at 188-225.

⁷⁴ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

⁷⁵ Letter of November 30, 1982, to Congressman John Dingell, reprinted in H. Rept. No. 968, 97th Cong., 2nd sess. 41 (1982).

⁷⁶ Public Papers of the Presidents, 1983, I, at 239.

documents. The reported purpose of this extraordinary cooperation was to forestall any possibility of an impeachment effort. Attorney General Edwin Meese, III, thought the Iran-Contra affair had the potential for “toppling” the President and triggering impeachment proceedings in the House.⁷⁷

In 1998, the House Committee on Government Reform and Oversight voted to cite Attorney General Janet Reno for contempt for refusing to release memos generated within the Justice Department regarding campaign finance issues. The committee was restricted to reading redacted versions of the memos. The contempt citation was not taken up by the House, but later that year, as part of an impeachment effort against President Bill Clinton, certain members and staff of the House Judiciary Committee gained access to the unredacted versions, and the memos were later released to the general public.⁷⁸

The Appointment Power

Until the President submits to the Senate the name of a nominee, Congress has no grounds for gaining access to the individual’s file. Requests for personnel and medical files might be regarded by the President as an unwarranted intrusion into personal privacy. President Grover Cleveland once withheld from the Senate various papers and documents that pertained to a suspended official. The power to remove, he said, was solely an executive prerogative and could not be shared or compromised with the Senate.⁷⁹ On the other hand, if the President is trying to get someone confirmed and needs the cooperation and good will of the Senate, he may have to surrender documents or allow executive officials to testify before congressional committees.

Senate “Holds”

The informal practice of imposing “holds” allows any Senator to stop floor action on legislation or nominations. The Majority Leader may then decide “whether, or for how long, [to] honor a colleague’s hold.”⁸⁰ Although there have been objections to “secret holds”—so-called anonymous holds—Senators generally recognize that holds are often necessary to pursue legitimate legislative interests.

There are many reasons for placing a hold, but often it is to obtain information that the executive branch has refused to release to Congress. In 1993, Senator John

⁷⁷ Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* 521 (New York: Hill and Wang, 1991).

⁷⁸ For further details, see later in this report under the heading “The Contempt Power.”

⁷⁹ Louis Fisher, “Grover Cleveland and the Senate,” 7 *Cong. Studies* 11 (1979).

⁸⁰ Walter Oleszek, “‘Holds’ in the Senate,” CRS Report 98-712 GOV (March 20, 2001).

Warner announced that he would release his hold on the intelligence authorization bill after receiving assurance from the CIA that it would search its files for information on Defense Department nominee Morton Halperin. The CIA had previously said that it could not find the documents requested by Republican members of the Senate Armed Services Committee. CIA Director James Woolsey had planned to brief committee Republicans but apparently was ordered not to do so by White House Counsel Bernard Nussbaum.⁸¹

In 1997, Senator Charles Grassley used holds to force the State Department to comply with a statutory procedure that required the Administration to consult with Senators on any unanimous consent agreements involving the Foreign Service promotion list. After the Administration missed several deadlines and extended deadlines in submitting the list, he put a hold on nominations for ambassadors to Bolivia, Haiti, Jamaica, and Belize. As Senator Grassley said, “we need to get the administration’s attention so that they will abide by the law.”⁸²

In 1999, several Senators wrote to the State Department, expressing their concern about the department’s treatment of Linda Shenwick, who worked at the U.S. mission to the United Nations. After giving Congress information on mismanagement at the UN, she was threatened with a suspension and transfer to another job.⁸³ As a way of getting the department’s attention, Senator Charles Grassley placed a hold on the nomination of Richard Holbrooke to be U.S. ambassador to the UN. He explained that if lawmakers did not protect agency whistleblowers, “a valuable source of information to Congress will likely dry up.”⁸⁴ After being reassured that Shenwick would not be punished by the State Department, Senator Grassley lifted his objections to Holbrooke, who was confirmed, but blocked approval of three other ambassadorial nominees to underscore his intention to protect Shenwick.⁸⁵

Kleindienst Nomination

President Nixon’s nomination of Richard G. Kleindienst in 1972 to be Attorney General precipitated lengthy hearings by the Senate Judiciary Committee. Columnist Jack Anderson charged that Kleindienst had lied in disclaiming any role in the Justice Department’s out-of-court settlement of antitrust cases against International Telephone and Telegraph Corp. (ITT). The Senate wanted Peter Flanigan, a presidential aide and the chief White House figure involved in the controversy, to testify. However, on April 12, 1972, White House Counsel John W. Dean III wrote to the committee that the doctrine of executive privilege would protect Flanigan and other White House

⁸¹ “CIA Offer of Help on Nominee Frees Up Authorization Bill,” *Washington Times*, November 5, 1993, at A5.

⁸² 143 Cong. Rec. S11631 (daily ed. November 4, 1997).

⁸³ Statement by Senator Grassley, 145 Cong. Rec. S7587 (daily ed. June 24, 1999); “Sen Grassley’s ‘hold’” [editorial], *The Hill*, August 11, 1999, at 10.

⁸⁴ Sen. Chuck Grassley, “Holds Practice Needs Big Changes” (letter to the editor), *Roll Call*, August 2, 1999, at 4.

⁸⁵ “Grassley Shifts Tack; Holbrooke Path Clear,” *Washington Times*, August 5, 1999, at A6; “Holbrooke Nomination Clears Hurdle,” *Washington Post*, August 5, 1999, at A4.

aides from testifying before congressional committees: “Under the doctrine of separation of powers, and long-established historical precedents, the principle that members of the President’s immediate staff not appear and testify before congressional committees with respect to the performance of their duties is firmly established.”⁸⁶

By 6-6 party-line votes, the committee rejected three motions to subpoena White House aides to testify.⁸⁷ Nevertheless, Senator Sam J. Ervin, Jr. made it clear that the Senate should not vote on Kleindienst “so long as those fellows aren’t coming up here and the White House is withholding information.”⁸⁸ With a filibuster looming, the White House within a few days retreated from Dean’s theory and Flanigan appeared at the hearings on April 20.⁸⁹ Following committee action, the Senate confirmed Kleindienst by a vote of 64 to 19.

Rehnquist for Chief Justice

On July 31, 1986, President Reagan invoked executive privilege to deny to the Senate certain internal memos that Chief Justice-designee William H. Rehnquist had written while serving in the Justice Department from 1969 to 1971. The reasons given for withholding the memos were familiar: to protect the confidentiality and candor of the legal advice submitted to Presidents and their assistants.⁹⁰ Nevertheless, Democrats on the Senate Judiciary Committee began rounding up votes to subpoena the papers.⁹¹ Committee Democrats had agreed with Republicans to vote on both Rehnquist and Associate Justice-designee Antonin Scalia on August 14, but the impasse over the papers threatened to delay the votes.⁹²

In an op-ed piece for the *Los Angeles Times*, Senator Ted Kennedy put the matter succinctly: “Rehnquist: No Documents, No Senate Confirmation.”⁹³ Hoping to move the nominations of Rehnquist and Scalia along, President Reagan agreed to a narrowed request by the committee to read 25 to 30 documents written by Rehnquist during his career in the Justice Department.⁹⁴ The eight Democrats on Senate Judiciary picked

⁸⁶ “Sen. Ervin Hints Filibuster on Kleindienst After Panel Rejects Calling of Nixon Aide,” *Wall Street Journal*, April 13, 1972, at 4.

⁸⁷ *CQ Almanac*, 1972, at 221.

⁸⁸ “Panel Votes Not to Subpoena Nixon Aides on I.T.T.,” *New York Times*, April 13, 1972, at 8.

⁸⁹ “Richard G. Kleindienst—Resumed” (Part 3), hearings before the Senate Committee on the Judiciary, 92nd Cong., 2nd sess. 1585 (1972).

⁹⁰ “Reagan Uses Executive Privilege to Keep Rehnquist Memos Secret,” *Washington Post*, August 1, 1986, at A1.

⁹¹ “Democrats Seek to Subpoena Papers,” *Washington Post*, August 2, 1986, at A1.

⁹² “Senators to Push for Rehnquist Memos,” *Washington Post*, August 5, 1986, at A4.

⁹³ Edward M. Kennedy, “Rehnquist: No Documents, No Senate Confirmation,” *Los Angeles Times*, August 5, 1986, Part II, at 5.

⁹⁴ “Rehnquist Told in 1974 of Restriction in Deed,” *Washington Post*, August 6, 1986, at A1.

up two moderate Republicans to form a majority in favor of a subpoena.⁹⁵ A few days later the committee requested and received additional documents prepared by Rehnquist while in the Justice Department.⁹⁶ The nominations of Rehnquist and Scalia then went forward as scheduled.

Nomination of Trott

Two years later the Senate replayed the same drama. The nomination of Stephen S. Trott for the Ninth Circuit was held up for four months because Senators Ted Kennedy and Howard Metzenbaum wanted internal documents from the Justice Department. The two Senators were interested in a report by the Public Integrity Section concerning the appointment of an independent counsel to investigate Faith Ryan Whittlesey, former ambassador to Switzerland.⁹⁷ Refusing to release the documents, the department explained: “As you know, it is a longstanding policy of the Department not to provide copies of internal, deliberative memoranda to persons outside the Department.”⁹⁸ That may have been “longstanding policy,” but the Trott nomination would not go anywhere until the department yielded, which it eventually did. Having received the documents they wanted, Kennedy and Metzenbaum released their hold.⁹⁹

An Ambassadorial Position

In 1991, the appointment of the U.S. ambassador to Guyana was held up for 17 months until Senator Jesse Helms got the documents he wanted from the State Department. During a Helms visit to Chile in 1985, one of his aides was accused of leaking U.S. intelligence information to the government of former President Augusto Pinochet. Helms insisted that the State Department show him secret cable traffic regarding the visit, but the department refused to turn over two cables, which it called internal memoranda.¹⁰⁰

When the deputy chief of mission at the U.S. Embassy in Chile was later nominated in June 1990 for the position of ambassador to Chile, Helms had the necessary leverage. After Helms renewed his request for the cables and the State Department again refused, he blocked the nomination. As the months rolled by and Helms held firm, Deputy Secretary of State Lawrence S. Eagleburger came to Helms’

⁹⁵ *Id.*

⁹⁶ “Senators Are Given More Rehnquist Data,” *Washington Post*, August 8, 1986, at A3.

⁹⁷ “Justice Aide Kept on Hold,” *Washington Post*, February 23, 1988, at A21.

⁹⁸ “Impasse Over Justice Documents Ends,” *Washington Post*, March 25, 1988, at A23.

⁹⁹ *Id.*

¹⁰⁰ “Ambassador to Guyana Is Appointed After 17-Month Standoff,” *Washington Post*, November 29, 1991, at A40.

office one day to show him the memos, which had been critical of both Helms and his aide. Helms released the hold and the nomination went forward.¹⁰¹

Environmental Crimes

In March 1994, a House subcommittee subpoenaed the records of six cases handled by the Environment and Natural Resources Division of the Justice Department.¹⁰² The subcommittee's request reflected congressional interest for the past several years in the work of the Environmental Crimes Section (ECS) and the shift of prosecution responsibilities from U.S. attorneys to Washington officials. In an effort to mediate the dispute, Attorney General Janet Reno allowed subcommittee staff to interview line attorneys within ECS.¹⁰³ President Clinton did not intervene in this subcommittee-department dispute. White House Communications Director Mark Gearan announced: "We will not assert any privilege or waiver."¹⁰⁴

In addition to sending the subpoenas, subcommittee chairman John Dingell (D-Mich.) and ranking minority member Dan Schaefer (R-Colo.) released letters to the Senate Judiciary Committee asking that the confirmation of Lois Schiffer be delayed. She had been serving as Acting Attorney General of the Environment and Natural Resources Division and had been nominated for the position on February 2, 1994.¹⁰⁵ Schaefer expressed his concern about her confirmation because of what he described as "obstruction of the subcommittee's work on oversight of the nation's environmental laws."¹⁰⁶

As the dispute deepened, ECS chief Neil S. Cartusciello announced his resignation.¹⁰⁷ By that time, the subcommittee had begun receiving some of the documents it had subpoenaed.¹⁰⁸ After Schiffer moved to find a replacement for Cartusciello, the hearing on her nomination was tentatively scheduled.¹⁰⁹ After some further delays, and after the subcommittee was satisfied with the cooperation it had received from the Justice Department, Schiffer was confirmed by the Senate on October 6, 1994.¹¹⁰

¹⁰¹ Id.

