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INVOKING EXECUTIVE PRIVILEGE: NAVIGATING TICKLISH POLITICAL WATERS

Louis Fisher*

In this Article, Louis Fisher acknowledges the constitutional legitimacy of executive privilege, but he argues that legal and political limits render the scope of the privilege narrower than what is commonly believed. In support of his argument, he points to early precedents set during the Washington Administration and to congressional leverage over the executive branch. Though he recognizes the executive branch's interest in ensuring that information is disclosed through authorized channels and its concern about disclosures of information that may embarrass the administration or one of its agency's, he asserts that there is no legal or constitutional justification for concealing such information. Dr. Fisher further argues that Congress' need for information to govern supports an investigatory power that trumps the executive branch's claim to exclusive control of information in national security and foreign affairs cases.

* * *

INTRODUCTION

Presidents and scholars identify a variety of constitutional principles and practices to justify executive privilege. There is no doubt that there are reasonable grounds for withholding documents from Congress and for prohibiting some executive officials from testifying before congressional committees. Just as there are sound reasons for executive privilege, however, there are also legal and political limits. Impressive claims for executive privilege can be offset by persuasive arguments that Congress needs access to information to fulfill its constitutional mandates. In many cases, the politics of the moment or practical considerations override legal principles. Efforts to discover enduring and enforceable norms in this area invariably fall short.

This Article examines some of the misconceptions about the extent of executive privilege. Part I reviews the precedent established during the Washington Administration for withholding documents from Congress. Close examination reveals that the scope of presidential authority has been greatly exaggerated. Congress had access to more documentation than is commonly believed and could have had more

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if it had demanded it. Part II focuses on congressional leverage. The power to impeach, to hold executive officials in contempt, and to block nominations may force executive officials to release documents that they otherwise would want to keep private and confidential. Even if a President announces perfectly plausible grounds for the withholding of documents, he may be forced to surrender to the will of Congress to achieve more important goals. Part III examines the overly general—and generous—claim that executive privilege has especially strong, if not unreviewable, authority in the fields of foreign affairs, diplomacy, and national security.

I. IDENTIFYING CONSTITUTIONAL PRINCIPLES: EARLY CONGRESSIONAL INVESTIGATIONS

The Constitution makes no specific reference to an executive power allowing the President to withhold documents from Congress, nor does it specifically recognize a need on the part of Congress for information from the Executive in order to legislate. It is now routine, however, 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 already had reached a rough understanding and worked out accommodations. When these two implied powers collide, one wonders which should prevail. No magic formula yields a ready and reliable answer, for too much depends on individual circumstances and political requirements.

A. *Robert Morris Inquiry*

During the First Congress, the House of Representatives debated a request from Robert Morris to investigate his conduct as Superintendent of Finance.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 George Washington to appoint three commissioners to inquire into the receipts and expenditures of public moneys during Morris' administration.⁴

The select committee of Madison, Sedgwick, and Sherman issued a report, recommending that a five-member committee be appointed to examine Morris'

¹ See, e.g., *United States v. Nixon*, 418 U.S. 683, 711 (1974) (holding that, to the extent that 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"); *McGrain v. Daugherty*, 273 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.").

² See 1 ANNALS OF CONG. 1129 (Joseph Gales ed., 1789).

³ See *id.* at 1164.

⁴ See *id.* at 1191.

performance in office. John Lawrence [Laurance] and William Smith were added to the three already in place.⁵ Elbridge Gerry objected on grounds that the House was pretending it still had the power of the Continental Congress, which 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 officers for mal-administration.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 to the country and to public officers."⁹ The committee was appointed and issued a report on February 16, 1791.¹⁰

The committee investigation did not produce a direct collision between Congress and the Washington Administration because the area of inquiry concerned activities that occurred during the previous Continental Congress. Nevertheless, it is important to note that Congress debated which branch of government—legislative or executive—was the proper party for investigating executive matters.¹¹ 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.¹²

B. *Major General Arthur 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 to Indian tribes.¹³ Out of 1400 troops, 657 were killed and another 271 wounded.¹⁴ The House committee was empowered "to call for such persons, papers,

⁵ See 2 ANNALS OF CONG. 1464 (1790).

⁶ *Id.* (statement of Rep. Elbridge Gerry).

⁷ See *id.* at 1464-65.

⁸ *Id.* at 1465 (statement of Rep. Theodorick Bland).

⁹ *Id.* (statement of Rep. James Madison).

¹⁰ See *id.* at 1964.

¹¹ See *id.* at 1465.

¹² See *id.*

¹³ See 3 ANNALS OF CONG. 493 (1792).

¹⁴ See George C. Chalou, *St. Clair's Defeat, 1792*, in 1 CONGRESS INVESTIGATES, A DOCUMENTED HISTORY, 1792-1974, at 7 (Arthur M. Schlesinger, Jr. & Roger Bruns eds.,

and records, as may be necessary to assist their inquiries.”¹⁵ 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.”¹⁶ Similar to the inquiry of Morris, some representatives thought the investigation should be conducted by President Washington.¹⁷ A motion to that effect was rejected 21 to 35, after which the House inquiry was supported 44 to 10.¹⁸

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. Jefferson reported that 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.¹⁹

According to Jefferson, the Cabinet concluded that “there was not a paper which might not be properly produced.”²⁰ President Washington instructed Secretary of War Henry Knox to “lay before the House of Representatives such papers from your Department, as are requested by the enclosed Resolution.”²¹ 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.”²² 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.²³ The general principle of

1975).

¹⁵ 3 ANNALS OF CONG. 493 (1792).

¹⁶ *Id.* at 490.

¹⁷ *See id.* at 491-92.

¹⁸ *See id.* at 493.

¹⁹ 1 THE WRITINGS OF THOMAS JEFFERSON 304 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Library ed. 1904).

²⁰ *Id.* at 305.

²¹ Letter from George Washington to the Secretary of War (Apr. 4, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON 15 (John C. Fitzpatrick ed., 1939).

²² *Id.* at 16.

²³ *See* 3 ANNALS OF CONG. at app. 1052-59, 1106-13, 1310-17.

executive privilege had been established because the President could refuse papers "the disclosure of which would injure the public."²⁴ The language here is significant. The President was concerned about injury to the *public*, not to himself or his associates. Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal improper or illegal activities.

C. *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.²⁵ At a Cabinet meeting, he received advice from Secretary of War Henry Knox that "no part of the correspondences should be sent to the Senate."²⁶ Secretary of Treasury Alexander Hamilton agreed with Knox, adding that "the principle is safe, by excepting such parts as the President may choose to withhold."²⁷ Attorney General Edmund Randolph, who would soon 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."²⁸ 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."²⁹

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."³⁰ Apparently, the Senate accepted this arrangement, but had senators wanted to press the matter, they might have forced the release of more material. As Abraham Sofaer notes, "[N]othing would have prevented a majority from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge."³¹

²⁴ 1 THE WRITINGS OF JEFFERSON, *supra* note 19, at 304.

²⁵ See 4 ANNALS OF CONG. 38 (1794).

²⁶ Cabinet Opinion of H. Knox, Alexander Hamilton, & Edm. Randolph (Jan. 28, 1794), in 4 THE WORKS OF ALEXANDER HAMILTON 505 (John C. Hamilton ed., New York, Charles S. Francis & Co. 1851).

²⁷ *Id.*

²⁸ *Id.* at 505-06.

²⁹ Cabinet Opinion of Wm. Bradford (1793), in 4 THE WORKS OF HAMILTON, *supra* note 26, at 494-95.

³⁰ 4 ANNALS OF CONG. 56 (1794).

³¹ Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975).

D. *The Jay Treaty*

Another executive-legislative conflict occurred in 1796 after President Washington informed Congress that the Jay Treaty had been ratified. His message was sent on March 1, 1796.³² The very next day, Representative 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."³³ 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."³⁴ 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."³⁵ 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."³⁶ Without the papers, the House might decide to withhold appropriations needed to implement the Treaty. Representative 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.³⁷

After weeks of debate, the House supported the Livingston resolution by a margin of 62 to 37.³⁸ Curiously, 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 inspected them. The same privilege, he doubted not, would be given to any member of that House who would request it."³⁹ It was during this period that Congress passed legislation to provide for the relief and protection of American seamen, many of whom had been impressed by Great Britain.⁴⁰ 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."⁴¹ He remarked that "[f]or the space of ten weeks any member of that House might have seen them."⁴² Another member of

³² See 5 ANNALS OF CONG. 394 (1796).

³³ *Id.* at 400.

³⁴ *Id.* at 400-01.

³⁵ *Id.* at 426.

³⁶ *Id.* at 428.

³⁷ See *id.* at 437, 466-74.

³⁸ See *id.* at 759.

³⁹ *Id.* at 461 (statement of Rep. Harper).

⁴⁰ See *id.* at 802-20.

⁴¹ *Id.* at 642 (statement of Rep. Williams).

⁴² *Id.* (statement of Rep. Williams).

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?"⁴³

Madison, who voted for Livingston's resolution, elaborated on his views regarding executive-legislative struggles over information. He began by avowing his intent to proceed "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."⁴⁴ 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."⁴⁵ Livingston's amendment to his resolution, Madison felt, went a long way toward removing constitutional objections.⁴⁶ 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."⁴⁷ Madison's amendment failed by a vote of 37 to 47.⁴⁸

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.⁴⁹ 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."⁵⁰ Washington's decision to withhold documents from the House was not an exercise of executive privilege, because he acknowledged that "all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration and advice."⁵¹

Washington's message to the House is unsatisfactory on several grounds. First, the House was not requesting documents as part of the treaty process. That process was complete; the Jay Treaty had been negotiated, approved by the Senate, and ratified. The House merely was requesting documents as part of the *post-treaty* process—the appropriation of funds to implement the treaty. The House had a right to whatever papers it needed to make an informed legislative judgment. Second, Washington seemed to understand that right; a letter from Hamilton to Washington

⁴³ *Id.* at 588 (statement of Rep. Freeman).

