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Congressional Investigations: Subpoenas and Contempt Power

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Congressional Investigations: Subpoenas and Contempt Power

Summary

When conducting investigations of the executive branch, congressional committees and Members of Congress generally receive the information required for legislative needs. If agencies fail to cooperate or the President invokes executive privilege, Congress can turn to a number of legislative powers that are likely to compel compliance. The two techniques described in this report are the issuance of subpoenas and the holding of executive officials in contempt. These techniques usually lead to an accommodation that meets the needs of both branches. Litigation is used at times, but federal judges generally encourage congressional and executive parties to settle their differences out of court. The specific examples in this report explain how information disputes arise and how they are resolved.

For legal analysis see CRS Report 95-464A, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry*, by Morton Rosenberg, and CRS Report RS30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg. A number of legislative tools, including subpoenas and contempt citations, are covered in CRS Report RL30966, *Congressional Access to Executive Branch Information: Legislative Tools*, by Louis Fisher. For a general report on oversight methods, see CRS Report RL30240, *Congressional Oversight Manual*.

This report will be updated as events warrant.

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Congressional Investigations: Subpoenas and Contempt Citations

When conducting investigations of the executive branch, congressional committees and Members of Congress generally receive the information required for legislative needs. If agencies fail to cooperate or the President invokes executive privilege, Congress can turn to a number of legislative powers that are likely to compel compliance. The two techniques described in this report are the issuance of subpoenas and the holding of executive officials in contempt. These procedures usually lead to an accommodation that meets the needs of both branches. Litigation is used at times, but federal judges generally encourage congressional and executive parties to settle their differences out of court. The specific examples in this report explain how information disputes arise and how they are resolved.

Congressional Investigations

Although the congressional power to investigate is not expressly provided for in the Constitution, the framers understood that legislatures must oversee the executive branch. Under British precedents, lawmakers were expected to hold administrators accountable. James Wilson, one of the framers and later a Justice on the Supreme Court, expected the House of Representatives to “form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.”¹ In an essay in 1774, he described members of the British House of Commons as “grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.”²

At the Philadelphia Convention, George Mason emphasized that Members of Congress “are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices.”³ Charles Pinckney submitted a list of congressional prerogatives, including: “Each House shall be Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same.”⁴ The Constitution, however, provided no express powers for Congress to investigate, issue subpoenas, or to punish for contempt. What was

¹ 1 The Works of James Wilson 415 (1967 ed.).

² 2 Id. 731 (essay “Consideration on the Nature and Extent of the Legislative Authority of the British Parliament”).

³ 2 The Records of the Federal Convention of 1787, at 206 (Farrand ed. 1937). See also Mason’s comments as reported by Madison, id. at 199.

⁴ Id. at 341.

left silent would be filled within a few years by implied powers and legislative practice.

Early Precedents

During the First Congress, the House debated a request from Robert Morris to investigate his conduct as Superintendent of Finance during the period of the Continental Congress. The matter was referred to a select committee consisting of three Members.⁵ The Senate adopted a different approach, preferring to authorize President George Washington to appoint three commissioners to look into the matter and report the results to Congress.⁶ The House persisted with its committee, which issued a report on February 16, 1791.⁷ The House committee investigation did not produce a total collision between the two branches because the area of inquiry concerned activities that occurred during the previous Continental Congress. Nevertheless, the House inquiry is significant because the House decided, as noted by James Madison, that it was necessary for Congress to acquire information in order to “do justice” to the country and to public officers.⁸

A 1790 request from Treasury Secretary Alexander Hamilton to Congress, seeking financial compensation for Baron von Steuben, triggered an early executive-legislative clash over access to documents. Although Hamilton initially withheld some materials from Congress, lawmakers received sufficient access to documents to permit passage of a bill for Steuben.⁹ In this confrontation the leverage of Congress was formidable. Without cooperation from the Administration, Congress could refuse to pass the bill.

In 1792, the House conducted a major investigation by appointing a committee to inquire into the heavy military losses suffered by the troops of Maj. Gen. Arthur St. Clair to Indian tribes. The committee was empowered “to call for such persons, papers, and records, as may be necessary to assist their inquiries.”¹⁰ According to the account of Thomas Jefferson, President Washington convened his Cabinet to consider the House request. 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

⁵ 1 Annals of Cong. 1168, 1204 (February 8, 10, 1790).

⁶ Id. at 1233 (February 11, 1790).

⁷ 2 Annals of Cong. 2017 (February 16, 1791).

⁸ Id. at 1515 (March 19, 1790).