¹⁰² "House Panel Subpoenas Justice," *Washington Post*, March 12, 1994, at A4.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ "Environmental Crimes Controversy Lingers Under Reno," *Washington Post*, April 7, 1994, at A25.

¹⁰⁸ "Chief of Environmental Crimes Section Quits," *Washington Post*, April 2, 1994, at A4.

¹⁰⁹ "Teaming Up," *Washington Post*, July 13, 1994, at A15.

¹¹⁰ 140 Cong. Rec. 28359-60 (1994). For further details on this controversy, see *Damaging Disarray: Organization Breakdown and reform in the Justice Department's Environmental* (continued...)

These examples illustrate that Congress has sufficient tools at its command to wrest from the executive branch the documents it needs to fulfil congressional duties. The issue according to one observer is “not the adequacy of congressional power to obtain information, but the willingness of committee chairs and staffers to aggressively pursue information.”¹¹¹

Congressional Subpoenas

The Supreme Court has held that the congressional power of inquiry “is an essential and appropriate auxiliary to the legislative function.”¹¹² As a tool of this inquiry, both Houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee’s jurisdiction. The issuance of a subpoena pursuant to an authorized investigation is “an indispensable ingredient of lawmaking.”¹¹³ To be legitimate, a congressional inquiry need not produce a bill or legislative measure. “The very nature of the investigative function—like any research—is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.”¹¹⁴

Committee investigations are appropriate when they satisfy certain standards. Legislative inquiries must be authorized by Congress, pursue a valid legislative purpose, raise questions pertinent to the issue being investigated, and apprise witnesses of the pertinency of the questions asked.¹¹⁵ Private citizens, more so than agency officers, may invoke certain constitutional protections, such as the First Amendment rights of free association and free speech. Witnesses may claim the Fifth Amendment privilege against self-incrimination.¹¹⁶ Also, congressional inquiries may not interfere with adjudicatory proceedings before a department or agency.¹¹⁷

If a witness refuses to testify or produce papers in response to a committee subpoena, and the committee votes to report a resolution of contempt to the floor and

¹¹⁰ (...continued)

Crimes Program, a staff report prepared for the use of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, Committee Print 103-T, 103rd Cong., 2nd sess. (December 1994); Neal Devins, “Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing,” 48 Adm. L. Rev. 109, 123-25 (1996).

¹¹¹ Devins, “Congressional-Executive Information Access Disputes,” at 133.

¹¹² *McGrain v. Daugherty*, 272 U.S. 135, 174 (1927).

¹¹³ *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505 (1975).

¹¹⁴ *Id.* at 509.

¹¹⁵ *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961); *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (1976).

¹¹⁶ *Wilkinson v. United States*, 365 U.S. at 409.

¹¹⁷ *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

one of the chambers votes in support of the contempt citation, the President of the Senate or the Speaker of the House shall certify the facts to the appropriate U.S. Attorney, “whose duty it shall be to bring the matter before the grand jury for its action.”¹¹⁸ Witnesses subject to this process may be found guilty of a misdemeanor punishable by a fine and imprisonment.¹¹⁹

Immunity

By majority vote of either House or a two-thirds vote of a committee or subcommittee, Congress may request a federal court to issue an order that compels witnesses to testify. By surrendering the Fifth Amendment right, witnesses are given either partial immunity or full immunity. Partial immunity (“use immunity”) means that their testimony may not be used against them in a criminal case, although the person might be prosecuted on the basis of other information. Full immunity (“transactional immunity”) offers absolute protection against prosecution for the offense.

During the Iran-Contra investigation in 1987, Congress offered partial immunity to several witnesses, including Col. Oliver North. He was later convicted of three felonies, but those charges were subsequently dismissed because of his immunized testimony. Under the standards imposed by the D.C. Circuit, prosecutors must show that a defendant’s testimony could have had no influence on the witnesses called to a trial. Otherwise, the remarks of the witnesses are “tainted” and may not be used to convict.¹²⁰

In such situations Congress decides whether it is more important to inform itself and the public rather than have a successful prosecution. Lawrence Walsh, the independent counsel for Iran-Contra, described this setting of national priorities: “If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power. . . . The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need.”¹²¹

The Ashland Case

On October 6, 1975, in his capacity as a Member of Congress, John Moss asked the Federal Trade Commission to make available to him data gathered by the commission pertaining to lease extensions on federal lands. FTC denied the request for the reason that the data sought constituted “trade secrets and commercial or financial information [and] geological and geophysical information and data, including maps, concerning wells” and that such materials were exempt from mandatory

¹¹⁸ 2 U.S.C. § 194 (1994).

¹¹⁹ *Id.* at § 192.

¹²⁰ *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). See also *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992).

¹²¹ Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” 25 *Houston L. Rev.* 1, 9 (1988).

disclosure under subsections (b)(4) and (b)(9) of the Freedom of Information Act.¹²² Moss responded by pointing out that the statute specifically provided that it did not authorize the withholding of information from Congress, and made a second request, this time as chairman of the Subcommittee on Oversight and Investigation, for the material.

After the commission agreed to furnish Moss with the information, Ashland Oil, Inc., went to court to enjoin the FTC from releasing the data. At that point the subcommittee issued a subpoena for the FTC chairman to appear and bring the requested documents. The full House then passed a resolution authorizing Moss to intervene and appear in the case in order to secure the information needed for his subcommittee. A federal district court agreed that the data at issue constituted “trade secret” information within the purview of Section 6(f) of the Federal Trade Commission Act, but ruled that Ashland Oil had failed to show that release of the material to the subcommittee would irreparably injure the company. The court rejected the argument that the transfer of the data from the FTC to the subcommittee would lead “inexorably to either public dissemination or disclosure to Ashland’s competitors.” Courts must assume that congressional committees “will exercise their powers responsibly and with due regard for the rights of affected parties.”¹²³

That decision was affirmed by the D.C. Circuit.¹²⁴ A dissenting judge concluded that the subpoena was invalid, but the majority noted that FTC’s decision to turn over the materials to the subcommittee “was not based on—and in fact predated—issuance of the subpoena.”¹²⁵ The commission had agreed to provide Moss with the material after receiving the letter in his capacity as subcommittee chairman.

DOJ Documents: Seizing Suspects Abroad

Beginning in 1989, Congress held hearings on whether the FBI could seize a suspect from a foreign country without the cooperation and consent of that country. On November 8, a subcommittee of the House Judiciary Committee received testimony from William P. Barr, head of the Office of Legal Counsel (OLC) in the Justice Department, State Department Legal Adviser Abraham D. Sofaer, and Oliver B. Revell, Associate Deputy Director of Investigations in the FBI.¹²⁶ Although OLC concluded in 1980 that the FBI had no authority to perform such an arrest,¹²⁷ Barr explained that OLC reexamined its position and issued an opinion on June 21, 1989,

¹²² *Ashland Oil, Inc. v. F.T.C.*, 409 F.Supp. 297, 300 (D.D.C. 1976). Subsection (b)(4) covers “trade secrets and commercial or financial information obtained from a person and privileged or confidential”; subsection (b)(9) covers “geological and geophysical information and data, including maps, concerning wells.”

¹²³ *Id.* at 308.

¹²⁴ *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976).

¹²⁵ *Id.* at 979.

¹²⁶ “FBI Authority to Seize Suspects Abroad,” Hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 1st sess. (1991).

¹²⁷ 4B Op. O.L.C. 543 (1980).

partially reversing the 1980 opinion.¹²⁸ Although the first opinion had been published, Barr said the second “must remain confidential.”¹²⁹ While insisting on withholding the 1989 opinion, he agreed to explain OLC’s conclusions and its legal reasoning.¹³⁰

The subcommittee issued a subpoena on July 25, 1991, to obtain the 1989 OLC memo, arguing that it needed the memo to determine whether it was necessary for Congress to legislate in this area.¹³¹ Initially the Administration decided to fight the subpoena. Attorney General Dick Thornburgh wrote to the subcommittee on November 28, explaining why it could not have the 1989 OLC opinion.¹³² However, the department decided that it would release the documents to the committee and allow one or more committee members to review the legal memo.¹³³

DOJ Documents: The Inslaw Affair

On December 5, 1990, Representative Jack Brooks, chairman of the House Judiciary Committee, convened a hearing to review the refusal of Attorney General Richard Thornburgh to provide the committee with access to all documents regarding a dispute brought by Inslaw, Inc., a computer company. Inslaw charged that the Justice Department had stolen a computer program the company had designed to keep track of civil and criminal cases.¹³⁴

On July 25, 1991, the House Judiciary Committee issued a subpoena to Attorney General Thornburgh. Brooks said he wanted the documents to explore whether the department had acted illegally by engaging in criminal conspiracy. Thornburgh insisted that the Inslaw documents amounted to “privileged attorney work products” that could not be shared with the committee.¹³⁵ When the committee failed to receive the materials, Brooks said that the committee would consider contempt of Congress proceedings against the department.¹³⁶

¹²⁸ “FBI Authority to Seize Suspects Abroad, Hearing, at 3.

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 4, 5.

¹³¹ “Panel Challenges Thornburgh Over Right to Documents,” *CQ Weekly Report*, July 27, 1991, at 2080; “Administration to Fight House Panel’s Subpoena,” *New York Times*, July 30, 1991, at A12.

¹³² “FBI Authority to Seize Suspects Abroad,” Hearing, at 92-93.

¹³³ “Both Sides Softening Stance on Documents on Foreign Arrests,” *New York Times*, August 1, 1991, at B7; “Justice Yields to House, Averting Showdown,” *CQ Weekly Report*, August 3, 1991, at 2179.

¹³⁴ “The Attorney General’s Refusal to Provide Congressional Access to ‘Privileged’ Inslaw Documents,” Hearing before a subcommittee on the House Committee on the Judiciary, 101st Cong., 2nd sess. (1990).

¹³⁵ Paul M. Barrett, “Thornburgh, Brooks Clash Over Charge of Wrongdoing at Justice Department,” *Wall Street Journal*, December 10, 1990, at B7A.

¹³⁶ Susan B. Glasser, “Deadline Passes, But Justice Dept. Still Hasn’t Given Papers to
(continued...)

At that point several hundred documents were delivered to the committee, which later released a formal investigative report on the Inslaw affair.¹³⁷ The committee gained access to sensitive files of the Office of Professional Responsibility (OPR) in the Justice Department, took sworn statements from Justice officials and employees without a department attorney present, and received more than 400 documents related to “ongoing litigation and other highly sensitive matters and ‘protected’ under the claims of attorney-client and attorney work product privileges.”¹³⁸

Whitewater Notes

In 1995, the Special Senate Committee to Investigate Whitewater Development Corporation and Related Matters (the Senate Whitewater Committee) issued a subpoena for certain documents. The White House announced that it would withhold material about a November 5, 1993 meeting involving senior presidential aides and private lawyers, on the ground that the documents were protected by the lawyer-client privilege and executive privilege. William Kennedy, who at the time was an associate White House counsel, took extensive notes at the meeting.¹³⁹ President Clinton said that he believed “the president ought to have a right to have a confidential conversation with his minister, his doctor, his lawyer.”¹⁴⁰ That argument would apply if a President met with his private lawyer, but the issue was complicated by the presence of government lawyers at the meeting.

Within a few days, the White House offered to turn over the Kennedy notes if the committee agreed that the meeting was privileged. The committee refused because it learned of other meetings attended by White House officials and private attorneys. Unable to reach an acceptable compromise, the committee voted to send the issue to the Senate floor and from there to federal district court.¹⁴¹ On December 20, 1995, the Senate began consideration of a resolution directing the Senate Legal Counsel to bring a civil action to enforce the subpoena. In a letter on that day to the committee, White House Special Counsel Jane Sherburne described various options, stating: “We have said all along that we are prepared to make the notes public.”¹⁴² The resolution passed

¹³⁶ (...continued)

Brooks,” Roll Call, September 19, 1991.