⁴⁴ *Id.* at 437 (statement of Rep. Madison).

⁴⁵ *Id.* at 438 (statement of Rep. Madison).

⁴⁶ *See id.*

⁴⁷ *Id.* (statement of Rep. Madison).

⁴⁸ *See id.*

⁴⁹ *See id.* at 760-62.

⁵⁰ *Id.* at 760.

⁵¹ *Id.* at 761.

implied 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*.⁵²

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 reported that, in an unfound letter to Hamilton, Washington "apparently suggested that he planned to comply with the request in Livingston's resolution."⁵³

Hamilton, no longer in the administration, later 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."⁵⁴ 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."⁵⁵ Hamilton's admonishment was good advice.

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

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

⁵² Letter from Alexander Hamilton to George Washington (Mar. 24, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 81-82 (Harold C. Syrett ed., 1974).

⁵³ Editor's Introductory note to Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 THE PAPERS OF HAMILTON, *supra* note 52, at 66.

⁵⁴ Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 THE PAPERS OF HAMILTON, *supra* note 52, at 69 (alteration in original).

⁵⁵ *Id.* at 69.

Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.⁵⁶

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.”⁵⁷ 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.”⁵⁸ Yet, Madison expressed some misgivings about Washington’s rationale that the papers were not related to any objective of the House:

[The rationale] 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 each 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.⁵⁹

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.”

⁵⁶ 5 ANNALS OF CONG. 771 (1796). For the votes, see *id.* at 782-83.

⁵⁷ *Id.* at 773.

⁵⁸ *Id.*

⁵⁹ *Id.*

Precisely those conditions prevailed in 1796 because President Washington needed the support of both Houses to pass an appropriation of \$90,000 to implement the Jay Treaty.⁶⁰ Congressman Samuel Maclay lamented the situation, noting that members of the House, having been denied the papers they requested, “were left to take their measures in the dark; or, in other words, they were called upon to act without information.”⁶¹ 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.⁶²

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 48.⁶³ James Madison voted against the bill.⁶⁴ An earlier test vote showed the House divided 49 to 49, with the Speaker willing to break the tie to support the treaty.⁶⁵ The appropriation was enacted into law.⁶⁶ 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 some votes.

E. *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

⁶⁰ See *id.* at 991.

⁶¹ *Id.* at 970.

⁶² *Id.* at 970-71.

⁶³ See *id.* at 1291.

⁶⁴ See *id.*

⁶⁵ See *id.* at 1280.

⁶⁶ See 1 Stat. 459 (1796).

into an agreement with France to buy the whole of the Louisiana Territory.⁶⁷ Jefferson thought that the executive officials who had negotiated the terms "have done an act beyond the Constitution."⁶⁸ Because Congress would have to "ratify and pay for it,"⁶⁹ the treaty "must of course be laid before both Houses, because both have important functions to exercise respecting it."⁷⁰

Jefferson sent copies of the ratified treaty to both 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."⁷¹ The House debated at length a resolution asking Jefferson to submit certain papers and documents relating to the treaty.⁷² Some portions of the resolution were adopted, others rejected.⁷³ The resolution as a whole went down to defeat, 57 to 59.⁷⁴ 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. Subsequently, the House joined the Senate in passing legislation to enable Jefferson to take possession of the Louisiana Territory.⁷⁵

F. *Subsequent Disputes*

On other occasions, the House opposed treaties that required appropriations, two examples being the Gadsden Purchase Treaty with Mexico in 1853⁷⁶ and the Alaskan Purchase Treaty with Russia in 1867.⁷⁷ The need to have support from both houses for certain treaties was recognized in a reciprocity treaty with the Hawaiian Islands in 1876.⁷⁸ A proviso made the treaty dependent on the consent by both houses.⁷⁹ A commercial treaty with Mexico in 1883 contained a clause making its validity

⁶⁷ See Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON 407, 408 (Albert Ellery Bergh ed., Definitive ed. 1907).

⁶⁸ *Id.* at 411.

⁶⁹ *Id.*

⁷⁰ *Id.* at 410.

⁷¹ Special Message to the Senate and House of Representatives of the United States (Oct. 21, 1803), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 362-63 (James D. Richardson ed., 1905); see also 13 ANNALS OF CONG. 18, 382 (1803).

⁷² See 13 ANNALS OF CONG. 385 (1803).

⁷³ See *id.* at 385-419.

⁷⁴ See *id.* at 419.

⁷⁵ See 2 Stat. 245, 247 (1803).

⁷⁶ See Ivan M. Stone, *The House of Representatives and the Treaty-Making Power*, 17 KY. L.J. 216, 233 n.53 (1929).

⁷⁷ See *id.*

⁷⁸ See *id.* at 234.

⁷⁹ Chalfant Robinson, *The Treaty-Making Power of the House of Representatives*, 12 YALE REV. 191 (1903); see also Stone, *supra* note 76, at 234-35.

dependent on action by both houses.⁸⁰ The House Committee on Ways and Means interpreted the language to mean that the House had a voice in treaties affecting revenue.⁸¹ Although additional conventions extended the time available for congressional approval, the House refused to support the treaty and it did not take effect.⁸² The use of statutes that authorize reciprocal trade agreements have also protected the prerogatives of the House in other matters of foreign commerce, tariffs, and revenues.⁸³

The House continues to make its will felt in treaty matters. Although the Ford Administration believed it could enter into an executive agreement with regard to military bases in Spain, the Senate insisted it be done by treaty.⁸⁴ Later, members of both the House and the Senate objected to language in the treaty that appeared to make appropriations mandatory over a five-year period.⁸⁵ In the end, the prerogatives of the appropriations 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."⁸⁶ Congress enacted legislation in 1976 to authorize the appropriation of funds needed to implement the Spanish treaty.⁸⁷

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."⁸⁸ 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

⁸⁰ See Stone, *supra* note 76, at 235.

⁸¹ See 2 ARTHUR C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1526, at 990 (1907) [hereinafter HINDS' PRECEDENTS].

⁸² See 24 Stat. 1018 (1886); 25 Stat. 1370 (1885); 24 Stat. 975 (1883); 2 HINDS' PRECEDENTS, *supra* note 81, §§ 1526-1528, at 990-91.

⁸³ For the development of reciprocal trade legislation, see LOUIS FISHER, PRESIDENT AND CONGRESS 133-55 (1972).

⁸⁴ See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 239 (1977).

⁸⁵ See *id.*

⁸⁶ S. REP. NO. 94-941, at 2 (1976).

⁸⁷ See International Security Assistance and Arms Export Control Act of 1976, § 507, Pub. L. No. 94-329, 90 Stat. 729, 765 (1976); see also Pub. L. No. 94-537, 90 Stat. 2498 (1976) (authorizing appropriations for the International Security Assistance and Arms Control Act of 1976).

⁸⁸ Agreement on Friendship, Defense and Cooperation Between the United States of America and the Kingdom of Spain, July 2, 1982, U.S.-Spain, Complementary Agreement Three, Art. 2, 34 U.S.T. 3966, 3966.

lawful and feasible.”⁸⁹ 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.⁹⁰ The purpose of the bill was to implement the worldwide General Agreements on Tariffs and Trade (GATT).⁹¹ 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.⁹² However, there are no clear constitutional guidelines on the types of national policy that must be included in a treaty only and not in a statute. The subject matter of NAFTA and GATT—international trade—is certainly within the constitutional jurisdiction of Congress as a whole to “regulate commerce with foreign nations”⁹³ and therefore merits action by both houses through the regular statutory process.⁹⁴

II. USING CONGRESSIONAL LEVERAGE

Exquisite legal and constitutional arguments may have to play second fiddle to the political leverage that Congress can exert when it wants. As mentioned previously, this may involve the simple act of having to appropriate funds to implement a treaty, thus elevating the House to equal partnership with the Senate. Either house may decide to roll out heavy artillery to get the administration’s attention by unleashing the impeachment power or holding an executive official in contempt of Congress. On other occasions, the administration may agree reluctantly to release sensitive papers and documents because that is the only way to jump-start the confirmation process.⁹⁵

A. *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

⁸⁹ *Id.*

⁹⁰ See Uruguay Round Agreements, submitted Sept. 27, 1994.

⁹¹ See (check the purposes section of the bill).

⁹² See *GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong. 302-12 (1994) (statement of Harvard Law School Prof. Laurence H. Tribe).

⁹³ U.S. CONST. art. I, § 8, cl. 3.

⁹⁴ See Bruce Ackerman & 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. 1221 (1995).

⁹⁵ See Nada Mourtada-Sabbah, *Le Privilège de L Exécutif Aux États-Unis* 221-351 (1999).

legitimately requested the documents was impeachment, "which the resolution has not expressed."⁹⁶ Presumably, if Congress had requested the documents on that basis, Washington would have acquiesced. 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 Departments. 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.⁹⁷

Even short of impeachment, the exercise of executive privilege is inappropriate when there are serious charges of administrative malfeasance. President Jackson, a zealous 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.⁹⁸

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."⁹⁹

While defending a broad theory of executive privilege, Attorney General William French Smith admitted in 1982 that he would not try "to shield documents [from Congress] which contain evidence of criminal or unethical conduct by agency officials from proper review."¹⁰⁰ During a news conference in 1983, President Ronald Reagan said, "[W]e will never invoke executive privilege to cover up wrongdoing."¹⁰¹ It would not be the first time. After the Iran-Contra story broke in November 1986,

⁹⁶ 5 ANNALS OF CONG. 760 (1796).

⁹⁷ Special Message to the House of Representatives (Apr. 20, 1846), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, *supra* note 71, at 431, 434.