⁹ 6 Stat. 2 (1790); 1 Annals of Cong. 972, 978-80; 2 Annals of Cong. 1572, 1584, 1606, 1609-10 (April 6, 19, May 7, 10, 1790); Kenneth R. Bowling and Helen Veit, eds., *The Diary of William Maclay* 265-74 (1988); 6 *The Papers of Alexander Hamilton* 221, 326-27 (Syrett ed. 1962).

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

exercise a discretion. Fourth, that neither the committee nor the 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.¹¹

The Cabinet concluded that “there was not a paper which might not be properly produced.”¹² 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.¹³ The general principle of executive privilege had been established because the President could refuse papers “the disclosure of which would injure the public.” The injury had to be to the *public*, not to the President or his associates.

The first use of the investigative power to protect the dignity of the House occurred in 1795. William Smith, a Representative from South Carolina, announced that a Robert Randall had confided in him a plan to seek a grant of some twenty million acres from Congress, to be divided into forty shares. More than half that amount would be reserved to lawmakers who assisted him. The House passed a resolution directing the Sergeant at Arms to arrest Randall and one of his associates, Charles Whitney.¹⁴ On January 6, 1796, the House concluded that Randall had been guilty of contempt and a breach of House privileges by attempting to corrupt the integrity of its Members. He was brought to the bar of the House, reprimanded, recommitted to custody, and released a week later.¹⁵

Four years later, the Senate opened an investigation into material published by William Duane, editor of the *Aurora* newspaper.¹⁶ The Federalist Senate, voting 20 to 8 along party lines, regarded language in the newspaper as “false, defamatory, scandalous, and malicious; tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States.”¹⁷ Duane was ordered to appear at the bar of the Senate to defend his conduct. He appeared and asked for the assistance of counsel, which the Senate granted. He then refused to return, explaining that he was “bound by the most sacred duties to decline any further voluntary attendance upon that body, and leave them to pursue such measures in this case as, in their *wisdom*, they may deem meet.”¹⁸

¹¹ 1 The Writings of Thomas Jefferson 304 (Bergh ed. 1903).

¹² Id. at 305.

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

¹⁴ Annals of Cong., 4th Cong., 1st Sess. 155-70 (1795).

¹⁵ Id. at 171-245.

¹⁶ Annals of Cong., 6th Cong., 1st-2d Sess. 63 (February 26, 1800).

¹⁷ Id. at 111-12.

¹⁸ Id. at 122 (emphasis in original).

It was for that action, and not the published material, that the Senate voted 16-12 to hold him in contempt.¹⁹ A warrant was issued for his arrest, but Duane managed to stay a step ahead of the Sergeant at Arms.²⁰ The Senate adopted a resolution (13 to 4) requesting the President to prosecute Duane in the courts. He was indicted by a federal grand jury, but after several postponements was never convicted.²¹

The first committee witness punished for contempt of the House was Nathaniel Rounsavell, a newspaper editor, charged in 1812 with releasing sensitive information to the press. After being held in custody, he admitted that part of the source of his story was overhearing a conversation between Members of the House, but refused to identify the lawmakers or say where the conversation took place. In a letter he disclaimed any intention of showing disrespect to the House. Rep. John Smilie then identified himself as the Member who Rounsavell overheard, stating that the information that appeared in the newspaper was “of no importance” and that if the House wanted a victim he offered himself as a substitute for Rounsavell. The Speaker asked Rounsavell whether he was willing to answer questions put to him. After he agreed that he was, the House voted that he had purged himself of contempt and he was released.²²

Judicial Guidelines

The Supreme Court first placed limits on congressional investigations in *Anderson v. Dunn* (1821). Rep. Lewis Williams informed the House that a Col. John Anderson had offered him \$500 if he would reciprocate with certain favors. The House ordered the Sergeant at Arms to take Anderson into custody. After interrogation by the Speaker, the House voted Anderson in contempt and in violation of the privileges of the House. The Speaker reprimanded him and released him from custody.²³ The Supreme Court upheld the House action as a valid exercise in self-preservation. Without the power to punish for contempt, the House would be left “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it.”²⁴ However, the Court ruled that the power to punish for contempt was not unlimited. The House had to exercise the least possible power adequate to fulfill legislative needs (in this case, the power of imprisonment), and the duration of punishment could not exceed the life of the legislative body. Thus, imprisonment had to cease when the House adjourned at the end of a Congress.²⁵

¹⁹ Id. at 123.

²⁰ James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Law and American Civil Liberties* 297-98 (1956).