¹³⁷ H. Rept. No. 857, 102nd Cong., 2nd sess. (1992).

¹³⁸ *Id.* at 92-93.

¹³⁹ “White House Gives Rationale for Balking at a Subpoena,” *New York Times*, December 13, 1995, at B14; “White House Rejects Subpoena,” *Washington Post*, December 13, 1995, at A1.

¹⁴⁰ “Legal Experts Uncertain on Prospects of Clinton Privilege Claim,” *Washington Post*, December 14, 1995, at A14.

¹⁴¹ “Compromise on Notes Rejected,” *Washington Post*, December 15, 1995, at A2.

¹⁴² 141 Cong. Rec. S18964 (daily ed. December 20, 1995).

the Senate by a vote of 51 to 45.¹⁴³ On the following day, the White House agreed to give the notes to the Senate Whitewater Committee.¹⁴⁴

The Contempt Power

When executive officials or private persons refuse to comply with a congressional request to appear before committees, to respond to questions, or to produce documents, one of the instruments of legislative coercion is the contempt power. Although the legislative power of contempt is not expressly provided for in the Constitution and exists as an implied power, as early as 1821 the Supreme Court recognized that without this power the legislative branch would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”¹⁴⁵ Individuals who refuse to testify or produce papers are subject to criminal contempt, leading to fines and imprisonment.¹⁴⁶

Actions from 1975 to 1981

From 1975 to the start of the Reagan Administration, Congress several times threatened to hold executive officials in contempt for refusing to cooperate with congressional committees. In the end, the committees obtained access to the requested documents.

Rogers C. B. Morton. A 1975 tug of war between the branches, with Congress the eventual victor, concerned reports compiled by the Department of Commerce identifying the U.S. companies that had been asked to join a boycott of companies doing business with Israel. Secretary of Commerce Rogers Morton refused to release the documents to a House Interstate and Foreign Commerce subcommittee, citing the following language from Section 7(c) of the Export Administration Act of 1969:

No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.¹⁴⁷

¹⁴³ Id. at S18993.

¹⁴⁴ “Whitewater Notes Being Surrendered,” *Washington Post*, December 22, 1995, at A1.

¹⁴⁵ *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 228 (1821). For legal analysis of the legislative contempt power, see “Congressional Oversight Manual,” CRS Report RL 30240 (June 25, 1999), at 35-36.

¹⁴⁶ 2 U.S.C. §§ 192, 194 (1994).

¹⁴⁷ Letter of July 24, 1975, from Secretary Morton to John E. Moss, chairman of the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Relations, reprinted in “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” hearings before the Subcommittee on Oversight and Investigations of the House

In his letter of July 24, 1975, to the subcommittee, Morton said he understood the need to provide Congress “with adequate information on which to legislate,” but concluded that “disclosing the identity of reporting firms would accomplish little other than to expose such firms to possible economic retaliation by certain private groups merely because they *reported* a boycott request, whether or not they complied with that request.”¹⁴⁸ On July 28, the subcommittee issued a subpoena. On August 22, in a letter to the committee, Morton again reiterated his refusal to release the documents, explaining that his decision was not based “on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress.”¹⁴⁹ However, he said he was prepared to make copies of the documents available, “subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved.”¹⁵⁰

At subcommittee hearings on September 22, Representative John E. Moss, chairman of the subcommittee seeking the documents, told Secretary Morton that Section 7(c) did not “in any way refer to the Congress nor does the Chair believe that any acceptable interpretation of that section could reach the result that Congress by implication had surrendered its legislative and oversight authority under Article I and the Rules of the House of Representatives.”¹⁵¹ Morton told Moss that he had been advised by Attorney General Edward Levi not to make the documents available to the committee.¹⁵² On November 11, the subcommittee voted 10 to 5 to find Morton in contempt for failure to comply with the subpoena of July 28.¹⁵³ The prospect of contempt proceedings was sufficient incentive for Morton to release the material to the subcommittee.¹⁵⁴

Congress passed legislation in 1977 to specify that Section 7(c) does not authorize the withholding of information from Congress, and that any information obtained under the Export Administration Act “shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act which is submitted on a confidential basis unless the full committee determines that the withholding thereof is contrary to the national interest.”¹⁵⁵

¹⁴⁷ (...continued)

Committee on Interstate and Foreign Commerce, 94th Cong., 1st sess. 153 (1975).

¹⁴⁸ *Id.* at 153-54 (emphasis in original).

¹⁴⁹ *Id.* at 158.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 4.

¹⁵² *Id.* at 6. For Levi’s September 4, 1975 letter to Morton, see 173-75.

¹⁵³ *Id.* at 137.

¹⁵⁴ 1975 CQ Almanac, at 343-44. See also 121 Cong. Rec. 3872-76, 36038-39, 40230, 40768-69 (1975).

¹⁵⁵ 91 Stat. 241, § 113 (1977), amending 83 Stat. 845, § 7(c) (1969).

Joseph A. Califano, Jr. In 1978, a subcommittee of the House Committee on Interstate and Foreign Commerce began an investigation of the manufacturing process used by drug companies for making generic drugs and pricing brand-name drugs. The panel looked into charges that drug companies merely put trade names on drugs manufactured by general drug firms and sold them at much higher prices. One way to claim manufacturing responsibility was for a trade name company to put an employee in a general drug house while the product was being manufactured. In order to learn more about this “man-in-the-plant” strategy, the subcommittee requested documents from the Department of Health, Education, and Welfare. Legislation (H.R. 12980) had been introduced to limit or eliminate the man-in-the-plant practice.¹⁵⁶

In July, the subcommittee sent several letters to HEW Secretary Joseph A. Califano, Jr. for the documents. Failing to receive the material, the subcommittee agreed on July 27 to subpoena Califano. The subpoena signed by the full committee was dated August 4. In a memo dated August 9, the Justice Department took the position that language in the Food, Drug, and Cosmetic Act, prohibiting FDA employees from disclosing trade secret information, justified the withholding of the material from the subcommittee. The memo argued:

Where an agency is barred by statute from disclosing certain information, congressional committees have no right to that information unless there is a clearly expressed congressional intent to exclude committee access from the general restriction on disclosure. . . .

. . . Indeed, it is significant that section 301(j) explicitly provides for disclosure to one of the coordinate branches of government, *i.e.*, the courts, but makes no comparable provision for disclosure to committees of the Congress.¹⁵⁷

The subcommittee met with Califano on August 16, at which time he produced some material but also stated that any documents given to the subcommittee related to trade secret information and the manufacturing process would be blackened out because of the Justice Department legal analysis.¹⁵⁸ Subcommittee chairman John Moss made it clear that the blackened out material did not comply with the subpoena. Califano explained that his refusal to release the unredacted material had nothing to do with separation of powers or executive privilege, but rather with statutory language that prohibited the release of trade secret information. Congress, he said, “has the power to change that statute.”¹⁵⁹

The subcommittee then voted 9 to 8 to find Califano in contempt for failing to comply with the subpoena.¹⁶⁰ A month later, the subcommittee dropped the contempt

¹⁵⁶ “Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.,” Committee Print No. 95-76, 95th Cong., 2nd sess. 1-2 (1978).

¹⁵⁷ *Id.* at 7, 10.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Id.* at 18.

¹⁶⁰ *Id.* at 87. See “House Panel Votes Contempt Citation Against Califano,” Wall Street (continued...)

action after Califano turned over the materials that had been subpoenaed. He explained that a further review by the department of the withheld material disclosed that some information had been “inappropriately deleted” from documents given to the panel.¹⁶¹

Charles W. Duncan, Jr. On April 2, 1980, President Carter imposed a fee on imported oil and gasoline in an effort to reduce domestic consumption. A subcommittee of the House Government Operations Committee requested in writing, on April 8, certain categories of material from the Department of Energy (DOE). With no documents delivered, the subcommittee held a hearing on April 16 to investigate the delay. Thomas Newkirk, the department’s Deputy General Counsel for Regulation, told the subcommittee that he was “not prepared to submit the documents at this time” because White House Counsel Lloyd Cutler was reviewing a pile of documents “between a foot and 18 inches high.”¹⁶² Newkirk thought the documents might be subject to the claim of executive privilege because they revealed the “deliberative process underlying the President’s decision to impose the gasoline conservation fee.”¹⁶³ The subcommittee voted unanimously to instruct Newkirk to deliver the documents by 5 o’clock that evening.¹⁶⁴

After the department failed to meet the deadline, the subcommittee voted unanimously on April 22 to subpoena the materials from Energy Secretary Charles W. Duncan, Jr. On the following day, the subcommittee received 28 documents but also a letter from Duncan explaining that to the extent the subcommittee request involved “deliberative materials underlying a major Presidential decision,” it would “seriously undermine the ability of the Chief Executive and his Cabinet Officers to obtain frank legal and policy advice from their advisors.”¹⁶⁵ Newkirk appeared before the subcommittee on April 24 to state that the department would not comply in full with the subcommittee’s request of April 8, but did not rest his case on executive privilege.¹⁶⁶ By a vote of 9-0, the subcommittee subpoenaed Duncan to appear before the subcommittee on April 29 and bring the requested documents.¹⁶⁷

¹⁶⁰ (...continued)

Journal, August 17, 1978, at 6; “House Panel Backs Contempt Citation After Califano Refuses to Yield Data,” Washington Post, August 17, 1978, at A2; “Moss v. Califano” (editorial), Washington Post, August 18, 1978, at A18.

¹⁶¹ “House Unit Ends Bid To Cite for Contempt HEW Chief Califano,” Wall Street Journal, September 22, 1978, at 10.

¹⁶² “The Petroleum Import Fee: Department of Energy Oversight,” Hearings before a Subcommittee of the House Government Operations Committee, 96th Cong., 2nd sess. 3, 27 (1980).

¹⁶³ Id. at 5.

¹⁶⁴ Id. at 35.

¹⁶⁵ Id. at 100.

¹⁶⁶ Id. at 98-100.

¹⁶⁷ Id. at 116-17. See “House Unit Subpoenas Duncan,” New York Times, April 25, 1980, at D3.

Duncan, appearing at the April 29 hearing, told the subcommittee: “I must decline to turn over the documents and I do not have them with me at this time.”¹⁶⁸ However, he also offered to allow the subcommittee chairman and the ranking minority member to review the documents “in confidence to assist in defining that request.”¹⁶⁹ Representative Paul McCloskey (the ranking minority member) objected that “the idea that two members of a nine-member committee should be trusted and some should not be is repugnant to the rules of the House.”¹⁷⁰ After further efforts to reach an accommodation failed, the subcommittee voted 8 to 0 to hold Duncan in contempt for not complying with the April 24 subpoena.¹⁷¹

The subcommittee held another hearing on May 14, with Secretary Duncan again in attendance. Representative Toby Moffett, subcommittee chairman, announced that “at long last the subcommittee has been provided with every document it feels it needs to conduct its inquiry. Subcommittee members and staff have seen every document specifically demanded under the subpoena we issued April 24, and any document we deemed useful to this investigation has now been produced.”¹⁷² On the previous day, a federal district court had struck down Carter’s April 2 proclamation as invalid, either under the President’s inherent power or under statutory authority.¹⁷³ A White House spokesman said that he didn’t think executive privilege was ever formally asserted, either by President Carter or Secretary Duncan, although there was consideration of doing so.¹⁷⁴ In any event, the subcommittee received the material it requested.¹⁷⁵

James B. Edwards. The following year, Secretary of Energy James B. Edwards narrowly avoided a contempt citation from the House Government Operations Committee. The dispute involved legislative access to documents regarding contract negotiations between the Energy Department and the Union Oil Company to build an oil shale plant in Colorado. Committee members were concerned that the department was moving too hastily in awarding billions of dollars in federal subsidies to major oil companies, particularly prior to the Reagan Administration’s plans to create a Synthetic Fuels Corporation.¹⁷⁶ Failing to obtain the requested materials, the

¹⁶⁸ “The Petroleum Import Fee,” Hearings, at 122.