⁹⁸ 13 CONG. DEB. app. at 202 (1836-37). For the entire discussion, see *id.* at 189-225.

⁹⁹ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

¹⁰⁰ Letter from Attorney General William French Smith to Rep. John Dingell, *reprinted in* H.R. REP. NO. 97-968, at 41 (1982).

¹⁰¹ The President's News Conference, 1 PUB. PAPERS 238, 239 (Feb. 16, 1983).

President Reagan permitted his two former national security advisers, Robert McFarlane and John Poindexter, to testify before Congress,¹⁰² 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,¹⁰³ and made available to Congress thousands of sensitive, classified documents.¹⁰⁴ The purpose of this extraordinary cooperation was to forestall any possibility of an impeachment effort.¹⁰⁵

B. *The Contempt Power*

When executive officials refuse to comply with a congressional request for information, the contempt power may be used as an instrument of legislative coercion. In 1975, Congress clashed with the executive branch over reports compiled by the Department of Commerce identifying U.S. companies that had been asked to join the Arab boycott of Israel.¹⁰⁶ Commerce Secretary Rogers Morton initially refused to comply with a subpoena from a House Interstate and Foreign Commerce subcommittee, but the prospect of contempt proceedings was sufficient incentive for him to release the material to the subcommittee.¹⁰⁷

In 1980, President Carter threatened to withhold documents concerning his oil import fee. After a subcommittee of the House Government Operations Committee voted to hold Energy Secretary Charles W. Duncan, Jr., in contempt of Congress for refusing to produce the documents, Duncan bowed to the congressional will.¹⁰⁸ White House Senior Associate Counsel Douglas B. Huron said that he did not think that executive privilege ever was asserted formally, although the White House considered it.¹⁰⁹ In any event, the subcommittee received the material it wanted.

In 1982, the House actually voted to hold in contempt Anne (Gorsuch) Burford, Administrator of the Environmental Protection Agency (EPA), when she refused to

¹⁰² See THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* 498 (1991).

¹⁰³ See *id.* at 540.

¹⁰⁴ Theodore Draper, *Foreword* to *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY*, at xiii (Peter Kornbluh & Malcolm Byrne eds., 1993); see generally *THE IRAN-CONTRA SCANDAL*, *supra* (containing a collection of documents relating to the Iran-Contra affair).

¹⁰⁵ Attorney General Edwin Meese III thought the Iran-Contra affair had the potential for "toppling" the President and triggering impeachment proceedings in the House. See Testimony in trial of Oliver North (Mar. 28, 1989) in DRAPER, *supra* note 102, at 521.

¹⁰⁶ See 31 CONG. Q. ALMANAC 343 (1975).

¹⁰⁷ See 31 CONG. Q. ALMANAC 343-44 (1975); see also 121 CONG. REC. 33,872-76, 36,038-39, 40,230, 40,768-69 (1975) (noting highlights of the proceedings for the record).

¹⁰⁸ See Elder Witt, *Carter Foiled in First Tilt With Executive Privilege*, CONG. Q. WKLY. REP., May 17, 1980, at 1352.

¹⁰⁹ See *Executive Privilege, Revisited*, CONG. Q. WKLY. REP., June 21, 1980, at 1753.

release certain documents.¹¹⁰ 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."¹¹¹ Shortly thereafter, the Reagan Administration decided that Congress could not see, under any circumstances, documents in active litigation files.¹¹² 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.¹¹³ Accepting that position, congressional oversight would have to be put on hold for years until the government completed its enforcement and litigation actions.

After the committee held Gorsuch in contempt, the House of Representatives voted 259 to 105 to support the contempt citation.¹¹⁴ To create the top-heavy majority, 55 Republicans joined 204 Democrats.¹¹⁵ After the matter had a short detour to court, the Administration eventually agreed to release "enforcement sensitive" documents to Congress.¹¹⁶ Although the legislative branch eventually prevailed,¹¹⁷ the litigation highlighted a serious weakness of 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 will delay the delivery of documents to Congress.¹¹⁸

In 1995, the House Committee on Government Reform and Oversight began a detailed inquiry into the firing of seven Travel Office employees at the Clinton White House.¹¹⁹ After the President invoked executive privilege to keep documents from the committee, it voted 27 to 19 to hold White House Counsel Jack Quinn in contempt.¹²⁰

¹¹⁰ See 128 CONG. REC. 31746-76 (1982).

¹¹¹ H.R. REP. NO. 97-968, at 11 (1982).

¹¹² See *id.* at 15, 21.

¹¹³ *Id.* at 42.

¹¹⁴ See 128 CONG. REC. 31,746-76 (1982).

¹¹⁵ See *id.*

¹¹⁶ See *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); H.R. REP. NO. 98-323, at 18-40 (1983).

¹¹⁷ See *House of Representatives*, 556 F. Supp. at 153.

¹¹⁸ See Stanley M. Brand & 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).

¹¹⁹ See *id.*

¹²⁰ See *id.*

Before the contempt citation could be taken to the floor, the disputed documents were released to the committee.¹²¹

C. *The Appointment Power*

Until the President submits the name of a nominee to the Senate, Congress has no grounds for gaining access to the files relating to the individual's employment with the government. Requests for personnel and medical files might be regarded by the President as unwarranted intrusions 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.¹²²

If the President, on the other hand, is trying to insure confirmation and needs the cooperation and goodwill of the Senate, he may be forced to surrender documents that could otherwise be withheld under the doctrine of executive privilege. 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 1971.¹²³ The reason given for withholding the memos was familiar: to protect the confidentiality and candor of the legal advice submitted to presidents and their assistants.¹²⁴ Nevertheless, Democrats on the Senate Judiciary Committee began rounding up votes to subpoena the papers.¹²⁵ 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.¹²⁶

In an op-ed piece for the *Los Angeles Times*, Senator Edward M. Kennedy put the matter succinctly: "Rehnquist: No Documents, No Senate Confirmation."¹²⁷ Hoping to move the nominations of Rehnquist and Scalia along, President Reagan agreed to a narrowed request by the committee for twenty-five to thirty documents written by Rehnquist during his career in the Justice Department.¹²⁸ The eight

¹²¹ See David Johnston, *Panel Acts to Gain Travel Office Papers*, N.Y. TIMES, May 10, 1996, at A26; Eric Schmitt, *White House Gives Committee More Papers in Dismissal Case*, N.Y. TIMES, May 31, 1996, at A20.

¹²² See Louis Fisher, *Grover Cleveland and the Senate*, 7 CONG. STUD. 11 (1979).

¹²³ George Lardner, Jr. & Al Kamen, *Reagan Uses Executive Privilege to Keep Rehnquist Memos Secret*, WASH. POST, Aug. 1, 1986, at A1.

¹²⁴ See *id.*

¹²⁵ See Howard Kurtz & Ruth Marcus, *Democrats Seek to Subpoena Papers*, WASH. POST, Aug. 2, 1986, at A1.

¹²⁶ See George Lardner, Jr. & Al Kamen, *Senators to Push for Rehnquist Memos*, WASH. POST, Aug. 5, 1986, at A4.

¹²⁷ Edward M. Kennedy, *Rehnquist: No Documents, No Senate Confirmation*, L.A. TIMES, Aug. 5, 1986, Part II, at 5.

¹²⁸ See Al Kamen & Howard Kurtz, *Rehnquist Told in 1974 of Restriction in Deed*,

Democrats on the Senate Judiciary Committee picked up two moderate Republicans to form a majority in favor of a subpoena.¹²⁹ A few days later the Committee requested and received additional documents prepared by Rehnquist for the Justice Department.¹³⁰ The nominations of Rehnquist and Scalia then went forward as scheduled.¹³¹

Two years later, the Senate replayed the same drama. The nomination of Stephen S. Trott for Ninth Circuit judge was delayed four months because Senators Kennedy and Howard Metzenbaum wanted internal documents from the Justice Department.¹³² 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."¹³³ That may have been "longstanding policy," but the Trott nomination did not proceed until the Department yielded, which it eventually did. Having received the documents they wanted, Kennedy and Metzenbaum released their hold.¹³⁴

In 1991, the appointment of the U.S. Ambassador to Guyana was delayed seventeen months until Senator Jesse Helms received documents he wanted from the State Department.¹³⁵ During a visit by Helms to Chile in 1985, one of his aides was accused of leaking U.S. intelligence information to the government of former Chilean President Augusto Pinochet.¹³⁶ Helms insisted that the State Department show him secret cable traffic regarding the visit, but the Department refused to turn over two cables, which they called internal memoranda.¹³⁷

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,¹³⁸ Helms had the necessary leverage. After Helms renewed his request for the cables and the State Department again refused, he blocked the nomination.¹³⁹ As the months rolled by and Helms held firm, Deputy Secretary of State Lawrence S. Eagleburger came to Helms'

WASH. POST, Aug. 6, 1986, at A1.

¹²⁹ See *id.*

¹³⁰ See *Senators Are Given More Rehnquist Data*, WASH. POST, Aug. 8, 1986, at A3.

¹³¹ See Al Kamen, *Rehnquist Confirmed In 65-33 Senate Vote; Scalia Approved as Associate Justice, 98-0*, WASH. POST, Sept. 18, 1986, at A1.

¹³² See Ruth Marcus, *Impasse Over Justice Documents Ends*, WASH. POST, Mar. 25, 1988, at A23.

¹³³ *Id.* (quoting Assistant Attorney General John R. Bolton).