²¹ Id. at 306; *Annals of Cong.*, 6th Cong., 1st-2d Sess. at 184.

²² *Annals of Cong.*, 12th Cong., 1st Sess. 1255-74.

²³ *Annals of Cong.*, 15th Cong., 1st Sess. 580-83, 592-609, 777-90 (1818).

²⁴ *Anderson v. Dunn*, 6 Wheat. 204, 228 (1821).

²⁵ The Senate, a continuing body, is not limited by the expiration of a Congress; *McGrain v. Daugherty*, 273 U.S. 135, 181-82 (1927).

As a result of this decision, it would be possible for someone to violate the dignity of the House in the closing days of a Congress and be punished only for the remaining period. To handle such situations, Congress passed legislation in 1857 to enforce the attendance of witnesses on the summons of either House. If an individual fails to appear or refuses to answer pertinent questions, that person can be indicted for misdemeanor in the courts.²⁶ Witnesses can invoke their Fifth Amendment right not to incriminate themselves.

Initially the Court defined the legislative power to investigate somewhat narrowly. In 1881, it spoke of Congress investigating only with “valid legislation” in mind.²⁷ That particular case concerned the power of Congress to investigate the affairs of private citizens engaged in a real-estate pool. If the individuals committed a crime or offence, the Court said the judiciary would be the proper branch to act. The Court worried about “a fruitless investigation into the personal affairs of individuals.”²⁸

Later judicial rulings came to recognize a much greater sweep to congressional authority. In 1927, the Court faced a situation where Congress looked not into the activities of people in the private sector but rather the conduct of the executive branch, particularly the administration of the Justice Department. The Court first stated that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary of the legislative function.”²⁹ Congress could not legislate “wisely or effectively in the absence of information.”³⁰ Unlike the decision in 1881, the Court in 1927 did not confine congressional investigations to “valid legislation.” Congress had a right to seek information “for legislative purposes.”³¹ The Court recognized that the Senate resolution that launched the investigation of the Justice Department

does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or mistreated, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited.³²

²⁶ 11 Stat. 155 (1857), amended by 12 Stat. 333 (1862). The 1857 law, as amended, was upheld by the Supreme Court; *In re Chapman*, 166 U.S. 661 (1897). As amended in 1936 (49 Stat. 2041) and 1938 (52 Stat. 942), this law is codified at 2 U.S.C. § 192-94 (2000).

²⁷ *Kilbourn v. Thompson*, 103 U.S. 168, 195 (1881).

²⁸ *Id.*

²⁹ *McGrain v. Daugherty*, 273 U.S. at 174.

³⁰ *Id.* at 175.

³¹ *Id.* at 177.

³² *Id.*

It was enough, said the Court, that the subject of investigation “was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.”³³ That is, a *potential* for legislation was sufficient. A congressional investigation could have legislation as a possible, but not a necessary, outcome. Investigation as pure oversight into the operations of the executive branch was adequate justification.

To accomplish the purpose of legislation or oversight, each House is entitled to compel witnesses to provide testimony pertinent to the legislative inquiry.³⁴ Even the “potential” theory too narrowly circumscribes legislative investigations. Courts recognize that committee investigations may take researchers up “blind alleys” and into nonproductive enterprises: “To be a valid legislative inquiry there need by no predictable end result.”³⁵

Subpoenas

The Supreme Court has described the congressional power of inquiry as “an essential and appropriate auxiliary to the legislative function.”³⁶ The issuance of a subpoena pursuant to an authorized investigation is “an indispensable ingredient of lawmaking.”³⁷ This section describes how committee subpoenas are used to force testimony and the release of documents, and how Congress can grant immunity to individuals who exercise their Fifth Amendment privilege against self-incrimination. The particular examples of subpoena power selected here include these actions: Rep. John Moss arrayed against the Federal Trade Commission, a House subcommittee requesting documents regarding Justice Department policy on seizing suspects abroad, a conflict between a House committee and the Justice Department involving the Inslaw affair, and a Senate committee seeking documents on Whitewater.

Issuing a Subpoena

Lawmakers and their committees usually obtain the information they need for legislation or oversight without threats of subpoenas. They understand that committee investigations have to satisfy certain standards. Legislative inquiries must be authorized by Congress, pursue a valid legislative purpose, raise questions relevant to the issue being investigated, and inform witnesses why questions put to them are pertinent.³⁸ Congressional inquiries may not interfere with adjudicatory

³³ Id.

³⁴ Id. at 180.

³⁵ *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975).

³⁶ *McGrain v. Daugherty*, 272 U.S. 135, 174 (1927).

³⁷ *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 505.