¹⁶⁹ *Id.* at 123.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 139. See “House Unit Cites Duncan For Gas-Tax Contempt,” *New York Times*, April 30, 1980, at D18.

¹⁷² “The Petroleum Import Fee,” Hearings, at 142. See also “President’s Oil Import Fee Assailed in Congress, Court,” *CQ Weekly Report*, May 17, 1980, at 1308; “Carter Foiled in First Tilt With Executive Privilege,” *CQ Weekly Report*, May 17, 1980, at 1352.

¹⁷³ *Independent Gasoline Marketers Council v. Duncan*, 492 F.Supp. 614 (D.D.C. 1980).

¹⁷⁴ “Executive Privilege, Revisited,” *CQ Weekly Report*, June 21, 1980, at 1753.

¹⁷⁵ The subcommittee’s confrontation with Secretary Duncan, including correspondence, appears in H. Rept. No. 96-1099, 96th Cong., 2nd sess. 18-30, 33-56 (1980).

¹⁷⁶ “DOE’s Enforcement of Alleged Pricing Violations by the Nation’s Major Oil Companies,” Hearing before a Subcommittee of the House Committee on Government Operations, 97th

Environment, Energy and Natural Resources Subcommittee voted 6 to 4 on July 23 to hold Edwards in contempt.

The issue was complicated by division within the Administration. Edwards wanted to sign the contract, but OMB Director David Stockman opposed federal subsidies to the synthetic fuels program and had taken steps to block the contract with Union Oil.¹⁷⁷ The full committee was scheduled to vote on the contempt citation on the morning of July 30, 1981. Edwards said he would not produce the documents until the contract between the Energy Department and Union Oil had been signed. President Reagan agreed to the project and officials from the Energy Department and Union signed the contract. Thirteen boxes of documents on the contract negotiations were delivered to the committee.¹⁷⁸

Gorsuch Contempt

The examples above describe threats to hold an executive official in contempt. In 1982, the House actually voted on contempt. Anne (Gorsuch) Burford, Administrator of the Environmental Protection Agency (EPA), refused to release certain documents. The House Public Works Committee, seeking documents on the EPA's enforcement of the "Superfund" program, was advised by the agency that there would be no objection "so long as the confidentiality of the information in those files was maintained."¹⁷⁹ Shortly thereafter the Reagan Administration decided that Congress, under any circumstances, could not see documents in active litigation files.¹⁸⁰ A memorandum from President Reagan to Gorsuch claimed that the documents in question represented "internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites" by the EPA or the Justice Department.¹⁸¹ The implication, which Congress rejected, was that congressional oversight would have to be put on hold for years until the government completed its enforcement and litigation actions.

Following the committee action to hold Gorsuch in contempt, the House of Representatives voted 259 to 105 to support the contempt citation. Fifty-five Republicans joined 204 Democrats to create the top-heavy majority.¹⁸² After the matter had a short detour to court, the Administration eventually agreed to release

¹⁷⁶ (...continued)

Cong., 1st sess. 2, 57-60 (1981).

¹⁷⁷ "Reagan Overrides Stockman, Backs Edwards on Synfuel," *Washington Post*, July 30, 1981, at A2.

¹⁷⁸ "Edwards' Contempt Citation Headed Off by Approval of Synthetic Fuel Contract," *CQ Weekly Report*, August 1, 1981, at 1425.

¹⁷⁹ H. Rept. No. 968, 97th Cong., 2nd sess. 11 (1982).

¹⁸⁰ *Id.* at 15, 21.

¹⁸¹ *Id.* at 42, 76.

¹⁸² 128 Cong. Rec. 31746-76 (1982).

“enforcement sensitive” documents to Congress.¹⁸³ Although the legislative branch eventually prevailed, the litigation highlighted a serious weakness with the contempt process. If the President opposes the release of documents to Congress, there is little likelihood that the Justice Department will vigorously prosecute someone in the Administration who is doing the President’s bidding. At the very least, the ability of the Administration to take the matter to court can delay the delivery of documents to Congress.¹⁸⁴

Contempt Move Against Quinn

The House Committee on Government Reform and Oversight conducted a detailed inquiry into the 1993 firings of seven Travel Office employees at the Clinton White House. The committee received the documents it requested from the Justice Department and other federal agencies, but in September 1995 the White House informed the panel that President Clinton might claim executive privilege and refuse to turn over some or all of 907 documents.¹⁸⁵

In January 1996, the committee subpoenaed the records from the White House, and in May it announced that it would hold the White House in contempt unless it turned over the materials.¹⁸⁶ On May 10, the committee voted 27 to 19 to hold White House Counsel Jack Quinn in contempt. It also voted to hold two others in contempt: former White House Director of Administration David Watkins and his aide, Matthew Moore.¹⁸⁷ Committee chairman Representative William F. Clinger said he would delay the next step, sending the contempt citation to the House for a vote, to leave open the possibility of an accommodation with the White House.¹⁸⁸ He offered to have Quinn come before the committee before floor action.¹⁸⁹ The disputed documents were eventually released to the committee, just hours before the House was scheduled to

¹⁸³ *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983); H. Rept. No. 323, 98th Cong., 1st sess. 18-40 (1983).

¹⁸⁴ Stanley M. Brand and Sean Connelly, “Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials,” 36 *Cath. U. L. Rev.* 71, 79-81 (1986).

¹⁸⁵ “Clinton May Assert Executive Privilege,” *Washington Post*, September 8, 1995, at A11.

¹⁸⁶ “House Prober Presses Demand for Travel Office Documents,” *Washington Post*, May 3, 1996, at A2.

¹⁸⁷ “Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore, as part of the Committee Investigation Into the White House Travel Office Matter,” House Committee on Government Reform and Oversight, 104th Cong., 2nd sess. 88 (Committee Print, June 1996); “House Panel Votes for Contempt Citation,” *Washington Post*, May 10, 1996, at A4.

¹⁸⁸ “Panel Moves to Gain Travel Office Files,” *New York Times*, May 10, 1996, at A26.

¹⁸⁹ “Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore,” at 46.

take up the contempt vote. The White House also provided an 11-page list of about 2,000 Travel Office documents for which it made a claim of executive privilege.¹⁹⁰

Contempt Action Against Reno

On July 27, 1998, the Justice Department refused to turn over two internal documents that urged Attorney General Janet Reno to appoint an independent counsel in the campaign finance investigation. The House Government Reform and Oversight Committee had subpoenaed a 27-page memo to Reno by FBI Director Louis J. Freeh and a 94-page report by Charles G. LaBella, former head of the department's campaign finance task force.¹⁹¹ After this refusal, the House committee voted 24 to 19 on August 6 to cite Reno for contempt. She warned that release of the documents would "provide criminals, targets and defense lawyers alike with a road map to our investigations."¹⁹²

Reno, offering to give the committee a confidential briefing on the documents, accused the panel of "political tampering" with her prosecutorial independence.¹⁹³ A few weeks later, she gave committee chairman Dan Burton access to heavily redacted versions of the memos, leaving him roughly 30% to read.¹⁹⁴ Burton asked Reno to allow three former prosecutors and a former White House deputy counsel to review the memos and give their opinions to him and to the House Republican leadership. She rejected that proposal.¹⁹⁵ She did agree, however, to allow six other Republican members of the committee to view the redacted copy, but insisted that Burton withdraw the subpoena and drop the contempt citation.¹⁹⁶ After these attempts to find common ground failed, Burton moved forward with the contempt citation. Although the committee recommended holding Reno in contempt, the matter was not taken to the floor for House action.

¹⁹⁰ "White House Gives Committee More Papers in Dismissal Case," *New York Times*, May 31, 1996, at A20; "White House Gives Congress 1,000 Pages of Travel Office Papers," *Washington Post*, May 31, 1996, at A10. The contempt actions against Quinn, Watkins, and Moore are summarized in H. Rept. No. 104-598, 104th Cong., 2nd sess. (1996). See also "Correspondence Between the White House and Congress in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore," a report by the House Committee on Government Reform and Oversight, 104th Cong., 2nd sess. (Committee Print, May 1996).

¹⁹¹ "Justice Dept. Defies House Subpoena for Campaign Finance Probe Memos," *Washington Post*, July 28, 1998, at A8.

¹⁹² "House Panel Votes to Hold Reno in Contempt," *Washington Post*, August 7, 1998, at A1.

¹⁹³ "Panel Steps Up Confrontation Over Campaign Finance Memos, Voting to Cite Reno for Contempt," *CQ Weekly Report*, August 8, 1998, at 2175. For background documents on the contempt citation against Reno, see "Contempt of Congress," Report by the House Committee on Government Reform and Oversight, H. Rept. No. 105-728, 105th Cong., 2nd sess. (September 17, 1998).

¹⁹⁴ "Reno Still Faces Citation for Contempt," *CQ Weekly Report*, September 5, 1998, at 2330.

¹⁹⁵ "Burton Pushes Contempt Against Reno," *Roll Call*, September 21, 1998, at 3.

¹⁹⁶ "The Contempt Citation," *Washington Post*, September 22, 1998, at A16.

As part of the impeachment action against President Clinton, members of the House Judiciary Committee eventually saw the Freeh and LaBella documents. On December 2, 1998, U.S. District Judge Norma Holloway Johnson granted the committee access to the two memos.¹⁹⁷ On June 6, 2000, the House Government Reform Committee released the Freeh and LaBella memos along with other Justice Department documents related to the appointment of an independent counsel to investigate campaign finance issues.¹⁹⁸ WorldNetDaily made the two memos available to the general public on its website (www.worldnetdaily.com).

House Resolutions of Inquiry

A House resolution of inquiry “is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch.”¹⁹⁹ It is the practice to use the word “request” in asking for information from the President, and “direct” when addressing department heads. The resolution of inquiry is privileged and may be considered at any time after it is properly reported or discharged from committee. The privileged status applies only to requests for facts within the Administration’s control and not for opinions or investigations.²⁰⁰ If a resolution of inquiry is not reported to the House within 14 legislative days after its introduction, a motion to discharge the committee is privileged. Typically, the House debates a resolution of inquiry for no more than one hour before voting on it.

There is no counterpart in current Senate practice for resolutions of inquiry, although there are precedents dating to the end of the 19th century and an effort in 1926.²⁰¹ Nothing prevents the Senate from passing such resolutions, but apparently the Senate is satisfied with the leverage it has through other legislative means, including the nomination process and Senate “holds.” Unlike the House, the Senate has no special practices for expediting consideration through committee discharge or non-debatable motions, and resolutions are not generally privileged for immediate consideration.²⁰²

House resolutions of inquiry sometimes give the Administration discretion in providing factual information to Congress. For example, in 1971 the House considered a resolution directing the Secretary of State to furnish certain information

¹⁹⁷ “Justice Memos May Yield Very Little,” *Washington Post*, December 3, 1998, at A18.

¹⁹⁸ “Memos: Reno Was Warned,” *Washington Post*, June 7, 2000, at A1.

¹⁹⁹ Deschler’s Precedents, H. Doc. No. 94-661, 94th Cong., 2nd sess., vol. 7, ch. 24, § 8.

²⁰⁰ *Id.* See also House Rule XIII, Cl. 7 (Rules of the House of Representatives, H. Doc. No. 106-320, 106th Cong., 2nd sess. 618 (2001)).

²⁰¹ Riddick’s Senate Procedure, S. Doc. No. 101-28, 101st Cong., 2nd sess. 799, 1205 (1992). The effort in 1926 was challenged on a point of order. When the sponsor of the resolution asked for unanimous consent to proceed, there was objection. 67 Cong. Rec. 2658-59, 2661-62, 2663.