¹³⁴ See *id.*

¹³⁵ See Al Kamen, *Ambassador to Guyana is Appointed After 17-Month Standoff*, WASH. POST, Nov. 29, 1991, at A40.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

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.¹⁴⁰

In March 1994, a House subcommittee subpoenaed the records of six cases handled by the Environment and Natural Resources Division of the Justice Department.¹⁴¹ 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 in the field to Washington officials.¹⁴² In an effort to mediate the dispute, Attorney General Janet Reno allowed subcommittee staff to interview line attorneys within ECS.¹⁴³ 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."¹⁴⁴

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.¹⁴⁵ 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, 1994.¹⁴⁶ 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."¹⁴⁷

As the dispute deepened, ECS chief Neil S. Cartusciello announced his resignation.¹⁴⁸ By that time, the subcommittee had begun receiving some of the documents it had subpoenaed.¹⁴⁹ After Schiffer moved to find a replacement for Cartusciello, the hearing on her nomination tentatively was scheduled.¹⁵⁰ 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, 1994.¹⁵¹

¹⁴⁰ See *id.*

¹⁴¹ See Jim McGee, *House Panel Subpoenas Justice*, WASH. POST, Mar. 12, 1994, at A4.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ *Id.* (quoting Mark Gearan).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* (quoting Rep. Shafer).

¹⁴⁸ See Jim McGee, *Environmental Crimes Controversy Lingers Under Reno*, WASH. POST, Apr. 7, 1994, at A25.

¹⁴⁹ See Jim McGee, *Chief of Environmental Crimes Section Quits*, WASH. POST, Apr. 2, 1994, at A4.

¹⁵⁰ See Al Kamen, *Teaming Up*, WASH. POST, July 13, 1994, at A15.

¹⁵¹ See 140 CONG. REC. 28359-60 (1994). For further details on this controversy, see STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 103D CONG., *DAMAGING DISARRAY: ORGANIZATION BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM*, 103-T

These examples illustrate that Congress has sufficient tools at its command to wrest from the executive branch the documents it needs to fulfill congressional duties. The question is whether lawmakers will press their advantage. The issue is "not the adequacy of congressional power to obtain information, *but* the willingness of committee chairs and staffers to aggressively pursue information."¹⁵²

III. SHOUTING "NATIONAL SECURITY" IS NOT ENOUGH

Those who write about executive privilege sometimes imply that the mere claim by the administration of "national security" (or "foreign affairs" or "diplomacy") is sufficient to establish an unreviewable presidential power. In a recent article, Saikrishna Prakash writes 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"¹⁵³

Writing for the Court in the Watergate tapes case, Chief Justice Burger rejected an "absolute, unqualified" presidential privilege of immunity from judicial process.¹⁵⁴ However, in clumsy dicta, he seemed to cede ground if the President claimed a "need to protect military, diplomatic, or sensitive national security secrets."¹⁵⁵ If the Supreme Court wants to accept such presidential arguments, it is free to do so. Congress, however, should not follow in its steps. The Watergate tapes case concerned *judicial*, not *congressional*, access to executive branch information.¹⁵⁶

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 Information Act (FOIA), requiring executive agencies to make documents available to the public, it set forth nine exemptions from the Act, 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."¹⁵⁷ Another exemption excluded "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."¹⁵⁸ Yet another exemption excluded "records or information compiled for law enforcement

(Comm. Print 1994); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 123-25 (1996).

¹⁵² Devins, *supra* note 151, at 133.

¹⁵³ Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1145 (1999).

¹⁵⁴ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

¹⁵⁵ *Id.*

¹⁵⁶ A footnote in the Court's decision makes this distinction clear: "We are not here concerned with . . . congressional demands for information" *Id.* at 712 n.19.

¹⁵⁷ 5 U.S.C. § 552(b)(1) (1994).

¹⁵⁸ *Id.* § 552(b)(5).

purposes.”¹⁵⁹ These exemptions 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.”¹⁶⁰

A. Controlling National Security Information

A 1996 memorandum prepared by the Office of Legal Counsel of the Justice Department (OLC) argued that a congressional enactment “would be unconstitutional if it were interpreted ‘to 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.’”¹⁶¹ OLC based this position on the following separation of powers rationale:

[T]he President’s roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command—and to erect an obstacle to the President’s exercise of all executive powers relating to the Nation’s security—by vesting lower-level employees in the Executive Branch with a supposed “right” to disclose national security information to Members of Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President.¹⁶²

According to this analysis, two congressional statutes and pending language in

¹⁵⁹ *Id.* § 552(b)(7).

¹⁶⁰ *Id.* § 552(d).

¹⁶¹ Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Michael J. O’Neil, General Counsel of the Central Intelligence Agency, Nov. 26, 1996, at 3 (on file with author) [hereinafter OLC Memo].

¹⁶² *Id.* at 4.

a Senate bill were unconstitutional.¹⁶³ The Department's position relies on generalizations and misconceptions about the President's roles as Commander in Chief, head of the executive branch, and "sole organ" of the nation in its external relations.

1. Commander in Chief

The Constitution empowers the President to be Commander in Chief, but that title must be understood in the context of military responsibilities that the Constitution grants to Congress. Article II reads, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"¹⁶⁴ For the militia, Congress—not the President—does the calling. The Constitution gives to Congress the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."¹⁶⁵ The Commander in Chief Clause also was intended to preserve civilian supremacy.¹⁶⁶

Article I empowers Congress to declare war, raise and support armies, and make rules for the land and naval forces. The debates at the Philadelphia Convention made clear that the Commander in Chief Clause did not grant the President unilateral, independent power other than the power to "repel sudden attacks."¹⁶⁷ Roger Sherman said the President should be able "to repel and not to commence war."¹⁶⁸ Taking the country from a state of peace to a state of war was a deliberative process that required congressional debate and approval. James Mason told his colleagues that he was for "clogging rather than facilitating war."¹⁶⁹ At the Philadelphia ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress"¹⁷⁰

The framers gave Congress the power to initiate war because they believed that presidents, in the search for fame and personal glory, would have a bias that favored war.¹⁷¹ John Jay warned in *Federalist No. 4* that "absolute monarchs will often make

¹⁶³ See *infra* Pt. III.D.

¹⁶⁴ U.S. CONST. art. II, § 2.

¹⁶⁵ *Id.* art. I, § 8, cl. 15.

¹⁶⁶ See 10 Op. Att'y Gen. 74, 79 (1861).

¹⁶⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1937) [hereinafter CONSTITUTIONAL DEBATES].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 319.

¹⁷⁰ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1941).

¹⁷¹ See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*,

war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”¹⁷² James Madison made the same point. Writing in 1793, he called war:

the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.¹⁷³

The historical record is replete with examples of Congress relying on the regular legislative process, including access to information held by the executive branch, to control the President’s actions in military affairs.¹⁷⁴ There is no evidence from these sources that the Framers intended the Commander in Chief Clause to deny to members of Congress information needed to supervise the executive branch and learn of agency wrongdoing.

2. Head of the Executive Branch

The Framers placed the President at the head of the executive branch to provide for unity, responsibility, and accountability. There can be no doubt that such an authorization of power was an important principle for assuring that the President, under Article II, Section 3, was positioned to “take Care that the Laws be faithfully executed.”¹⁷⁵ The delegates at the Constitutional Convention rejected the idea of a plural executive, preferring to anchor that responsibility in a single individual. Said John Rutledge, “A single man would feel the greatest responsibility and administer the public affairs best.”¹⁷⁶

Yet, placing the President at the head of the executive branch did not remove from Congress the power to direct certain executive activities and to gain access to information needed for the performance of its legislative duties. At the Convention, Roger Sherman considered the Executive “nothing more than an institution for carrying the will of the Legislature into effect.”¹⁷⁷ It was never the purpose to make the President personally responsible for executing all the laws. Rather, he was to

82 CORNELL L. REV. 695, 699-700 (1997).

¹⁷² THE FEDERALIST No. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 1961).

¹⁷³ 6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

¹⁷⁴ See generally LOUIS FISHER, PRESIDENTIAL WAR POWER (1995).

¹⁷⁵ U.S. CONST. art. II, § 3.

¹⁷⁶ 1 CONSTITUTIONAL DEBATES, *supra* note 167, at 65.

¹⁷⁷ *Id.*

ensure that the laws be faithfully executed, including laws that excluded him from some operations in the executive branch. For example, from an early date, Congress vested in certain subordinate executive officials the duty to carry out specified "ministerial" functions without interference from the President.¹⁷⁸ On many occasions, attorneys general have advised presidents that they have no legal right to interfere with administrative decisions made by the auditors and comptrollers in the Treasury Department,¹⁷⁹ pension officers,¹⁸⁰ and other officials.¹⁸¹ The President is responsible for seeing that administrative officers faithfully perform their duties, "but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties."¹⁸² In several decisions, the Supreme Court has recognized that Congress can impose certain duties on executive officials that are beyond the control and direction of the President.¹⁸³

These principles were underscored by a confrontation during the Reagan administration. In 1984, Congress passed the Competition in Contracting Act (CICA)¹⁸⁴ to give the Comptroller General certain authorities over agency contracting. President Reagan signed the bill, but instructed Attorney General Edwin Meese III to inform all executive branch agencies how to comply with the statute "in a manner consistent with the Constitution."¹⁸⁵ A memorandum from the Justice Department concluded that the contested provision for the Comptroller General was unconstitutional and should not be enforced by the agencies.¹⁸⁶ In effect, the administration had exercised an item veto by deciding what parts of a statute to carry out. This was part of a larger strategy devised by enthusiasts who believed in the

¹⁷⁸ See LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 127-28 (1998).

¹⁷⁹ See, e.g., 1 Op. Att'y Gen. 624 (1823); 1 Op. Att'y Gen. 636 (1824).

¹⁸⁰ See, e.g., 4 Op. Att'y Gen. 515 (1846).

¹⁸¹ See, e.g., 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 705 (1825); 1 Op. Att'y Gen. 706 (1825); 2 Op. Att'y Gen. 480 (1831); 2 Op. Att'y Gen. 507 (1832); 2 Op. Att'y Gen. 544 (1832); 5 Op. Att'y Gen. 287 (1851); 11 Op. Att'y Gen. 14 (1864); 13 Op. Att'y Gen. 28 (1869).