³⁸ *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961); *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (1976).

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proceedings before a department or agency.³⁹ Other arguments may be offered to resist a subcommittee subpoena, such as the need to protect confidential trade secrets or to protect information within the Justice Department,⁴⁰ but those justifications can be overridden by legislative needs.

Federal courts give great deference to congressional subpoenas. If the investigative effort falls within the “legitimate legislative sphere,” the congressional activity—including subpoenas—is protected by the absolute prohibition of the Speech or Debate Clause, which prevents Members of Congress from being “questioned in any other place.” In a 1975 case, the Supreme Court ruled that such legislative activities are immune from judicial interference.⁴¹ A concurrence by Justices Marshall, Brennan, and Stewart did not agree that “the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry.”⁴² In a dissent, Justice Douglas rejected the majority’s position regarding broad legislative immunity from judicial review.⁴³

As a tool of legislative inquiries, both Houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee’s jurisdiction. Committee subpoenas “have the same authority as if they were issued by the entire House of Congress from which the committee is drawn.”⁴⁴ If a witness refuses to testify or produce papers in response to a committee subpoena, and the committee votes to report a resolution of contempt to the floor, the full House or Senate may vote in support of the contempt citation.

Committees and subcommittees are authorized to request, by subpoena, “the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.” For a committee or subcommittee to issue a subpoena, a majority must be present, although the power to authorize and issue subpoenas may be delegated to the committee chairman.⁴⁵ Committee rules can vary the procedures for issuing subpoenas.

A congressional subpoena identifies the name of the committee or subcommittee; the date, time, and place of the hearing a witness is to attend; and the

³⁹ *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

⁴⁰ See John C. Grabow, *Congressional Investigations: Law and Practice* 79-85 (1988); James Hamilton & John C. Grabow, “A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas,” 21 *Harv. J. Legis.* 145 (1984); James Hamilton, *The Power to Probe* 57-78 (1977); and Raoul Berger, “Congressional Subpoenas to Executive Officials,” 75 *Colum. L. Rev.* 865 (1975).

⁴¹ *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 501.

⁴² *Id.* at 515.

⁴³ *Id.* at 518.

⁴⁴ *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (1978), cert. denied, 441 U.S. 943 (1979).

⁴⁵ House Rule XI(2)(m). See also Senate Rule XXVI(1).

particular kind of documents sought. A subpoena may state that if the documents are delivered by a particular date, the person who has custody over the documents need not appear. Congressional subpoenas are typically served by the U.S. Marshal's office or by committee staff. The Senate has statutory authority to seek civil enforcement of its subpoenas over private individuals.⁴⁶ The House relies on its rules and criminal contempt statutes.⁴⁷

It is rare for an executive official to wholly sidestep a congressional subpoena. In 1989, a House subcommittee issued a subpoena to former Housing and Urban Development Secretary Samuel Pierce. He appeared, but invoked his constitutional right not to incriminate himself. He became the first former or current Cabinet official to invoke the Fifth Amendment since the Teapot Dome scandal of 1923.⁴⁸ In 1991, Secretary of Commerce Robert Mosbacher became the first sitting Cabinet officer to refuse to appear before a congressional committee to explain why he would not comply with a subpoena.⁴⁹

In 1981, Attorney General William French Smith issued an opinion that analyzed how the Administration should respond to a congressional subpoena. He concluded that when Congress issues a subpoena as part of a "legislative oversight inquiry," access by Congress has less justification than when it seeks information for legislative purposes.⁵⁰ He acknowledged that Congress "does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation." Yet "the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question."⁵¹ This distinction between legislation and oversight is not so crisp. It is well established that Congress has as much constitutional right to oversee the execution of a law as to pass it. Moreover, even if such a distinction could be created, Congress could easily erase it by introducing a bill to "justify" every oversight proceeding.

⁴⁶ 2 U.S.C. §§ 288b(b), 288d (2000); 28 U.S.C. § 1365 (2000).

⁴⁷ 2 U.S.C. §§ 192-194 (2000).

⁴⁸ Valerie Richardson and Jerry Seper, "House Committee Subpoenas Pierce," *Washington Times*, September 21, 1989, at A5; Gwen Ifill, "Pierce Invokes Fifth Amendment," *Washington Post*, September 27, 1989, at A1; Haynes Johnson, "Teapot Dome of the '80s," *Washington Post*, September 29, 1989, at A2.

⁴⁹ Susan B. Glasser, "Secretary Spurns Census Subpoena," *Roll Call*, December 12, 1991, at 1.