²⁰² Riddick’s Senate Procedure, at 1204.

respecting U.S. operations in Laos, but the language of the resolution included the phrase “to the extent not incompatible with the public interest.”²⁰³ This particular resolution was tabled, 261 to 118.²⁰⁴ In 1979, in the midst of an energy crisis, a resolution of inquiry (H. Res. 291) requesting certain facts from the President regarding shortages of crude oil and refined petroleum products, refinery capacity utilization, and related matters was adopted 340 to 4.²⁰⁵

A more recent use of a resolution of inquiry occurred in 1995, after the Clinton Administration offered a multibillion dollar rescue package to Mexico. As initially introduced by Representative Marcy Kaptur, the resolution (H. Res. 80) did not contain discretion for the Administration. It requested the President, within 14 days after the adoption of the resolution, “to submit information to the House of Representatives concerning actions taken through the exchange stabilization fund to strengthen the Mexican peso and stabilize the economy of Mexico.” The House Banking Committee voted 37 to 5 to report the resolution, but with a substitute directing the President to submit the documents “if not inconsistent with the public interest.”²⁰⁶ On March 1, the House adopted the committee substitute and agreed to the resolution, 407 to 21.²⁰⁷

Although the resolution established a deadline of 14 days, White House Counsel Abner J. Mikva sent a letter to Speaker Newt Gingrich that the Administration would not be able to provide the documentary material until May 15, or two months after the date set in the resolution.²⁰⁸ By April 6, the Treasury Department had supplied Congress with 3,200 pages of unclassified documents and 475 pages of classified documents, with additional materials promised.²⁰⁹ Treasury said it was in “substantial compliance” with the resolution.²¹⁰

GAO Investigations

Congress created the General Accounting Office in 1921 to strengthen legislative control over executive agencies. The Comptroller General, as head of GAO, was directed to investigate “all matters relating to the receipt, disbursement, and application

²⁰³ 117 Cong. Rec. 23800 (1971).

²⁰⁴ Id. at 23807. See “Laos Secrets: House Defeat of Disclosure Move,” CQ Weekly Report, July 9, 1971, pp. 1463-66.

²⁰⁵ 125 Cong. Rec. 15039 (1979).

²⁰⁶ 141 Cong. Rec. 6409 (1995).

²⁰⁷ Id. at 6422.

²⁰⁸ “House GOP Considers Stance on Bailout of Mexico,” CQ Weekly Report, March 25, 1995, at 880.

²⁰⁹ “Treasury Says Congress Given Papers on Mexico,” Washington Post, April 7, 1995, at F1.

²¹⁰ 1995 CQ Almanac at 10-17.

of public funds.”²¹¹ To enable the Comptroller General to perform that function, departments and establishments “shall furnish” information regarding the powers, duties, activities, organization, financial transactions, and methods of business “as he may from time to time require of them.”²¹² He and his assistants were to “have access to and the right to examine any books, documents, papers, or records of any such department or establishment.”²¹³

Comparable language appears in current law. The Comptroller General shall investigate “all matters related to the receipt, disbursement, and use of public money.”²¹⁴ However, the scope of that investigative power is qualified by other statutory provisions. When an agency record is not made available to the Comptroller General “within a reasonable time,” the Comptroller General may make a written request to the agency head, who has 20 days to describe the record withheld and the reason for its withholding. If the Comptroller General is not given an opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the OMB Director, the Attorney General, the agency head, and Congress. Moreover, the Comptroller General may bring a civil action in federal court to require the agency head to produce a record and may subpoena a record of a person “not in the United States Government.”²¹⁵

However, the Comptroller General may not bring a civil action or issue a subpoena if the record relates to activities the President designates as “foreign intelligence or counterintelligence activities;” or if the record is specifically exempted from disclosure to the Comptroller General by a statute that “without discretion requires that the record be withheld from the Comptroller General,” establishes particular criteria for withholding the record from the Comptroller General, or refers to particular types of records to be withheld from the Comptroller General; or by the 20th day after the Comptroller General files a report regarding the withholding of a record the President or the OMB Director certifies to the Comptroller General and Congress that the record could be withheld under Exemptions 5 or 7 of the Freedom of Information Act “and disclosure reasonably could be expected to impair substantially the operations of the Government.”²¹⁶ These procedures, however, do not “authorize information to be withheld from Congress.”²¹⁷

A 1960 Senate document provided examples over the previous five years in which the Defense Department, the State Department, and the National Aeronautics and

²¹¹ 42 Stat. 25, § 312(a) (1921).

²¹² *Id.* at 26, § 313.

²¹³ *Id.*

²¹⁴ 31 U.S.C. § 712 (1994).

²¹⁵ *Id.* at §§ 716(b), 716(c).

²¹⁶ *Id.* at § 716(d). Exemption 5 of the FOIA refers to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” while Exemption 7 covers certain records or information compiled for law enforcement purposes. 5 U.S.C. § 552(b).

²¹⁷ *Id.* at § 716(e)(3).

Space Administration (NASA) had withheld information from GAO. These conflicts were reported to the Senate Committee on Government Operations and to other committees, sometimes leading to a resolution of the dispute and sometimes not.²¹⁸ In the case of the State Department, Congress subsequently passed legislation to assist GAO in obtaining documents, even to the point of providing for a cutoff of funds 35 days after a refusal has been made to GAO or pertinent congressional committees, unless the information is delivered or the President certifies that he has forbidden its release and given his reasons.²¹⁹

In 1972, Deputy Comptroller General Robert F. Keller told a congressional committee that GAO had received good cooperation in obtaining access to executive records except the State Department, the Defense Department, and certain activities of the Treasury Department, the Federal Deposit Insurance Corporation, and the Emergency Loan Guarantee Board. He said that GAO had been experiencing “increasing difficulties” in obtaining access to information for programs involving U.S. relations with foreign countries.²²⁰ In 1975, Comptroller General Elmer B. Staats told a House committee that GAO did not know how much the United States spent on intelligence. GAO had stopped auditing CIA expenditures in 1962 after being unable to obtain information, and had difficulty in getting information from other intelligence agencies, including the National Security Agency and the Defense Intelligence Agency.²²¹

A 1979 study by Joseph Pois, a lawyer and professor of public administration, includes a chapter on GAO’s access to information in executive agency and contractors’ files and records. Much of the chapter is devoted to continuing GAO difficulty in obtaining documents from the Defense Department. Even when GAO ultimately prevailed or negotiated an acceptable compromise, lengthy delays detracted from the timeliness and usefulness of the eventual report.²²²

More recent studies describe the problems that GAO encounters in seeking information from the executive branch. A 1996 GAO report on National Intelligence Estimates (NIEs) stated that the scope of the study “was significantly impaired” by a lack of cooperation from the CIA, the National Intelligence Council, and the Departments of Defense and State. Officials from Defense and State referred GAO to CIA, which declined to cooperate, explaining that GAO review of certain NIEs would be contrary to oversight arrangements that Congress had established.²²³ GAO has requested statutory authority to expand its oversight role of CIA but has not received it.

²¹⁸ S. Doc. No. 108, 86th Cong., 2nd sess. (1960).

²¹⁹ *Id.* at 11-12; 73 Stat. 254, § 401(i) (1959); 73 Stat. 720, § 111(d) (1959).

²²⁰ 118 Cong. 18121 (1972).

²²¹ “GAO Is Unable To Give Costs Of Intelligence,” *Washington Post*, August 1, 1975, at A2.

²²² Joseph Pois, *Watchdog on the Potomac: A Study of the Comptroller General of the United States* 115-59 (Washington, D.C.: University Press of America, 1979).

²²³ U.S. General Accounting Office, “Foreign Missile Threats: Analytic Soundness of Certain National Intelligence Estimates,” GAO/NSIAD-96-225, B-274120, August 1996, at 15.

At House hearings in 1997, a GAO official described the problems that he and his colleagues had encountered in conducting a review of counternarcotics activities in Colombia. A lengthy screening program within the State Department delayed by several months delivery of documents to GAO. Moreover, the department denied access to some documents and deleted or redacted information from others.²²⁴ The experience contrasted with State Department cooperation the previous two years when GAO conducted counternarcotics reviews in Colombia, Mexico, Bolivia, and Peru.²²⁵

In 1997, a subcommittee of the House Appropriations Committee held hearings on GAO's investigation of allegations that there had been 938 overnight guests in the Executive Residence of the White House. The subcommittee wanted to know whether the \$550,000 in overtime pay for 36 full-time White House employees (maids, butlers, chefs, housekeepers, doormen, etc.) was related to these overnight stays. Seven months after the subcommittee had ordered the investigation, GAO was unable to comply because information had been withheld by the White House. The information was denied to GAO to "preserve the privacy of the First Family."²²⁶ GAO had audited the Executive Residence in previous years without difficulty.²²⁷

On March 6, 2001, the GAO reported to the House Committee on International Relations regarding its study about U.S. participation in UN peacekeeping operations. After the Departments of State and Defense and the National Security Council had failed to provide GAO access to the records it requested, the Comptroller General issued "demand letters" to the head of each agency. After almost nine months of effort, GAO obtained from State "reasonable access" to records. Following the demand letter, Defense provided some material but GAO had access to only about one-quarter of the Defense records it had requested and many of those were heavily redacted. The NSC responded by denying GAO "full and complete access to the records."²²⁸

Testimony by White House Officials

When White House aides are asked to testify, Administrations frequently advise Congress that under "long-established" precedents the immediate staff of a President do not appear before committees. In fact, given the right political conditions, they do

²²⁴ "International Drug Control Policy: Colombia," Hearing before the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight, 105th Cong., 1st sess. 70 (1997).

²²⁵ *Id.* at 73.

²²⁶ "Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998 (Part 6: GAO Investigation of the White House)," Hearings before a Subcommittee of the House Committee on Appropriations, 105th Cong., 1st sess. 7 (1997).

²²⁷ *Id.* at 11.

²²⁸ U.S. General Accounting Office, March 6, 2001 letter to The Honorable Henry J. Hyde, Chairman, Committee on International Relations, and The Honorable Benjamin Gilman, Chairman, Subcommittee on the Middle East and South Asia, "Subject: U.N. Peacekeeping: GAO's Access to Records on Executive Branch Decision-making," at 2.

appear and have appeared in great numbers. The previous section on the appointment power explained how presidential aide Peter Flanigan testified in 1972 as part of the Kleindienst nomination to be Attorney General. There are many other examples.

On March 2, 1973, President Richard Nixon objected to the appearance of White House Counsel John Dean at congressional hearings. Nixon said that “no President could ever agree to allow the Counsel to the President to go down and testify before a committee.”²²⁹ He later elaborated on the reasons for refusing to allow White House aides to testify:

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.²³⁰

In a statement on March 15, Nixon offered other reasons for denying Congress the right to question Dean at legislative hearings: “Mr. Dean is Counsel to the White House. He is also one who was counsel to a number of people on the White House Staff. He had, in effect, what I would call a double privilege, the lawyer-client relationship, as well as the Presidential privilege.”²³¹ He repeated his position that members of the White House staff “will not appear before a committee of Congress in any formal session.”²³²

However, on April 17, Nixon agreed to allow White House aides to testify before the Senate Select Committee on Presidential Campaign Activities, provided they adhere to four ground rules: White House aides would appear, in the first instance, in executive session, if appropriate; executive privilege would be expressly reserved and could be asserted during the course of the hearing to any question; the proceedings could be televised; and all members of the White House staff would appear “voluntarily” and testify under oath to “answer fully all proper questions.”²³³

On July 7, Nixon relaxed some of those guidelines. He directed that the right of executive privilege concerning possible criminal conduct “no longer be invoked for present or former members of the White House staff.”²³⁴ He also agreed to permit “the unrestricted testimony of present and former White House staff members” before the committee.²³⁵ Beginning on May 17 and continuing until September 23, 1975, a number of White House aides testified before the committee, including John Dean, Jeb

²²⁹ Public Papers of the Presidents, 1973, at 160.

²³⁰ *Id.* at 185.

²³¹ *Id.* at 203.

²³² *Id.* at 211.

²³³ *Id.* at 299.

²³⁴ *Id.* at 636-37.

²³⁵ *Id.* at 637.