¹⁸² 19 Op. Att'y Gen. 685, 686-87 (1890).

¹⁸³ See, e.g., *United States v. Louisville*, 169 U.S. 249, 253-55 (1898); *United States v. Price*, 116 U.S. 43, 44 (1885); *Butterworth v. Hoe*, 112 U.S. 50, 68 (1884); *United States v. Schurz*, 102 U.S. 378, 394-95 (1880); *Kendall v. United States*, 37 U.S. 522, 610 (1838).

¹⁸⁴ 31 U.S.C. §§ 3551-3556 (1994).

¹⁸⁵ 2 PUB. PAPERS 1053 (1984).

¹⁸⁶ See Office of Legal Counsel, Department of Justice, Memorandum for the Attorney General, "Implementation of the Bid Protest Provisions of the Competition in Contracting Act" (Oct. 17, 1984), at 15 (on file with the author).

theory of a "unitary executive," with all parts of the executive branch directly accountable and subordinate to the President.¹⁸⁷

This theory was repeatedly struck down in the courts. In upholding the provisions of CICA, a New Jersey district court judge stated that the position of the Reagan administration "flatly violates the express instruction of the Constitution that the President shall 'take care that the Laws be faithfully executed.'"¹⁸⁸ Once a bill is enacted into law, the President executes all of it, not just the parts he favors. The district court's ruling was upheld on appeal by the Third Circuit.¹⁸⁹ The Ninth Circuit, in upholding the Comptroller General provision, said that once Reagan put his signature to CICA it became "part of the law of the land and the President must 'take care that [it] be faithfully executed.'"¹⁹⁰ In his role as head of the executive branch, the President has no authority to "employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees."¹⁹¹ A later attempt by the Justice Department to challenge the constitutionality of CICA also was turned aside in the courts.¹⁹²

Agencies have a direct responsibility to Congress, the body that creates them. In 1854, Attorney General Caleb Cushing advised departmental heads that they had a threefold relation: to the President, to execute his will in cases in which the President possessed a constitutional or legal discretion; to the law, which directs them to perform certain acts; and to Congress, "in the conditions contemplated by the Constitution."¹⁹³ Agencies are created by law and "most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government."¹⁹⁴

¹⁸⁷ For an excellent analysis of the deficiencies of this theory, see Morton Rosenberg, *Congress' Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989).

¹⁸⁸ *Ameron, Inc. v. United States Army Corps of Engineers*, 610 F. Supp. 750, 755 (D. N.J. 1985) (quoting U.S. CONST. art. II, § 3); see also *Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962 (D. N.J. 1985).

¹⁸⁹ See *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 980 (3d Cir. 1986); *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 876 (3d Cir. 1986).

¹⁹⁰ *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988) (quoting U.S. CONST. art. I, § 7).

¹⁹¹ *Id.*

¹⁹² See *United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811, 816 (D.D.C. 1992).

¹⁹³ 6 Op. Att'y Gen. 326, 344 (1854).

¹⁹⁴ *Id.*

3. "Sole Organ" in Foreign Affairs

During debate in the House of Representatives in 1800, John Marshall said that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁹⁵ This remark was later incorporated in Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*,¹⁹⁶ to suggest that the President is the exclusive policymaker in foreign affairs.¹⁹⁷ However, Justice Sutherland wrenched Marshall's statement from context to imply a position that Marshall never held. At no time, either in 1800 or later, did Marshall ever suggest that the President could act unilaterally to make foreign policy in the face of statutory limitations.

The debate in 1800 focused on the decision of President John Adams to turn over to England someone who had been charged with murder.¹⁹⁸ Because the case was already pending in an American court, some members of Congress thought that President Adams should be impeached for encroaching upon the judiciary and violating the doctrine of separated powers.¹⁹⁹ It was then that Marshall intervened to say that there was no basis for impeachment.²⁰⁰ Adams, by carrying out an extradition treaty entered into between England and the United States, was not attempting to make national policy single-handedly. Instead, he was carrying out a policy made jointly by the President and the Senate (for treaties).²⁰¹ Only after the policy had been formulated through the collective effort of the executive and legislative branches (by treaty or by statute) did the President emerge as the "sole organ" in *implementing* national policy. The President merely *announced* policy; he did not alone *make* it. Consistent with that principle, Marshall later decided a case as Chief Justice of the Supreme Court and ruled that, in a conflict between a presidential proclamation and a congressional statute governing the seizure of foreign vessels during wartime, the statute prevails.²⁰²

Sutherland's use of the "sole organ" remark in *Curtiss-Wright* prompted Justice Robert Jackson to say in 1952 that the most that can be drawn from Sutherland's decision is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress."²⁰³ Jackson also noted that "much of the [Sutherland] opinion is dictum."²⁰⁴ In 1981, the

¹⁹⁵ 10 ANNALS OF CONG. 613 (1800).

¹⁹⁶ 299 U.S. 304 (1936).

¹⁹⁷ See *id.* at 320.

¹⁹⁸ See 10 ANNALS OF CONG. 532 (1800).

¹⁹⁹ See *id.* at 552 (statement of Rep. Harper).

²⁰⁰ See *id.* at 596 (statement of Rep. Marshall).

²⁰¹ See *id.* at 597, 613-14.

²⁰² See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

²⁰³ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952).

²⁰⁴ *Id.*

District of Columbia Circuit cautioned against placing undue reliance on “certain dicta” in Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.”²⁰⁵

B. *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.²⁰⁶

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 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.”²⁰⁷

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.²⁰⁸ Nevertheless, 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.”²⁰⁹ The Fourth Circuit freely expressed its uneasiness in this area: “[T]he courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized.”²¹⁰ The court even referred

²⁰⁵ American Intern. Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

²⁰⁶ Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

²⁰⁷ United States v. Reynolds, 345 U.S. 1, 10 (1953).

²⁰⁸ See *infra* Pt. III.B.2.

²⁰⁹ United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980).

²¹⁰ *Id.* at 913-14.

to the executive branch “as the pre-eminent authority in foreign affairs.”²¹¹ However obsequious federal judges decide to behave, Congress—given its explicit constitutional duties—does not have to assume the same posture.

1. 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.²¹² Justice Stewart wrote a concurrence that spoke approvingly of independent president 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.²¹³

At first glance, this sentence seems logical: if one clause is valid, the other follows. There is, however, no necessary linkage between the two. 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.²¹⁴ Congress shares that responsibility with the President. In the field of foreign affairs, the Constitution does not give “a large degree of unshared power” either to Congress or to the President.²¹⁵

Justice Stewart offered 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

²¹¹ *Id.* at 914.

²¹² *See New York Times Co. v. United States*, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring).

²¹³ *Id.* at 728-29 (Stewart, J., concurring).

²¹⁴ *Id.* at 729 (Stewart, J., concurring).

²¹⁵ *Id.* (Stewart, J., concurring).

responsibilities in the fields of international relations and national defense.²¹⁶

No one doubts that the President has important duties and prerogatives in protecting confidential information. The more difficult question is the degree to which Congress can share in those duties and prerogatives by enacting restrictive legislation and, on that issue, Stewart's concurrence provides no answer.

Justice Stewart did acknowledge that the President lacks a monopoly: "This is not to say that Congress and the courts have no role to play."²¹⁷ Yet, he appeared to assign to Congress a narrow, subordinate role: "Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets."²¹⁸ In any event, a single concurrence by one justice has no authoritative value in settling or defining constitutional issues.

Two other points about the Stewart concurrence deserve comment. First, his overall analysis depends almost entirely upon a single case, *Curtiss-Wright*,²¹⁹ which is itself deeply flawed. Second, largely because he concluded that the presidential power in national defense and international relations is "largely unchecked by the Legislative and Judicial branches,"²²⁰ and that there is "the absence of the governmental checks and balances present in other areas of our national life,"²²¹ he concluded that the Pentagon documents should be published in the newspapers. Because of what he believed to be inadequate governmental checks on presidential power, Justice Stewart declared that "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government."²²² It was for that reason that he supported "an informed and free press" to enlighten the people.²²³

2. Recent Statutory Changes

Judicial attitudes have become somewhat more emboldened in recent decades, in part because of congressional legislation. In 1973, the Supreme Court decided that it had no authority to examine *in camera* certain documents regarding a planned

²¹⁶ *Id.* at 729-30 (Stewart, J., concurring).

²¹⁷ *Id.* at 730 (Stewart, J., concurring).

²¹⁸ *Id.* (Stewart, J., concurring).

²¹⁹ See *id.* at 727 n.2, 728-29 n.3 (Stewart, J., concurring) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

²²⁰ *Id.* at 727 (Stewart, J., concurring) (footnotes omitted).

²²¹ *Id.* at 728 (Stewart, J., concurring).

²²² *Id.* (Stewart, J., concurring).

²²³ *Id.* (Stewart, J., concurring).

underground nuclear test to sift out "non-secret components" for their release.²²⁴ In response, Congress passed legislation that clearly authorized 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.²²⁵ The Foreign Intelligence Surveillance Act of 1978²²⁶ required a court order to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information.²²⁷ The Chief Justice appoints a special court, the Foreign Intelligence Surveillance Court (FISC), to review applications submitted by government attorneys.²²⁸ In 1980, Congress passed the Classified Information Procedures Act (CIPA)²²⁹ to establish court procedures for allowing judges to screen classified information to determine whether it could be used during the trial.²³⁰

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 should not be taken by Congress. Unlike the courts, Congress has explicit duties under the Constitution to declare war,²³¹ provide for the common defense,²³² raise and support armies,²³³ and provide and maintain a navy.²³⁴ Legislative expertise exists in the Armed Services Committees, the defense appropriations subcommittees, the Budget Committees, the intelligence committees, and other legislative panels.