⁵⁰ 5 O.L.C. 27, 29-30 (1981).

⁵¹ *Id.* at 30.

Immunity

Private citizens, more so than executive agency officers, may invoke certain constitutional protections, such as the First Amendment rights of free association and free speech. Witnesses may claim the Fifth Amendment privilege against self-incrimination.⁵² A witness before a congressional committee has a constitutional right not “to be a witness against himself.”⁵³ If a witness refuses to testify by invoking the Fifth Amendment, Congress can vote to force testimony by granting the witness either partial or full immunity.

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

During the Iran-Contra investigation in 1987, Congress offered partial immunity to several witnesses, including Col. Oliver North. He was later convicted of three felonies, but those charges were subsequently dismissed because of his immunized testimony. Under standards imposed by the D.C. Circuit, prosecutors must show that a defendant’s testimony could have had no influence on the witnesses called to a trial. Otherwise, the remarks of the witnesses are “tainted” and may not be used to convict.⁵⁴ Immunized congressional testimony can, therefore, present a formidable problem for later prosecution.

In such situations Congress decides whether it is more important to inform itself and the public rather than to have a successful prosecution. Lawrence Walsh, the independent counsel for Iran-Contra, described this setting of national priorities: “If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power. . . . The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need.”⁵⁵

⁵² *Wilkinson v. United States*, 365 U.S. at 409.

⁵³ U.S. Const., amend 5 (“No person . . . shall be compelled in any criminal case to be a witness against himself”).

⁵⁴ *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). See also *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992).

⁵⁵ Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” 25 *Houston L. Rev.* 1, 9 (1988). For proposals to change the immunity statute to make congressional grants of immunity less costly to prosecutors and to Congress, see Ronald F. Wright, “Congressional Use of Immunity Grants After Iran-Contra,” 80 *Minn. L. Rev.* 407 (1995).

The *Ashland* Case

A dispute between a House subcommittee and the Federal Trade Commission (FTC) began on April 16, 1975, when the commission issued an order requiring Ashland Oil, Inc. to submit information on Ashland's estimates of natural gas reserves on various leases. Ashland submitted the information on August 27, stating that the information was confidential and of a proprietary nature, and that disclosure to competitors would cause injury to Ashland.⁵⁶

On October 6, in his capacity as a Member of Congress, John Moss asked the commission to make available to him data gathered by the commission relating to energy development on federal lands. FTC denied the request for the reason that the data sought constituted "trade secrets and commercial or financial information [and] geological and geophysical information and data, including maps, concerning wells," and that such materials were exempt from mandatory disclosure under subsections (b)(4) and (b)(9) of the Freedom of Information Act (FOIA).⁵⁷ Moss had to point out that FOIA specifically provides that the procedure for withholding certain information from the public has nothing to do with Congress. The procedure "is not authority to withhold information from Congress."⁵⁸ Moss proceeded to make a second request for the material, this time as chairman of the Subcommittee on Oversight and Investigation (of House Committee on Interstate and Foreign Commerce).

After the commission agreed to furnish Moss with the information, Ashland Oil went to court to enjoin the FTC from releasing the data. At that point the subcommittee issued a subpoena on December 2, ordering the FTC chairman to appear the following day with the requested documents.⁵⁹ On the deadline day, the commission wrote to Moss, advising him that on November 24 a district judge had issued a temporary restraining order enjoining the commission "from disclosing the documents to any third party, including Congress"⁶⁰ With the matter tied up in court, the House Committee on House Administration reported a resolution on December 17, providing for the appointment of a special counsel to represent the House and the Committee on Interstate and Foreign Commerce in judicial proceedings related to the subpoena. The committee vote for the resolution was strongly bipartisan, 17 to 2.⁶¹

⁵⁶ H.Rept. No. 94-756, 94th Cong., 1st Sess. 6-7 (1975).

⁵⁷ *Ashland Oil, Inc. v. F.T.C.*, 409 F.Supp. 297, 300 (D.D.C. 1976). Subsection (b)(4) covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; subsection (b)(9) covers "geological and geophysical information and data, including maps, concerning wells."

⁵⁸ 5 U.S.C. § 552(d) (2000).

⁵⁹ H.Rept. No. 94-756, at 3.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 1.

The full House passed the resolution on December 18, authorizing Moss to intervene and appear in the case in order to secure the information needed for his subcommittee. Wayne Hayes, chairman of the Committee on House Administration, explained that the judicial proceedings “infringe upon the rights of the House of Representatives or that could infringe upon the rights of the House of Representatives.”⁶² The resolution passed without a dissent.