Magruder, Alexander Butterfield, Herbert Kalmbach, John Ehrlichman, H.R. Haldeman, Patrick Buchanan, Leonard Garment, and Gen. Alexander M. Haig, Jr.²³⁶

On October 31, 1975, Henry Kissinger appeared before the House Select Committee on Intelligence, at a time when he served in a dual capacity as Secretary of State and National Security Adviser. In 1980, White House Counsel Lloyd Cutler and National Security Adviser Zbigniew Brzezinski appeared at hearings conducted by a subcommittee of the Senate Judiciary Committee to investigate the role of Billy Carter, the President's brother, with regard to Libya. President Carter had instructed all members of the White House staff to cooperate fully with the subcommittee and to "respond fully to such inquiries from the subcommittee and to testify if the subcommittee determines that oral testimony is necessary."²³⁷

In 1987, President Ronald Reagan told executive officials, including those in the White House, to assist in the congressional investigation into the Iran-Contra affair in any way possible, including testifying before Congress. The White House aides who testified at the hearings included former National Security Adviser Robert McFarlane, former National Security Adviser John Poindexter, and Lt. Col. Oliver North, former staff member of the National Security Council. Some of these officials, such as North, testified after receiving partial immunity.

Congressional hearings in 1994 focused on whether White House aides had inappropriately learned details of a Resolution Trust Corporation (RTC) investigation of the failed Madison Guaranty Savings and Loan, with President Clinton and Mrs. Clinton named as potential beneficiaries of alleged wrongdoing at Madison. Among those testifying at the hearings were White House Counsel Lloyd Cutler; Lisa Caputo, press secretary to Hillary Clinton; associate counsel to the President Neil Eggleston; assistant to the President Bruce Lindsey; former White House Chief of Staff Thomas McLarty; former White House Counsel Bernard Nussbaum; assistant to the President John Podesta; senior policy adviser to the President George Stephanopoulos; and Margaret Williams, chief of staff to Hillary Clinton.²³⁸ In 1995 and 1996, as part of the investigation of the dismissal of seven employees from the White House Travel Office in 1993, former assistant to the President John Podesta and former director of the White House Office of Administration David Watkins testified before the House Committee on Government Reform and Oversight.

Senate hearings into the Whitewater Development Corporation in 1995-96 brought these White House officials before a special Senate committee: assistant to the President Mark Gearan, former special assistant to the President Sylvia Mathews, deputy assistant to the President Patsy Thomasson, former assistant to the President for management and administration David Watkins, White House deputy press secretary Evelyn Lieberman, counsel to the President Thomas McLarty, assistant to the President Jack Quinn, assistant to the President Bruce Lindsey, special counsel to

²³⁶ The complete list appears in Louis Fisher, "White House Aides Testifying Before Congress," 27 *Pres. Stud. Q.* 139, 141-42 (1997).

²³⁷ *Public Papers of the Presidents, 1980-81 (II)*, at 1420.

²³⁸ Other White House attendees are cited in Fisher, "White House Aides," at 145-46.

the President Jane Sherburne, special assistant to the President Carolyn Huber, deputy chief of White House staff Harold Ickes, and many others.²³⁹

Even when the White House decides that presidential aides shall not testify, other mechanisms can be used to satisfy congressional needs. In 1981, Martin Anderson, President Reagan's assistant for policy development, refused to appear before a House Appropriations subcommittee responsible for funding his budget request for the Office of Policy Development. The subcommittee retaliated by deleting all of the \$2,959,000 requested for the office. In doing so, it pointed out that the previous heads of the office (Stuart Eizenstat in the Carter years, James Cannon in the Ford years, and Kenneth Cole in the Nixon years) had appeared before the subcommittee. As a compromise, Anderson met informally and off-the-record with the subcommittee to respond to their questions. After the Senate restored almost all of the funds, Congress appropriated \$2,500,000 for the office.²⁴⁰

The Claim of “National Security”

Those who write about executive privilege sometimes imply that the mere claim by the Administration that documents are covered by “national security” (or “foreign affairs” or “diplomacy”) is sufficient to establish an unreviewable presidential power. A recent law review article states that “national security considerations strongly bolster the case for an executive privilege. . . . Properly wielded, an executive privilege could lead to . . . enhanced supervision of foreign affairs”²⁴¹

Writing for the Court in the Watergate Tapes Case, in which the Court for the first time explicitly recognized an executive privilege, Chief Justice Burger rejected an “absolute, unqualified” presidential privilege of immunity from judicial process.²⁴² However, he seemed to make an exception when Presidents claim a “need to protect military, diplomatic, or sensitive national security secrets.”²⁴³ This remark, however, was non-binding dicta and not the holding of the Court. Moreover, if the Court wants to accept presidential justifications based on military, diplomatic, or national security needs, it is free to do so. But Congress need not accept those justifications. The Watergate Tapes Case concerned *judicial*, not *congressional*, access to executive branch information.²⁴⁴

Unlike the judiciary, Congress has express constitutional powers and duties in the fields of military affairs and national security. When Congress passed the Freedom of

²³⁹ Id. at 148-49.

²⁴⁰ Id. at 139-40.

²⁴¹ Saikrishna Bangalore Prakash, “A Critical Comment on the Constitutionality of Executive Privilege,” 83 Minn. L. Rev. 1143, 1145 (1999).

²⁴² United States v. Nixon, 418 U.S. 683, 706 (1974).

²⁴³ Id.

²⁴⁴ A footnote in the Court's decision makes this distinction clear: “We are not here concerned with . . . congressional demands for information.” 418 U.S. at 712 n. 19.

Information Act (FOIA), requiring executive agencies to make documents available to the public, it set forth nine exemptions, including matters that are “ (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”²⁴⁵ Another exemption: “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”²⁴⁶ Yet another exemption: “records or information compiled for law enforcement purposes”²⁴⁷ Those are some of the grounds for denying members of the public information from executive agencies. They do not apply to Congress. FOIA specifically provides that these exemptions do not constitute “authority to withhold information from Congress.”²⁴⁸

In recent decades, as discussed below, Congress and the executive branch have clashed over legislative access to “national security” and “foreign affairs” documents. On each occasion the Justice Department insisted that these documents could not be shared with a congressional committee. In the end, the Administration had to drop its claim to having an exclusive role in determining what to release. In some cases, federal courts applied pressure on the executive branch to release documents to Congress. In other confrontations, the power of Congress to hold an executive official in contempt has been sufficient leverage to pry loose the documents.

The AT&T Cases

In 1976, Representative John Moss and his subcommittee requested from the American Telephone and Telegraph Co. (AT&T) information on “national security” wiretaps by the Administration. The company was willing to release the information, but the Justice Department intervened to prevent compliance with the subcommittee subpoena, arguing that compliance might lead to public disclosure of vital information injurious to national security. President Ford wrote directly to Moss: “I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security.”²⁴⁹

A district judge decided that if a final determination had to be made about the need for secrecy and the risk of disclosure, “it should be made by the constituent branch of government to which the primary role in these areas is entrusted. In the areas of national security and foreign policy, that role is given to the Executive.”²⁵⁰ This judicial deference to presidential power was soon overturned by Judge Harold Leventhal of the D.C. Circuit, who rejected the claim of the Justice Department that

²⁴⁵ 5 U.S.C. § 552(b)(1) (1994).

²⁴⁶ *Id.* at § 552(b)(5).

²⁴⁷ *Id.* at § 552(b)(7).

²⁴⁸ *Id.* at § 552(d).

²⁴⁹ “Judge Halts Hill Probe of Wiretaps,” *Washington Post*, July 23, 1976, at A12.

²⁵⁰ *United States v. AT&T*, 419 F.Supp. 454, 461 (D.D.C. 1976).

the President “retains ultimate authority to decide what risks to national security are acceptable.”²⁵¹ The cases cited by the Administration did not establish “judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers.”²⁵² Leventhal urged executive and legislative officials to settle their differences out of court, pointing out that a “compromise worked out between the branches is most likely to meet their essential needs and the country’s constitutional balance.”²⁵³

Continued disagreement between the Justice Department and the subcommittee forced the appellate court to intervene again to give additional guidance. Leventhal dismissed the idea that the dispute was a “political question” beyond the court’s jurisdiction. When a dispute consists of a clash of authority between the two branches, “judicial abstention does not lead to orderly resolution of the dispute,” for neither branch had “final authority in the area of concern.” In a dispute of this nature, judicial intervention helps promote the “smooth functioning of government.”²⁵⁴

Leventhal urged the parties to resolve their differences by seeking middle-ground positions. He noted that the framers, in adopting a Constitution with general and overlapping provisions, anticipated that “a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”²⁵⁵ Each branch “should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.”²⁵⁶ The case was finally dismissed on December 21, 1978, after the Justice Department and the subcommittee settled their differences.²⁵⁷

Proceedings Against Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Secretary of State Henry Kissinger, directing him to provide documents relating to covert actions.²⁵⁸ After he failed to comply with the subpoena, the committee met in open session to determine what action should be taken against him.

²⁵¹ United States v. American Tel. & Tel. Co., 551 F.2d 384, 392 (D.C. Cir. 1976).

²⁵² *Id.*

²⁵³ *Id.* at 394.

²⁵⁴ United States v. AT&T, 567 F.2d 121, 126 (D.C. Cir. 1977).

²⁵⁵ *Id.* at 127.

²⁵⁶ *Id.*

²⁵⁷ House Select Committee on Congressional Operations, Court Proceedings and Actions of Vital Interest to the Congress, Current to December 31, 1978, 95th Cong., 2nd sess., 1978, at 50.

²⁵⁸ H. Rept. No. 94-693, 94th Cong. 4-5 (1975).

By a vote of 10 to 2, the committee recommended that the Speaker certify the committee report finding contumacious conduct and proceed to a contempt citation.²⁵⁹

Acting on the advice of the Justice Department, President Ford invoked executive privilege on November 14 to keep the material from the committee. He said that the documents included “recommendations from previous Secretaries of State to then Presidents,” jeopardizing the internal decisionmaking process.²⁶⁰ A few days later, in a letter to the committee, Ford cautioned that the dispute “involves grave matters affecting our conduct of foreign policy and raises questions which go to the ability of our Republic to govern itself effectively.”²⁶¹ Recognizing that Congress had constitutional responsibilities “to investigate fully matters relating to contemplated legislation,” Ford told the committee that he directed Kissinger not to comply with the subpoena on the grounds of executive privilege because the documents “revealed to an unacceptable degree the consultation process involving advice and recommendations to Presidents Kennedy, Johnson, and Nixon.”²⁶² Ford pointed out that some of the documents concerned the National Security Council, and that as of November 3, Kissinger was no longer his Assistant for National Security Affairs.²⁶³ As to those materials, “there has been a substantial effort by the NSC staff to provide these documents.”²⁶⁴

Calling the contempt threat “frivolous,” Kissinger warned that it would have adverse worldwide effects: “I profoundly regret that the committee saw fit to cite in contempt a secretary of state, raising serious questions all over the world what this country is doing to itself.”²⁶⁵ Nevertheless, under pressure of a contempt citation, an accommodation was reached. On December 9, three committee members and two staff members visited the House White to determine which documents would be made available. On the next day, they received an oral briefing on the information that had been the target of the subpoena, and an NSC aide read verbatim from documents concerning the covert actions. On December 10, the committee chairman announced that the White House was in “substantial compliance” with the subpoena and that the planned contempt action was “moot.”²⁶⁶

The James Watt Episode

In 1981, Interior Secretary James Watt refused to give a House subcommittee 31 documents relating to a reciprocity provision in the Mineral Lands Leasing Act.

²⁵⁹ *Id.* at 2.

²⁶⁰ *Public Papers of the Presidents, 1975, II*, at 1867.

²⁶¹ *Id.* at 1887. Letter of November 19, 1975, from President Ford to Congressman Otis Pike, chairman of the House Select Committee on Intelligence.

²⁶² *Id.* at 1887, 1889.

²⁶³ *Id.* at 1889-90.

²⁶⁴ *Id.* at 1890.

²⁶⁵ 1975 CQ Almanac, at 406.