Deference towards the executive branch by the courts need not mean deference by Congress. Two recent decisions by the Supreme Court—one in 1988 and the other in 1989—have been misinterpreted by the executive branch and some scholars to confer an unwarranted independent authority on the part of the President in foreign affairs and national security.

3. *Department of the Navy v. Egan*

A memorandum by the Office of Legal Counsel in 1996 relied in part on

²²⁴ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 78 (1973).

²²⁵ See Freedom of Information Act Amendments § 4(B), Pub. L. No. 93-502, 88 Stat. 1562 (codified as amended at 5 U.S.C. § 552 (1994)); see also H.R. REP. NO. 93-1380, at 8-9, 11-12 (1974).

²²⁶ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 (1994)).

²²⁷ See 50 U.S.C. § 1802.

²²⁸ See *id.*

²²⁹ Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C. app. 3 §§ 1-16 (1994)).

²³⁰ See 18 U.S.C. app. 3 § 4.

²³¹ See U.S. CONST. art. I, § 8, cl. 11.

²³² See *id.* art. I, § 8, cl. 1.

²³³ See *id.* art. I, § 8, cl. 12.

²³⁴ See *id.* art. I, § 8, cl. 13.

*Department of the Navy v. Egan*²³⁵ to maximize presidential power.²³⁶ *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.²³⁷ Egan subsequently was removed.²³⁸ He then sought review by the Merit Systems Protection Board (MSPB),²³⁹ but the Supreme Court upheld the Navy's action by holding that the denial of a security clearance is a sensitive and discretionary judgment call *committed by law* to the executive agency with the necessary expertise for protecting classified information.²⁴⁰ The conflict in this case was within the executive branch, between the Navy and the MSPB and 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 submitted to the Supreme Court: "The issue in this case is one of statutory construction and 'at bottom . . . turns on congressional intent.'"²⁴¹ The parties were directed to address this question: "Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merits Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance."²⁴²

The statutory questions concerned Sections 7512, 7513, 7532, and 7701 of title 5 of the United States Code. The Justice Department's brief analyzed the relevant statutes and their legislative history and could find no basis for determining that Congress intended the MSPB to review the merits of security clearance determinations.²⁴³ The entire oral argument before the Court on December 2, 1987, was devoted to the meaning of statutes and what Congress intended by them.²⁴⁴ 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.²⁴⁵ Although the Court referred to independent

²³⁵ 484 U.S. 518 (1988).

²³⁶ OLC Memo, *supra* note 161, at 6-7.

²³⁷ See *Egan*, 484 U.S. at 522.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.* at 529-30.

²⁴¹ Brief for the Petitioner at 22, *Egan* (No. 86-1552) (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400 (1987)).

²⁴² *Id.* at (I) (emphasis added).

²⁴³ See Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit at 4-5, 13, 15-16, 18, *Egan* (No. 86-1552).

²⁴⁴ See Transcript of Oral Argument, *Egan* (No. 86-1552).

²⁴⁵ See *Egan*, 484 U.S. at 520.

constitutional powers of the President, including those as Commander in Chief and head of the executive branch,²⁴⁶ and noted the President's responsibility with regard to foreign policy,²⁴⁷ 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,"²⁴⁸ the Court added this key qualification: "unless Congress specifically has provided otherwise."²⁴⁹ The Court appears to have borrowed this thought and language from the Justice Department's brief: "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs."²⁵⁰ Nothing in the legislative history of the Civil Service Reform Act of 1978 convinced the Court that the MSPB could review, on the merits, an agency's security-clearance determination.²⁵¹

In citing the President's role as Commander in Chief, the Court stated that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."²⁵² If Congress had never enacted legislation regarding classified information, certainly the President could act in the absence of congressional authority. Yet, if Congress acts by statute, it can narrow the President's range of action.

It is helpful to place *Egan* in the context of Justice Jackson's three categories laid out in the *Steel Seizure Cases* of 1952.²⁵³ (1) when the President acts pursuant to congressional authority, his authority is at its maximum because it includes everything that he possesses under the Constitution, plus what Congress has delegated to him;²⁵⁴ (2) when he acts in the absence of congressional authority, he operates in a "zone of twilight" in which he and Congress share concurrent authority;²⁵⁵ (3) when he acts against "the expressed or implied will of Congress, his power is at its lowest ebb."²⁵⁶ *Egan* belongs in the middle category. The President's range is broad until Congress enters the "zone of twilight" and exerts its own authority.

²⁴⁶ See *id.* at 527.

²⁴⁷ See *id.* at 529.

²⁴⁸ *Id.* at 530.

²⁴⁹ *Id.* (emphasis added).

²⁵⁰ Brief for the Petitioner at 21, *Egan* (No. 86-1552).

²⁵¹ See *Egan*, 484 U.S. at 531 n.6.

²⁵² *Id.* at 527.

²⁵³ See *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁵⁴ See *id.* at 635 (Jackson, J., concurring).

²⁵⁵ *Id.* at 637 (Jackson, J., concurring).

²⁵⁶ *Id.* (Jackson, J., concurring).

4. The *Garfinkel* Case

The OLC memorandum also misapprehended the litigation that led to the Supreme Court's decision in *American Foreign Service Ass'n. v. Garfinkel*.²⁵⁷ At various points, the memorandum cites *Garfinkel* 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."²⁵⁸ Yet, the progression of this case from district court to the Supreme Court and back to the district court illustrates how a lower court may exaggerate the national security powers of the President at the expense of congressional prerogatives. The district court's interpretation of executive power was quickly vacated by the Supreme Court.

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.²⁵⁹ 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.²⁶⁰

In 1988, District Court 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.²⁶¹ Among other authorities, Judge Gasch relied on *Egan* and *Curtiss-Wright*.²⁶² 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"²⁶³—without acknowledging that *Egan* was decided on statutory, not constitutional, grounds.²⁶⁴ From *Curtiss-Wright*, he concluded that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of

²⁵⁷ 490 U.S. 153 (1989).

²⁵⁸ OLC Memo, *supra* note 161, at 3.

²⁵⁹ See National Security Decision Directive 84; see also Louis Fisher, *Congressional-Executive Struggles Over Information Secrecy Pledges*, 42 ADMIN. L. REV. 89, 90 (1990).

²⁶⁰ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1988, Pub. L. No. 100-202, § 630, 101 Stat. 1329-31, 1329-432; Treasury, Postal Service, and General Government Appropriations Act of 1989, Pub. L. No. 100-440, § 619, 102 Stat. 1721, 1756.

²⁶¹ See *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 683 (D.D.C. 1988).

²⁶² See *id.* at 676, 684-85.

²⁶³ *Id.* at 685 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)).

²⁶⁴ See *id.*

purely domestic concern."²⁶⁵ In fact, the issue in *Curtiss-Wright* was whether Congress could delegate its powers to the President in the field of foreign relations.²⁶⁶ The previous year, the Court had struck down the National Industrial Recovery Act because it delegated an excessive amount of legislative power to the President in the field of domestic policy.²⁶⁷ The question before the Court in *Curtiss-Wright* was limited to whether Congress could use more general standards when delegating its authority in foreign affairs. The Court held that more general standards were permissible because of the changing circumstances that prevail in international affairs.²⁶⁸ The issue before the Court was the extent to which Congress could delegate its power (embargo authority), not the existence of independent and autonomous powers for the President.

Having mischaracterized both Supreme Court decisions, Judge 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 relations."²⁶⁹

On October 31, 1988, the Supreme Court noted probable jurisdiction in the *Garfinkel* case.²⁷⁰ Both the House and the Senate submitted briefs objecting strongly to Judge Gasch's analysis of the President's power over foreign affairs.²⁷¹ During oral argument, after Edwin Kneedler of the Justice Department spoke repeatedly about the President's constitutional role to control classified information, one of the justices remarked, "But, Mr. Kneedler, 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."²⁷²

On April 18, 1989, the Court issued a *per curiam* order that vacated Judge Gasch's order and remanded the case for further consideration.²⁷³ In doing so, the Court cautioned Judge Gasch to tread with greater caution in expounding upon constitutional matters: "Having thus skirted the statutory question whether the

²⁶⁵ *Id.*

²⁶⁶ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

²⁶⁷ See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

²⁶⁸ See *Curtiss-Wright*, 299 U.S. at 329.

²⁶⁹ *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 685 (D.D.C. 1988).

²⁷⁰ See *American Foreign Service Ass'n v. Garfinkel*, 488 U.S. 923 (1988).

²⁷¹ See Brief and Motion of the Speaker and Leadership Group for Leave to File Brief Amici Curiae Out of Time, *American Foreign Service Ass'n* (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* (No. 87-2127).

²⁷² Transcript of Oral Argument at 57-58, *Garfinkel* (No. 87-2127).

²⁷³ See *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153 (1989) (*per curiam*).

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 authority to protect the national security.²⁷⁴ 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."²⁷⁵

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.²⁷⁶ By dismissing the plaintiff's complaint on this ground, Judge Gasch did not address any of the constitutional issues.²⁷⁷

C. Continued Executive-Legislative Collisions

In the 1970s and 1980s, Congress and the executive branch clashed over 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 was forced to drop its pretensions of having an exclusive role in determining what to release. Federal courts applied the necessary pressure in the first dispute. In the next two confrontations, the power of Congress to hold an executive official in contempt was sufficient leverage to pry loose the documents.

1. The AT&T Cases

The first dispute began in 1976 when Representative John Moss and his subcommittee requested from the American Telephone and Telegraph Co. (AT&T) information on "national security" wiretaps by the administration.²⁷⁸ AT&T 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.²⁷⁹ President Ford wrote directly to Representative Moss, "I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive

²⁷⁴ *Id.* at 158.