A federal district court agreed that the data at issue constituted “trade secret” information within the purview of Section 6(f) of the Federal Trade Commission Act.⁶³ However, the court noted that the restrictions in FOIA do not refer to Congress,⁶⁴ and that the information sought in the subpoena was properly within the subcommittee’s jurisdiction.⁶⁵ Finally, the court ruled that Ashland Oil had failed to show that release of the material to the subcommittee would irreparably injure the company. The court rejected the argument that the transfer of the data from the FTC to the subcommittee would lead “inexorably to either public dissemination or disclosure to Ashland’s competitors.” Courts must assume that congressional committees “will exercise their powers responsibly and with due regard for the rights of affected parties.”⁶⁶

That decision was affirmed by the D.C. Circuit.⁶⁷ A dissenting judge concluded that the subpoena was invalid, but the majority noted that FTC’s decision to turn over the materials to the subcommittee “was not based on—and in fact predated—issuance of the subpoena.”⁶⁸ The commission had agreed to provide Moss with the material after receiving the letter in his capacity as subcommittee chairman. The majority pointed out that the dissent’s discussion of the subpoena “rests solely on an interpretation of statements made by the Government counsel during oral argument.”⁶⁹

Seizing Suspects Abroad

Beginning in 1989, Congress held hearings on whether the FBI could seize a suspect from a foreign country without the cooperation and consent of that country. On November 8, a subcommittee of the House Judiciary Committee received testimony from William P. Barr, head of the Office of Legal Counsel (OLC) in the Justice Department, State Department Legal Adviser Abraham D. Sofaer, and Oliver

⁶² 121 Cong. Rec. 41707 (1975).

⁶³ *Ashland Oil, Inc.*, 409 F.Supp. 297, 303-04 (D.D.C. 1976).

⁶⁴ *Id.* at 302.

⁶⁵ *Id.* at 305-06.

⁶⁶ *Id.* at 308.

⁶⁷ *Ashland Oil, Inc. v. F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976).

⁶⁸ *Id.* at 979. For additional analysis of *Ashland*, see Paul C. Rosenthal and Robert S. Grossman, “Congressional Access to Confidential Information Collected by Federal Agencies,” 15 Harv. J. Legis. 74 (1977).

⁶⁹ *Id.* at 980.

B. Revell, Associate Deputy Director of Investigations in the FBI.⁷⁰ Although OLC concluded in 1980 that the FBI had no authority to make such arrests,⁷¹ Barr explained that OLC had reexamined its position and issued an opinion on June 21, 1989, partially reversing the 1980 opinion.⁷² Notwithstanding publication of the first opinion, Barr insisted that the second “must remain confidential.”⁷³ Although he refused to release the 1989 opinion, he offered to explain “our conclusions and our reasoning to the committee.”⁷⁴ He gave reasons why he regarded the 1980 opinion as “flawed.”⁷⁵

Sofaer noted that Barr had restricted his analysis to the application of domestic legal authority to kidnappings abroad. Under international law, Sofaer said, such kidnappings are a violation. He continued: “While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our Nation’s respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.”⁷⁶

Initially, the Administration decided to withhold the document. Attorney General Dick Thornburgh wrote to the subcommittee on November 28, 1989, explaining why it could not have the 1989 opinion: “Apart from classified information, there is no category of documents in the Department’s possession that I consider more confidential than legal opinions to me from the Office of Legal Counsel.”⁷⁷ Subcommittee chair Don Edwards replied that OLC opinions had been made available to Congress in previous years.⁷⁸ In a letter on January 24, 1990, Edwards provided Thornburgh with other examples of OLC opinions being released to Congress.⁷⁹

On January 31, 1990, the chairman of the House Judiciary Committee, Jack Brooks, wrote to Thornburgh about a number of difficulties that Congress had experienced in receiving executive branch documents. With regard to the OLC opinion on extraterritorial arrests, Brooks said:

There should be no question that this is a matter involving an extremely serious national policy to which both the Congress and the Executive Branch should give

⁷⁰ “FBI Authority to Seize Suspects Abroad,” hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 1st Sess. (1991).

⁷¹ 4B Op. O.L.C. 543 (1980).

⁷² “FBI Authority to Seize Suspects Abroad,” at 3.

⁷³ Id. at 4.

⁷⁴ Id. at 5.

⁷⁵ Id.

⁷⁶ Id. at 23.

⁷⁷ Id. at 92.

⁷⁸ Id. at 94.