²⁶⁶ *Id.* at 407.

The specific country involved was Canada. Watt based his decision on the judgment of Attorney General William French Smith that the documents dealt with “sensitive foreign policy considerations.”²⁶⁷ The confrontation escalated to a recommendation by the Committee on Energy and Commerce that Watt be cited for contempt. When the full committee acted, the vote to hold Watt in contempt was 23 to 19.²⁶⁸

Attorney General Smith advised President Reagan to invoke executive privilege on the ground that “the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interests when specific legislative proposals are in question.”²⁶⁹ This argument ran counter to historical precedents. The first major investigation by Congress—of General St. Clair’s defeat—was not conducted for the purpose of legislation. Courts have consistently held that the investigative power is available not merely to legislate or when a “potential” for legislation exists, but even for pursuits down blind alleys.²⁷⁰ At the Philadelphia Convention, George Mason remarked that Congress “are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices.”²⁷¹ Moreover, Congress could easily erase Smith’s artificial distinction by introducing a bill whenever it had oversight in mind.

Smith also claimed that all of the documents at issue “are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations.”²⁷² Foreign policy is not an exclusive power of the President or the executive branch. Congress had a constitutionally-based need for the information. The dispute with Watt concerned the impact of Canadian investment and energy policies on American commerce, an issue clearly within the enumerated constitutional power of Congress to “regulate Commerce with foreign Nations” and its authority to oversee the particular statute that established the nation’s policy on foreign investments.

Despite Smith’s initial legal position regarding the “fundamental” importance of the deliberative process, the documents were eventually shared with the subcommittee.

²⁶⁷ “Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior,” prepared for the use of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 1st sess. 2 (Committee Print, November 1981).

²⁶⁸ “Contempt of Congress,” Hearings before the Subcommittee on Oversight and Investigations and the House Committee on Energy and Commerce, 97th Cong. 379 (1982); “Hill Panel Votes to Cite Watt for Contempt,” *Washington Post*, February 26, 1982, at A1.

²⁶⁹ “Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior,” at 3.

²⁷⁰ *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975).

²⁷¹ 2 *The Records of the Federal Convention of 1787*, at 206 (New Haven, Conn.: Yale University Press, 1937). See also Mason’s comments as reported by Madison, at 199.

²⁷² “Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt,” at 2.

On February 9, 1982, the subcommittee voted 11 to 6 to hold Watt in contempt.²⁷³ By that time, all but seven of the 31 subpoenaed documents had been given to the subcommittee.²⁷⁴ The remaining documents were delivered to a secure room on Capitol Hill and reviewed only by subcommittee members. Conditions were imposed: the technical assistance of subcommittee staff would not be available, and members could not photocopy the documents but could take notes.²⁷⁵ Subcommittee members got access to the papers they wanted.

CIA Whistleblowing

Members of Congress often seek information directly from executive branch employees rather than through agency officials. This practice was challenged by Presidents Theodore Roosevelt and William Howard Taft, prompting Congress to pass remedial legislation. Roosevelt and Taft both issued “gag orders” to prohibit executive branch employees from providing information to Congress except through heads of departments.²⁷⁶ Legislation in 1912, known as the Lloyd-LaFollette Act, nullified the two orders.²⁷⁷ The purpose of the legislation was to ensure that government employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.²⁷⁸ Members of Congress did not want to rely solely on information sifted through Cabinet officers.²⁷⁹

The Civil Service Reform Act of 1978 incorporated the Lloyd-LaFollette Act and codified it as permanent law.²⁸⁰ As codified, any interference with the right of executive branch employees in communicating with Congress becomes an enforceable right along with other prohibited personnel practices. The U.S. Code now provides that various qualifications to the provision on prohibited personnel practices “shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”²⁸¹

²⁷³ “House Subcommittee Votes to Cite Watt for Contempt,” *Washington Post*, February 10, 1982, at A1.

²⁷⁴ “Watt Says Congress Likely to Hold Him in Contempt,” *Washington Post*, February 11, 1982, at A9.

²⁷⁵ “Contempt of Congress,” hearings before the House Committee on Energy and Commerce, 97th Cong., 2nd sess. 385-94 (1982); H. Rept. No. 898, 97th Cong., 2nd sess. (1982); “White House Avoids Hill Showdown Over Documents,” *Washington Post*, March 17, 1982, at A5; “Data That Caused Citing of Watt Will Be Provided to House Group,” *New York Times*, March 17, 1982, at A21.

²⁷⁶ 48 Cong. Rec. 4513 (1912).

²⁷⁷ 37 Stat. 539, 555 (1912).

²⁷⁸ 48 Cong. Rec. 5201 (1912).

²⁷⁹ *Id.* at 5235, 5634, 5637, 10674.

²⁸⁰ 5 U.S.C. § 7211 (1994).

²⁸¹ 5 U.S.C. § 2302(b) (1994).

Congress has passed other legislation to assure access to information held by federal employees. The Whistleblower Protection Act of 1989 provides that federal employees “who make disclosures described in section 23202(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures,” and that “protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.”²⁸² Employees may disclose information that they reasonably believe evidences a violation of any law, rule, or regulation, or constitutes gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.²⁸³ Such disclosures are permitted unless “specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”²⁸⁴ Moreover, Congress regularly added language to the Treasury, Postal Service Appropriations Act to protect the right of executive branch employees to furnish information to Congress and its committees.²⁸⁵

In 1996, a memorandum from the Office of Legal Counsel, Department of Justice, analyzed the Lloyd-LaFollette Act and the language in the Treasury-Postal Service bill and found them constitutionally defective.²⁸⁶ This memo led to a confrontation with the intelligence committees, which considered legislation to preserve congressional access to executive branch information. A Senate report in 1997 explained that current “executive branch policies on classified information could interfere with [the Senate Intelligence Committee’s] ability to learn of wrongdoing within the elements over which it has oversight responsibility.”²⁸⁷ In creating the intelligence committees in the 1970s, Congress relied heavily on them to guard the interests of Congress as an institution. Senator Walter Huddleston, who served on the Senate Intelligence Committee, remarked in 1980 that the two intelligence committees “will be acting as proxies for the American people.”²⁸⁸ Representative Lee Hamilton, as chairman of the House Intelligence Committee, underscored that point in 1985: “The House and Senate Intelligence Committees provide the only check on intelligence agencies outside the executive branch.”²⁸⁹

²⁸² 103 Stat. 16, §§ 2(a)(1) and 2(a)(2) (1989).

²⁸³ *Id.* at § 1213(a)(1).

²⁸⁴ *Id.* Presidents have issued executive orders to protect classified information, but the intelligence committees have sought to maintain their access to employees in the intelligence community.

²⁸⁵ E.g., 110 Stat. 2009-359, § 625 (1996).

²⁸⁶ Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Micahel J. O’Neil, General Counsel of the Central Intelligence Agency, November 26, 1996.

²⁸⁷ S. Rept. No. 105-24, 105th Cong., 1st sess. 26 (1997).

²⁸⁸ 126 Cong. Rec. 13095 (1980).

²⁸⁹ 131 Cong. Rec. 32436 (1985).

In order to examine the objections raised in the OLC memo, the Senate Intelligence Committee held two days of hearings in 1998.²⁹⁰ Based on those hearings and its own independent staff analysis, the committee reported legislation despite the claims by the Justice Department that the bill represented an unconstitutional invasion of presidential prerogatives, and that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information.²⁹¹ The committee acted unanimously, voting 19 to 0 to report the measure.²⁹² The bill passed the Senate by a vote of 93 to 1.²⁹³

The House Intelligence Committee took a different approach in drafting the legislation, but also rejected the Administration's claim that the President exercised exclusive control over national security information. Like the Senate, the House committee dismissed the assertion that the President, as Commander in Chief, "has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity."²⁹⁴ The two committees reported and passed legislation with this language: "national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President."²⁹⁵ The statute further provides that "Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community."²⁹⁶

The Role of the Courts

In the period immediately after World War II, federal courts typically deferred to presidential responsibilities in military and diplomatic affairs. In 1948, the Supreme Court said it would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial."²⁹⁷ A few years later, in the midst of the Korean War, the Court again avoided a clash with the executive branch over national security affairs. It said that the judiciary "should not jeopardize

²⁹⁰ "Disclosure of Classified Information to Congress," Hearings before the Senate Select Committee on Intelligence, 105th Cong. (1998).

²⁹¹ *Id.* at 13-39.

²⁹² S. Rept. No. 105-165, 105th Cong., 2nd sess. (1998).

²⁹³ 144 Cong. Rec. S1564 (daily ed. March 9, 1998).

²⁹⁴ H. Rept. No. 105-747 (Part I), 105th Cong., 2nd sess. 15 (1998).

²⁹⁵ 112 Stat. 2413, § 701(b)(1) (1998).

²⁹⁶ *Id.* at § 701(b)(3); see also H. Rept. No. 105-780, 105th Cong., 2nd sess. 19 (1998).

²⁹⁷ *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948).

the security which the [government's] privilege [to withhold evidence from a pending lawsuit] is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."²⁹⁸

These attitudes have long since been superseded by statutory grants of power to the courts, inviting them to exercise independent judgment on matters of national security. In 1973, the Supreme Court decided that it had no authority to examine *in camera* certain documents regarding a planned underground nuclear test to sift out "non-secret components" for their release.²⁹⁹ In response, Congress passed legislation to clearly authorize courts to examine executive records in judges' chambers as part of a determination of the nine categories of exemptions in the Freedom of Information Act.³⁰⁰ The Foreign Intelligence Surveillance Act of 1978 requires a court order to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information. A special court, the Foreign Intelligence Surveillance Court (FISC), is appointed by the Chief Justice to review applications submitted by government attorneys.³⁰¹ In 1980, Congress passed the Classified Information Procedures Act (CIPA) to establish procedures in court to allow a judge to screen classified information to determine whether it could be used during the trial.³⁰²

These statutes bring the courts a long way in terms of attitude, procedures, and capability in passing judgment on national security matters. Even if courts were to continue to defer to the President, the same attitude would be inappropriate for Congress. Unlike the courts, Congress has explicit duties under the Constitution to declare war, provide for the common defense, raise and support armies, and provide and maintain a navy. Congressional panels, including Armed Services, the defense appropriations subcommittees, and the intelligence committees regularly have access to highly sensitive data.

Some courts continue to defer to the President. In 1980, the Fourth Circuit remarked that the "executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance."³⁰³ The Fourth Circuit freely expressed its uneasiness in this area: "the courts are unschooled in diplomacy, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be

²⁹⁸ United States v. Reynolds, 345 U.S. 1, 10 (1952).

²⁹⁹ EPA v. Mink, 410 U.S. 73 (1973).

³⁰⁰ 88 Stat. 1562, § 4(B) (1974); see H. Rept. No. 1380, 93rd Cong., 2nd sess. 8-9, 11-12 (1974).

³⁰¹ 93 Stat. 1783 (1978).

³⁰² 94 Stat. 2025 (1980).

³⁰³ United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980).

authorized.”³⁰⁴ The court even referred to the executive branch “as the pre-eminent authority in foreign affairs.”³⁰⁵

The AT&T cases discussed earlier offer a different model in which courts suggest “the outlines of a possible settlement” to meet congressional and executive needs without requiring “a judicial resolution of a head-on confrontation.”³⁰⁶ Yet in trying to avoid “a possibly unnecessary constitutional decision,”³⁰⁷ the court proceeded to analyze the constitutional powers of each branch, compare their relative strengths, and encourage both sides to negotiate a settlement. After negotiation had narrowed but not entirely bridged the gap between the two branches, the D.C. Circuit provided further guidelines. In so doing, it decided that complete judicial abstention on political question grounds was not warranted.³⁰⁸

The Pentagon Papers

In the Pentagon Papers case in 1971, the Supreme Court decided that two newspapers were constitutionally entitled to publish a Defense Department secret study that was critical of U.S. policy in the Vietnam War.³⁰⁹ In a concurrence, Justice Stewart spoke approvingly of independent presidential power: “If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.”³¹⁰

A single concurrence by one Justice has no authoritative value in settling or defining constitutional issues, but this language is cited frequently by those who draw presidential power broadly at the expense of congressional interests. Several points can be made about Justice Stewart’s language. First, it begins with an If: “If the Constitution gives the Executive” Second, there is no necessary connection between the first part of the quote and the second part. The President’s largely unshared power to *conduct* foreign affairs does not imply a largely unshared power to determine the *policy* for internal security. The conduct of foreign policy usually involves the implementation of national security policy determined jointly by Congress and the President. Conduct may be executive, but the policymaking power is executive-legislative. That proposition is true to an even greater extent in the “maintenance of our national defense,” as Justice Stewart expressed it. Congress shares that responsibility with the President. In the field of foreign affairs, many

³⁰⁴ Id. at 914.