²⁷⁵ *Id.* at 161.

²⁷⁶ *American Foreign Service Ass'n v. Garfinkel*, 732 F. Supp. 13, 16 (D.D.C. 1990).

²⁷⁷ *See id.* at 16, 17.

²⁷⁸ *See* Timothy S. Robinson, *Judge Halts Hill Probe of Wiretaps*, WASH. POST, July 23, 1976, at A1.

²⁷⁹ *See id.*

foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security.”²⁸⁰

A district court 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.”²⁸¹

This judicial deference to presidential power was soon overturned by Judge Harold Leventhal of the District of Columbia Circuit, who rejected the claim of the Justice Department that the President “retains ultimate authority to decide what risks to national security are acceptable.”²⁸² In the opinion of the District of Columbia Circuit, 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.”²⁸³

Leventhal urged executive and legislative officials to settle their differences out of court, noting that a “compromise worked out between the branches is most likely to meet their essential needs and the country’s constitutional balance.”²⁸⁴ Continued disagreement between the Justice Department and the subcommittee forced the appellate court to intervene again to give additional guidance.²⁸⁵ Leventhal dismissed the idea that the dispute was primarily a “political question” beyond the court’s jurisdiction.²⁸⁶ When a dispute consists of a clash of authority between the two branches, “judicial abstention does not lead to orderly resolution of the dispute,”²⁸⁷ for neither branch had “final authority in the area of concern.”²⁸⁸ In a dispute of this nature, judicial intervention helps promote the “smooth functioning of government.”²⁸⁹

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.”²⁹⁰ 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

²⁸⁰ *Id.* (quoting President Ford).

²⁸¹ *United States v. American Tel. & Tel. Co.*, 419 F. Supp. 454, 461 (D.D.C. 1976).

²⁸² *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 392 (D.C. Cir. 1976).

²⁸³ *Id.*

²⁸⁴ *Id.* at 394.

²⁸⁵ *See United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

²⁸⁶ *See id.* at 126.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 127.

fact situation.”²⁹¹ The case finally was dismissed on December 21, 1978, after the Justice Department and the subcommittee settled their differences.²⁹²

2. Proceedings Against Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Henry Kissinger, Secretary of State, commanding him to provide documents relating to covert actions.²⁹³ After he failed to comply with the subpoena, the Committee met in open session to determine what action should be taken against him. By a vote of 10 to 2, the Committee recommended that the Speaker certify the committee report regarding Kissinger’s contumacious conduct and proceed to a contempt citation.²⁹⁴

Acting on the advice of the Justice Department, President Ford invoked executive privilege on November 14 to keep the material from the committee.²⁹⁵ He said that the documents included “recommendations from previous Secretaries of State to previous Presidents,” jeopardizing the internal decisionmaking process.²⁹⁶ 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.”²⁹⁷ Recognizing that Congress had constitutional responsibilities “to investigate fully matters relating to contemplated legislation,”²⁹⁸ 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.”²⁹⁹ Ford pointed out that some of the documents concerned the National Security Council (NSC), and that, as of November 3, Kissinger was no longer his Assistant for National Security

²⁹¹ *Id.*

²⁹² See HOUSE SELECT COMMITTEE ON CONGRESSIONAL OPERATIONS, 95TH CONG. COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS, CURRENT TO DECEMBER 31, 1978, at 50 (Comm. Print 1978).

²⁹³ See H.R. REP. NO. 94-693, at 4-5 (1975).

²⁹⁴ See *id.* at 2.

²⁹⁵ See *The President's News Conference of November 14, 1975*, in 2 PUB. PAPERS 1866, 1867 (1975).

²⁹⁶ *Id.*

²⁹⁷ *Letter to the Chairman of the House Select Committee on Intelligence About Contempt Resolutions Concerning Testimony of Secretary of State Henry Kissinger*, in 2 PUB. PAPERS 1887 (1975).

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1889.

Affairs.³⁰⁰ As to those materials, "there has been a substantial effort by the NSC staff to provide these documents."³⁰¹

Calling the contempt threat "frivolous," Kissinger warned that it would have adverse effects worldwide: "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."³⁰² On December 9, three committee members and two staff members visited the White House to determine which documents would be made available.³⁰³ 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.³⁰⁴ 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."³⁰⁵

3. The James Watt Episode

The third dispute concerned a decision by Interior Secretary James Watt to withhold thirty-one documents from a House subcommittee in 1981.³⁰⁶ The confrontation quickly escalated to a committee subpoena for the documents and a recommendation by the House Committee on Energy and Commerce that Watt be cited for contempt.³⁰⁷ When the full committee acted, the vote to hold Watt in contempt was 23 to 19.³⁰⁸

Attorney General William French 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, considerable weaker than its interests when specific legislative proposals are in question."³⁰⁹ This was a remarkably ineffective argument. Courts have held consistently that the investigative power is available not merely to legislate or when a "potential" for legislating exists, but even for pursuits down blind alleys.³¹⁰ At the Philadelphia Convention, George Mason

³⁰⁰ See *id.* at 1889-90.

³⁰¹ *Id.* at 1890.

³⁰² 31 CONG. Q. ALMANAC 406 (1975) (quoting Secretary of State Kissinger).

³⁰³ See *id.* at 407.

³⁰⁴ See *id.*

³⁰⁵ *Id.*

³⁰⁶ See William Chapman, *Hill Panel Votes to Cite Watt for Contempt*, WASH. POST, Feb. 26, 1982, at A1.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ STAFF OF HOUSE COMMITTEE ON ENERGY AND COMMERCE, 97TH CONG., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 3 (Comm. Print 1981) [hereinafter EXECUTIVE PRIVILEGE].

³¹⁰ See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975).

remarked that Congressmen "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices."³¹¹ Moreover, Congress easily could erase Smith's artificial distinction by introducing a bill whenever it had oversight in mind.

Smith also claimed that all the documents at issue were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations."³¹² Attorney General Smith's comments about "foreign policy considerations" force one to wonder whether the Attorney General and his legal assistants in the Justice Department were unaware that Congress had a clearly legitimate and constitutionally-based reason for requesting the information. The dispute with Watt concerned the impact of Canadian investment and energy policies on American commerce,³¹³ 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.³¹⁴

The eventual outcome of this dispute demonstrated that the documents were not, as Smith argued, of "fundamental" importance to the deliberative process. They could have been, and eventually were, shared with the subcommittee. The White House delivered the documents to a secure room on Capitol Hill and only subcommittee members reviewed them.³¹⁵ Conditions were imposed: the technical assistance of subcommittee staff would not be available, and members could not photocopy the documents, but could take notes.³¹⁶ Subcommittee members, however, were granted access to the papers they wanted.

4. Immigration Cases

Newspaper stories in 1999 revealed the extent to which the Immigration and Naturalization Service (INS) relies on secret or classified evidence to take action against aliens. In late 1999, an immigration judge ordered the release of an Egyptian who had been kept in jail for three and a half years on grounds that the INS considered him a national security threat.³¹⁷ Classified FBI evidence linked him to

³¹¹ 2 CONSTITUTIONAL DEBATES, *supra* note 167, at 206; *see also id.* at 199 (Mason's comments, as recorded by Madison).

³¹² EXECUTIVE PRIVILEGE, *supra* note 309, at 2.

³¹³ *See* Chapman, *supra* note 306, at A5.

³¹⁴ U.S. CONST. art. I, § 8, cl. 3.

³¹⁵ *See* H.R. REP. 97-898, at 8 (1982).

³¹⁶ *See id.*; *Contempt of Congress: Hearings Before the House Committee on Energy and Commerce*, 97th Cong. 385-94 (1982); Margot Hornblower, *White House Avoids Hill Showdown Over Documents*, WASH. POST, Mar. 17, 1982, at A5.

³¹⁷ *See* Lorraine Adams and David A. Vise, *INS Drops Plea to Reno to Detain Egyptian*, WASH. POST, Nov. 30, 1999, at A5.

Sheik Omar Abdel Rahman who had been convicted of conspiring to bomb the United Nations.³¹⁸ The judge held that most of the evidence was “double or triple hearsay.”³¹⁹ INS Commissioner Doris Meissner “took the unusual step of citing ‘national security implications’ as a basis for asking [Attorney General Janet] Reno to order that [the Egyptian] not be released.”³²⁰ The previous month, a federal district judge in New Jersey had ruled that “it was unconstitutional to detain a Palestinian immigrant on the basis of secret evidence.”³²¹ Representative David Bonior recently introduced legislation to prohibit the use of classified evidence in deportation proceedings.³²² In approximately twenty pending immigration cases, the INS is relying on secret evidence.³²³

D. *Congressional Access to Executive Branch Employees*

In 1997, the Select House and Senate Intelligence Committees considered legislation to expand executive employee access to Congress. A Senate report explained that current “executive branch policies on classified information could interfere with [the Select Intelligence Committee’s] ability to learn of wrongdoing within the elements over which it has oversight responsibility.”³²⁴ In creating the Intelligence Committees in the 1970s, Congress relied heavily on them to guard the interests of Congress as an institution.³²⁵ To a great degree, Congress delegated to the committees the responsibility for monitoring and controlling the intelligence community.

A memorandum of November 26, 1996, from the Office of Legal Counsel (OLC), an office within the Department of Justice, analyzed the constitutionality of two congressional enactments concerning the rights of federal employees to provide information to Congress:³²⁶ the Lloyd-LaFollette Act³²⁷ and Section 625 of the

³¹⁸ *See id.*

³¹⁹ *Id.* (quoting Donn Livingston, an immigration judge).

³²⁰ Benjamin Weiser, *U.S. Frees Man Jailed 3 Years on Secret Data*, N.Y. TIMES, Nov. 30, 1999, at A1.

³²¹ *Id.* at B12.