⁷⁹ Id. at 96-98.

extremely careful consideration. No purpose is served by denying Congress access to all of the legal thought and analysis that have been directed to this issue, including that upon which the Justice Department relied in reaching its decision. I do not believe that it is either legally supportable or in the nation's best interests for the Justice Department to pick and choose which opinions of the Office of Legal Counsel are made available to the Congress. Indeed, it is my understanding that these opinions are published periodically. There is no justification for shielding them from Congressional access at the precise moment that critical decisions are being made.⁸⁰

Responding on February 20, 1990, Thornburgh suggested to Brooks a possible accommodation. As a substitute for the OLC opinion, the Justice Department would prepare "a comprehensive written statement of the Department's legal position on these issues."⁸¹ Thornburgh concluded that he was "not sure it is useful for us to exchange volleys over competing legal theories on this issue. No concrete dispute over national security information is before us. What is important is that on a practical, day-to-day basis we are able to work out our differences in this sensitive area in good faith."⁸²

The two sides, however, were unable to reach an acceptable accommodation, resulting in the issuance of a subcommittee subpoena on July 25, 1991. The subcommittee argued that it needed the 1989 memo to determine whether it was necessary for Congress to legislate in this area. Unless Thornburgh turned over the document by 9 a.m. on July 31, the committee would vote to hold him in contempt.⁸³ The Administration decided not to comply with the subpoena, preferring instead to assert executive privilege. Some Administration officials argued that release of the document might jeopardize the criminal prosecution of such defendants as General Manuel Antonio Noriega, who was arrested in Panama in January 1990, after the U.S. invasion. Brooks denied this line of reasoning: "This committee's request will in no way expose sensitive information to the public nor will it in any way deter or slow criminal prosecutions in these matters."⁸⁴

As the interbranch collision neared, the two sides were able to find some common ground. The President decided not to invoke executive privilege, and the Justice Department agreed to allow one or more committee members to review the legal memo if the subcommittee would suspend the subpoena and remove the threat of a contempt vote.⁸⁵

⁸⁰ Id. at 102.

⁸¹ Id. at 119.

⁸² Id. at 120-21.

⁸³ Joan Biskupic, "Panel Challenges Thornburgh Over Right to Documents," CQ Weekly Rep., July 27, 1991, at 2080.

⁸⁴ David Johnston, "Administration to Fight House Panel's Subpoena," New York Times, July 30, 1991, at A12.

⁸⁵ David Johnston, "Both Sides Softening Stance on Documents on Foreign Arrests," New York Times, August 1, 1991, at B7; "Justice Yields to House, Averting Showdown," CQ (continued...)

The Inslaw Affair

During the same time period as the confrontation over the kidnapping memo, the House and the Justice Department engaged in another showdown. On December 5, 1990, Chairman Brooks convened a hearing of the Judiciary Committee to review the refusal of Attorney General Thornburgh to provide the committee with access to all documents regarding a civil dispute brought by Inslaw, Inc., a computer company. Inslaw charged that high-level officials in the Justice Department conspired to force Inslaw into bankruptcy and have its computer software program, called PROMIS, transferred or bought by a rival company to help the department keep track of civil and criminal cases. Federal Bankruptcy Judge George Bason had already ruled that the Justice Department “took, converted, and stole” Inslaw’s proprietary software, using “trickery, fraud, and deceit.”⁸⁶

The Justice Department denied these charges, claiming that what was at stake was a contract dispute. Brooks said that the controversy reached the highest levels of the department, including at least two Assistant Attorneys General, a Deputy Attorney General, and Attorney General Edwin Meese. Because House and Senate investigating committees had been denied access to documents needed to establish the department’s guilt or innocence, Brooks concluded that he was “even more convinced that the allegations concerning INSLAW must be fully and independently investigated by the committee.”⁸⁷

Although the committee and the Justice Department were in disagreement over access to particular documents, the ranking member of the committee, Hamilton Fish, pointed out that the department had given considerable assistance to the legislative investigation, arranging for over fifty interviews with departmental employees, handing over “voluminous written materials,” and providing space for congressional staff.⁸⁸ In a letter to Fish, Assistant Attorney General W. Lee Rawls noted that in an accommodation with House Judiciary, “the Department did not insist on its usual practice of having a Department representative at these interviews.”⁸⁹ Committee staff also had access, pursuant to a confidentiality agreement, “to the files reflecting investigations by the Office of Professional Responsibility, and we have provided documents generated during investigations by the Criminal Division into allegations of wrongdoing relating to Inslaw.”⁹⁰ Committee staff were allowed to depose departmental employees “without the presence of Department counsel,” and were

⁸⁵(...continued)

Weekly Rep., August 3, 1991, at 2179.