³⁰⁵ Id.

³⁰⁶ United States v. American Tel. & Tel. Co., 551 F.2d at 385.

³⁰⁷ Id.

³⁰⁸ United States v. American Tel. & Tel. Co., 567 F.2d at 123.

³⁰⁹ New York Times Co. v. United States, 403 U.S. 713 (1971).

³¹⁰ Id. at 728-29.

experts acknowledge that the Constitution does not give “a large degree of unshared power” either to Congress or the President.

Justice Stewart’s concurrence contains other broad views about presidential power: “[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.”³¹¹

No doubt the President has important duties and prerogatives in protecting confidential information. Nevertheless, those duties and prerogatives do not amount to a monopoly. As Justice Stewart acknowledged: “This is not to say that Congress and the courts have no role to play.”³¹² Congress shares responsibility in this area by enacting legislation and conducting oversight.

The *Egan* Case

A memorandum by the Office of Legal Counsel of the Justice Department in 1996, challenging the right of access by Congress to information held by executive branch employees,³¹³ relied in part on the Supreme Court’s decision in *Department of the Navy v. Egan* (1988) to support a position of broad presidential power.³¹⁴ *Egan*, however, is fundamentally a case of statutory construction. The case involved the Navy’s denial of a security clearance to Thomas Egan, who worked on the Trident submarine program. He was subsequently removed. He then sought review by the Merit Systems Protection Board (MSPB). After action by the Board and the Court of Appeals for the Federal Circuit, the case reached the Supreme Court, which upheld the Navy’s action by noting that the denial of a security clearance is a sensitive and discretionary call committed by law to the executive agency with the necessary expertise for protecting classified information.³¹⁵ Thus, the conflict in this case was between the Navy and the MSPB, not between Congress and the executive branch.

The focus on statutory questions was evident throughout the case. As the Justice Department noted in its brief to the Supreme Court: “The issue in this case is one of statutory construction and ‘at bottom . . . turns on congressional intent.’”³¹⁶

³¹¹ Id. at 729-30.

³¹² Id. at 730.

³¹³ See earlier section on “CIA Whistleblowing.”

³¹⁴ Memorandum from Christopher H. Schroeder, Office of Legal Counsel, Department of Justice, to Michael J. O’Neil, General Counsel of the Central Intelligence Agency, November 26, 1996, cited at “Disclosure of Classified Information to Congress,” Hearings before the Senate Select Committee on Intelligence, 105th Cong., 2nd sess. 6, 8 (1998).

³¹⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

³¹⁶ Brief for the Petitioner, at 22, *Department of the Navy v. Egan* (No. 86-1552), quoting *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 400 (1987).

The Court asked the parties to address this question: “Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance.”³¹⁷

The statutory questions concerned Sections 7512, 7513, 7532, and 7701 of Title 5 of the U.S. Code. The Justice Department’s brief analyzed the relevant statutes and their legislative history and could find no basis for concluding that Congress intended the MSPB to review the merits of security clearance determinations.³¹⁸ The entire oral argument before the Supreme Court on December 2, 1987, was devoted to the meaning of statutes and what Congress intended by them.³¹⁹ At no time did the Justice Department suggest that classified information could be withheld from Congress.

The Court’s deference to the Navy did not cast a shadow over the right of Congress to sensitive information. The Court decided merely the “narrow question” of whether the MSPB had *statutory* authority to review the substance of a decision to deny a security clearance.³²⁰ Although the Court referred to independent constitutional powers of the President, including those as Commander in Chief and head of the executive branch,³²¹ and noted the President’s responsibility with regard to foreign policy,³²² the case was decided on statutory grounds. In stating that “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” the Court added this key qualification: “*unless Congress specifically has provided otherwise.*”³²³

The *Garfinkel* Case

In addition to relying on *Egan*, the 1996 OLC memo relied on the Supreme Court’s decision in *American Foreign Service Ass’n v. Garfinkel* (1989) for the proposition that Congress cannot “divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a ‘right’ to furnish such information to a Member of Congress without receiving official authorization to do so.” Yet the progression of this case from district court to the Supreme Court and back again illustrates how a lower court can exaggerate the national security powers of the President at the expense of congressional prerogatives. The district court’s decision was quickly vacated by the Supreme Court.

³¹⁷ *Id.* at (I) (emphasis added).

³¹⁸ Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, at 4-5, 13, 15-16, 18, *Department of the Navy v. Egan* (No. 86-1552).

³¹⁹ Transcript of Oral Argument, *Department of the Navy v. Egan* (No. 1552).

³²⁰ *Department of the Navy v. Egan*, 484 U.S. at 520.

³²¹ *Id.* at 527.

³²² *Id.* at 529

³²³ *Id.* at 530 (emphasis added).

In 1983, President Reagan directed that all federal employees with access to classified information sign “nondisclosure agreements” or risk the loss of their security clearance. Congress, concerned about the vagueness of some terms and the loss of access to information, passed legislation to prohibit the use of appropriated funds to implement the nondisclosure policy.³²⁴

In 1988, Judge Oliver Gasch held that Congress lacked constitutional authority to interfere by statute with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information.³²⁵ From *Egan* he extracted a sentence—“The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief”—without acknowledging that *Egan* was decided on statutory, not constitutional, grounds.³²⁶ Gasch concluded that Congress had passed legislation that “impermissibly restricts the President’s power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign affairs.”³²⁷

On October 31, 1988, the Supreme Court noted probable jurisdiction in the *Garfinkel* case.³²⁸ Both the House and the Senate submitted briefs strongly objecting to Judge Gasch’s analysis of the President’s power over foreign affairs.³²⁹ During oral argument, after Edwin Kneeder of the Justice Department spoke repeatedly about the President’s constitutional role to control classified information, one of the Justices remarked: “But, Mr. Kneeder, I just can’t—I can’t avoid interrupting you with this thought. The Constitution also gives Congress the power to provide for a navy and for the armed forces, and so forth, and often classified information is highly relevant to their task.”³³⁰

On April 18, 1989, the Supreme Court issued a per curiam order that vacated Judge Gasch’s order and remanded the case for further consideration.³³¹ In doing so, the Court cautioned Gasch to tread with greater caution in expounding on constitutional matters: “Having thus skirted the statutory question whether the Executive Branch’s implementation of [nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees’ argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President’s

³²⁴ 101 Stat. 1329-432, § 630 (1987); 102 Stat. 1756, § 619 (1998).

³²⁵ *National Fed’n of Fed. Employees v. United States*, 688 F.Supp. 671, 683 (D.D.C. 1988).

³²⁶ *Id.* at 685.

³²⁷ *Id.*

³²⁸ *American Foreign Service Ass’n v. Garfinkel*, 488 U.S. 923 (1988).

³²⁹ Brief and Motion of the Speaker and Leadership Group for Leave to File Brief Amici Curiae Out of Time, *American Foreign Service Ass’n v. Garfinkel* (No. 87-2127); Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of the United States Senate as Amicus Curiae, *American Foreign Service Ass’n v. Garfinkel* (No. 87-2127).

³³⁰ Transcript of Oral Argument, *American Foreign Service Ass’n v. Garfinkel* (No. 87-2127), at 57-58. The particular Justice is not identified in the transcript.

³³¹ *American Foreign Service Ass’n v. Garfinkel*, 490 U.S. 153 (1989).

authority to protect the national security.”³³² The Court emphasized that the district court “should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.”³³³

On remand, Judge Gasch held that the plaintiffs (American Foreign Service Association and Members of Congress) failed to state a cause of action for courts to decide.³³⁴ By dismissing the plaintiffs’ complaint on this ground, he did not have to address any of the constitutional issues.³³⁵

Conclusions

Congress depends on information obtained from the executive branch to perform its constitutional functions. The Supreme Court remarked in 1927 that a legislative body “cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to those who do possess it.”³³⁶ Investigation is a prerequisite for intelligent lawmaking, and much of the information that Congress requires is located within the executive branch. Congress needs information to enact legislation, to oversee the administration of programs, and to inform the public. To enforce these constitutional duties, Congress possesses the inherent power to issue subpoenas and to punish for contempt.³³⁷ The Supreme Court has said that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”³³⁸

The power of Congress to investigate reaches to all sectors of executive branch activity, not only domestic policy but also foreign, military, and national security policy. The first major congressional investigation, in 1792, involved an ill-fated military expedition. To buttress its power to investigate, Congress frequently enacts statutory language to require the executive branch to produce information. When Congress passed the Budget and Accounting Act of 1921, it directed the newly established Bureau of the Budget (now the Office of Management and Budget) to provide Congress with information. The Bureau “shall, at the request of any

³³² Id. at 158.

³³³ Id. at 161.

³³⁴ *American Foreign Service Ass’n v. Garfinkel*, 732 F.Supp. 13, 16 (D.D.C. 1990).

³³⁵ See id. at 16, 17.

³³⁶ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

³³⁷ *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 505 (1975); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

³³⁸ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

committee on either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.”³³⁹ The current version regarding congressional requests for information in the budget area appears at 31 U.S.C. § 1113 (1994).

As part of the National Security Act, Congress in 1991 required the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the U.S. government involved in intelligence activities to keep the intelligence committees “fully and currently informed of all intelligence activities,” other than a covert action. The procedures for covert actions are spelled out elsewhere. The Intelligence Committees are to receive “any information or material concerning intelligence activities . . . which is requested by either of the intelligence committees in order to carry out its authorized responsibilities.”³⁴⁰

Congress also relies on the assistance of employees within the executive branch. Upon the request of a congressional committee or a committee member, any officer or employee of the State Department, the U.S. Information Agency, the Agency for International Development, the U.S. Arms Control and Disarmament Agency, “or any other department, agency, or independent establishment of the United States Government primarily concerned with matters relating to foreign countries or multilateral organizations may express his views and opinions, and make recommendations he considers appropriate, if the request of the committee or member of the committee relates to a subject which is within the jurisdiction of that committee.”³⁴¹

The text and intent of the Constitution, combined with legislative and judicial precedents over the past two centuries, provide strong support for congressional access to information within the executive branch. Without that information, Congress would be unable to adequately discharge its legislative and constitutional duties. It could not properly oversee executive branch agencies, which are creatures of Congress. Part of legislative access depends on executive employees—the rank-and-file—who are willing to share with Congress information about operations within their agencies. During the past two centuries, Congress has amply demonstrated the value of gaining access to information regarding agency corruption and mismanagement that an Administration may want to conceal.

The executive branch has a natural interest in seeing that agency information is disclosed only through authorized channels. However, part of that concern has sometimes been directed toward controlling information that might be embarrassing to the agency, and the Administration, if released. There is no legal or constitutional justification for concealing that kind of information. To the extent that the concern of

³³⁹ 42 Stat. 20, 23, § 212 (1921).

³⁴⁰ “Compilation of Intelligence Laws and Related Laws and Executive Orders of Interest to the National Intelligence Community,” prepared for the use of the House Permanent Select Committee on Intelligence, 104th Cong., 1st sess. 20 (Committee Print July 1995); 50 U.S.C. § 413a, as added by the intelligence authorization act for fiscal 1991, P.L. 102-88, 105 Stat. 442.

³⁴¹ 2 U.S.C. § 194a (1994).

the executive branch is directed toward control of information that might be damaging to national security, the intelligence committees have procedures in place designed to protect against such damage.

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