³²² *See id.*

³²³ *See* David Cole, Editorial, *No More Secret Evidence*, WASH. POST, Dec. 3, 1999, at A41.

³²⁴ S. REP. NO. 105-24, at 26 (1997).

³²⁵ Senator Walter Huddleston, who served on the Senate Intelligence Committee, remarked in 1980, “[T]he two broadly based Intelligence Committees will be acting as proxies for the American people.” 126 CONG. REC. 13095 (1980). Congressman 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.” 131 CONG. REC. 32436 (1985).

³²⁶ Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Michael J. O’Neil, General Counsel of the Central Intelligence Agency, Nov. 26, 1996 (on file with

Treasury, Postal Service Appropriation Act for Fiscal 1997.³²⁸ Both statutory provisions give executive employees the right to furnish information to either chamber of Congress or to a committee or member thereof.

1. The Lloyd-LaFollette Act

The OLC memorandum swept broadly to challenge the constitutionality of the Lloyd-LaFollette Act, originally enacted in 1912.³²⁹ The statute responded to presidential efforts to block the flow of information from executive employees to Congress. For example, in 1902, President Theodore Roosevelt issued a “gag order” prohibiting executive branch employees from seeking to influence legislation “individually or through associations,” except through heads of departments.³³⁰ Failure to abide by this presidential order resulted in possible dismissal from government service.³³¹ In 1909, President William Howard Taft issued another gag order, forbidding any bureau chief or subordinate in government to apply to either house of Congress, to any committee of Congress, or to any member of Congress, for legislation, appropriations, or congressional action of any kind,

except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.³³²

Through language added to an appropriations bill in 1912, Congress nullified the gag orders issued by Roosevelt and Taft.³³³ The debate on this provision underscored Congress’ concern that the gag orders would put congressional committees in the position of hearing only “one side of a case”: the views of Cabinet officials rather than the rank-and-file employees of a department.³³⁴ Members wanted agency employees to express complaints about the conduct of their supervisors.³³⁵ The stated purpose of the legislation was to ensure that government employees could exercise

author).

³²⁷ 5 U.S.C. § 7211 (1994).

³²⁸ Pub. L. No. 104-208, 110 Stat. 3009-359 (codified at 5 U.S.C. § 7301 (1994)).

³²⁹ See 37 Stat. 539, 555 (1912).

³³⁰ 48 CONG. REC. 4513 (1912).

³³¹ See *id.*

³³² *Id.*

³³³ See 37 Stat. 539 (1912).

³³⁴ 48 CONG. REC. at 4657 (1912).

³³⁵ See *id.*

their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.³³⁶

Lawmakers viewed the gag orders as an effort “to prevent the Congress from learning the actual conditions that surrounded the employees of the service.”³³⁷ If agency employees could speak only through the heads of departments, “there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth or to conceal their official acts it is within their power to do so.”³³⁸ Another legislator remarked, “The vast army of Government employees have signed no agreement upon entering the service of the Government to give up the boasted liberty of the American citizens.”³³⁹ Even more explicit was the following statement delivered during a debate in the Senate:

Mr. President, it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States.³⁴⁰

Section 6 of the Postal Services Appropriations Act of 1912 added the language used to nullify the gag orders.³⁴¹ Section 6, known as the Lloyd-LaFollette Act, provided a number of procedural safeguards to protect agency officials from arbitrary dismissals. The final sentence of Section 6 reads: “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”³⁴²

The Civil Service Reform Act of 1978 later supplemented Section 6 and codified it as permanent law.³⁴³ The conference report elaborated on the need for executive employees to disclose information to Congress:

The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee

³³⁶ See *id.* at 5201.

³³⁷ *Id.* at 5235.

³³⁸ *Id.* at 5634 (statement of Rep. Lloyd).

³³⁹ *Id.* at 5637 (statement of Rep. Wilson).

³⁴⁰ *Id.* at 10674 (statement of Sen. Reed).

³⁴¹ See 37 Stat. 539, 555 (1912).

³⁴² *Id.*

³⁴³ See 5 U.S.C. § 7211 (1994).

may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.³⁴⁴

As codified in 1978, any interference with the right of executive branch employees in communicating with Congress becomes an enforceable right along with other prohibited personnel practices. The United States 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."³⁴⁵

2. Whistleblower Protection Act of 1989

Congress supplemented these federal employee protections by enacting legislation in 1989, finding that "[f]ederal employees who make disclosures described in section 2302(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"³⁴⁶ and that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service."³⁴⁷ 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.³⁴⁸ 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."³⁴⁹ In signing the bill, President George Bush said that "a true whistleblower is a public servant of the

³⁴⁴ S. REP. NO. 95-1272, 132 (1978).

³⁴⁵ 5 U.S.C. § 2302(b) (1994).

³⁴⁶ Pub. L. 101-12 § 2(a)(1), 103 Stat. 16 (1989).

³⁴⁷ *Id.* § 2(a)(2).

³⁴⁸ *See id.* § 1213(a)(1).

³⁴⁹ *Id.*

highest order. . . . [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."³⁵⁰

3. Congressional Action in 1998

In order to examine the objections raised by the OLC, the Senate Select Committee on Intelligence held two days of hearings in 1998.³⁵¹ Professor Peter Raven-Hansen of the George Washington University Law School and I appeared the first day to rebut the OLC's position that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information.³⁵² On the second day of hearings, I testified alongside an attorney from the OLC.³⁵³

Based on these hearings and its own independent staff analysis, the Committee reported legislation despite claims by the Justice Department that the bill was an unconstitutional invasion of presidential prerogatives.³⁵⁴ The Committee acted unanimously, voting 19 to 0 to report the measure.³⁵⁵ The bipartisan vote for legislative prerogatives was solid. The Senate report said that the "Administration's intransigence on this issue compelled the Committee to act."³⁵⁶ The bill passed the Senate by a vote of 93 to 1.³⁵⁷

The House Permanent Select Committee on Intelligence 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. I testified before the House Committee as well.³⁵⁸ 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."³⁵⁹ The two committees reported and enacted legislation with this language:

³⁵⁰ *Remarks on Signing the Whistleblower Protection Act of 1989*, in 1 PUB. PAPERS 391 (1989).

³⁵¹ *See Disclosure of Classified Information to Congress, 1988: Hearings Before the Senate Select Comm. on Intelligence*, 105th Cong. (1998).

³⁵² *See id.* at 13-39.

³⁵³ *See id.* at 45.

³⁵⁴ *See S. REP. NO. 105-165* (1998).

³⁵⁵ *See id.* at 2.

³⁵⁶ *Id.* at 5.

³⁵⁷ *See 144 CONG. REC.* at S1564 (daily ed. Mar. 9, 1998).

³⁵⁸ *See Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act: Hearings Before the House Permanent Select Committee on Intelligence*, 106th Cong. 32-53 (1998).

³⁵⁹ H.R. REP. NO. 105-747, pt.I, at 15 (1998).

“national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President.”³⁶⁰ The statute further provided 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.”³⁶¹

CONCLUSION

To perform its constitutional functions, Congress depends on information obtained from the executive branch. The Supreme Court remarked in 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; 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.³⁶²

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, to inform the public, and to protect its integrity, dignity, reputation, and privileges. To enforce these constitutional duties, Congress possesses the inherent power to issue subpoenas and to punish for contempt.³⁶³ 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.”³⁶⁴

The power of Congress to investigate reaches all sectors of executive branch activity, not merely domestic policy, but also foreign, military, and national security policy. The first major congressional investigation, in 1792, involved the ill-fated expedition of Major General St. Clair.³⁶⁵ To buttress its power to investigate, Congress frequently enacts statutory language that requires the executive branch to produce information.³⁶⁶ When Congress passed the Budget and Accounting Act of

³⁶⁰ Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, § 701(b)(1), 112 Stat. 2413 (1998).

³⁶¹ *Id.* § 701(b)(3); see also H.R. REP. NO. 105-780, at 19 (1998).

³⁶² *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

³⁶³ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 207 (1821).

³⁶⁴ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

³⁶⁵ See 3 ANNALS OF CONG. 490 (1792).

³⁶⁶ See *supra* Pt. III.

1921,³⁶⁷ 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 committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request."³⁶⁸ The current version regarding congressional requests for information in the budget area appears in title 31 of the United States Code.³⁶⁹

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 United States Government involved in intelligence activities" to "keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action."³⁷⁰ 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."³⁷¹

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.³⁷²

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 adequately to 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-

³⁶⁷ Pub. L. 67-13, 42 Stat. 20 (1921).

³⁶⁸ *Id.* § 212.

³⁶⁹ See 31 U.S.C. § 1113 (1994).

³⁷⁰ Pub. L. 102-88 § 502, 105 Stat. 442 (1991).

³⁷¹ 50 U.S.C. § 413a (1994), as added by the 1991 Intelligence Authorization Act, Pub. L. 102-88, 105 Stat. 442 (1991); STAFF OF HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, 104TH CONG., COMPILATION OF INTELLIGENCE LAWS AND RELATED LAWS AND EXECUTIVE ORDERS OF INTEREST TO THE NATIONAL INTELLIGENCE COMMUNITY 20 (Comm. Print 1995).

³⁷² 2 U.S.C. § 194(a) (1994).

and-file—who are willing to share with Congress information about operations within their agencies. On the basis of two centuries of experience, Congress knows the value of gaining access to information regarding agency corruption and mismanagement that an administration may want to conceal.

No doubt the executive branch has an interest in seeing that agency information is disclosed only through authorized channels. Part of that concern has 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 the executive branch is directed toward the control of information that might be damaging to national security, the intelligence committees have procedures in place designed to protect against such damage. To question these procedures would put the executive branch in the position of asserting that only its procedures can safely protect national security, even at the cost of denying Congress the information it needs to discharge its constitutional duties.