⁸⁶ “The Attorney General’s Refusal to Provide Congressional Access to ‘Privileged’ Inslaw Documents,” hearing before a subcommittee of the House Committee on the Judiciary, 101st Cong., 2d Sess. 1 (1990).

⁸⁷ Id. at 2.

⁸⁸ Id. at 3.

⁸⁹ Id. at 163.

⁹⁰ Id. at 164.



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Richard A. Arenberg

given access to the Civil Division's files on the Inslaw litigation. Out of tens of thousands of documents, the department "withheld only a minute fraction, which are privileged attorney work product that would not be available to a party in litigation with the United States."⁹¹

At the hearing, the committee heard testimony from Steven R. Ross, House General Counsel, who analyzed the Attorney General's decision to withhold documents because of pending civil litigation and the need for the department to protect litigation strategy and agency work products.⁹² Ross took exception to the position advanced by Rawls in his letter to Rep. Fish that congressional investigations "are justifiable only as a means of facilitating the task of passing legislation." Such a standard, Ross said, would "eradicate the time-honored role of Congress of providing oversight, which is a means that has been upheld by the Supreme Court on a number of occasions, by which the Congress can assure itself that previously passed laws are being properly implemented."⁹³ Fish intervened at that point to agree that the sentence by Rawls was "not a technically correct statement of the power of the Congress" and was "far too narrow."⁹⁴

Ross also challenged the claim by the Justice Department that it could deny Congress documents to protect pending litigation. Ross reviewed previous decisions by the Supreme Court to demonstrate that information could not be withheld from Congress simply because of "the pendency of lawsuits."⁹⁵ The congressional investigation of Anne Gorsuch, discussed in the next section, was cited by Ross as another example of the Justice Department labeling documents as "enforcement sensitive" or "litigation sensitive" to keep materials from Congress.⁹⁶

The media picked up the clash between Brooks and the Justice Department.⁹⁷ Finally, on July 25, 1991, a subcommittee of House Judiciary issued a subpoena to Thornburgh. A newspaper story said that the night before the subcommittee was scheduled to vote on the subpoena, the Justice Department indicated that it was willing to turn over the Inslaw documents. Brooks, given recent departmental promises, reportedly said he was too skeptical to accept the offer.⁹⁸ He wanted the documents to decide whether the department had acted illegally by engaging in criminal conspiracy. When the committee failed to receive the materials, Brooks

⁹¹ Id.

⁹² Id. at 77.

⁹³ Id. at 78.

⁹⁴ Id.

⁹⁵ Id. at 79.

⁹⁶ Id. at 80-81.

⁹⁷ Mary McGrory, "Nixon's Shadow Lengthens," *Washington Post*, December 6, 1990, at A2; Paul M. Barrett, "Thornburgh, Brooks Clash Over Charge of Wrongdoing at Justice Department," *Wall Street Journal*, December 10, 1990, at B7A.

⁹⁸ Joan Biskupic, "Panel Challenges Thornburgh Over Right to Documents," *CQ Weekly Report*, July 27, 1991, at 2080. See also David Johnston, "Administration to Fight House Panel's Subpoena," *New York Times*, July 30, 1991, at A12.

said that the committee would consider contempt of Congress proceedings against the department.⁹⁹

At that point several hundred documents were delivered to the committee, which later released a formal investigative report on the Inslaw affair.¹⁰⁰ The committee gained access to sensitive files of the Office of Professional Responsibility (OPR) in the Justice Department and received more than 400 documents that the department had described as related to “ongoing litigation and other highly sensitive matters and ‘protected’ under the claims of attorney-client and attorney work product privileges.”¹⁰¹

Whitewater Notes

On December 8, 1995, the Special Senate Committee to Investigate Whitewater Development Corporation and Related Matters (the Senate Whitewater Committee) issued a subpoena for certain documents. The White House announced that it would withhold material concerning a November 5, 1993, meeting at the law offices of Williams & Connolly, which had been retained by President Clinton and First Lady Hillary Clinton to provide personal counsel for Whitewater-related matters. Senior presidential aides and private lawyers discussed whether documents sought by Congress could be withheld on the ground that they were protected by the lawyer-client privilege and executive privilege. Present at the meeting were White House Counsel Bernard Nussbaum, White House aides Neil Eggleston and Bruce Lindsey, three private attorneys (David Kennedy, Stephen Engstrom, and James Lyon), and Associate White House Counsel William Kennedy, who took extensive notes at the meeting.¹⁰² President Clinton said that he believed the President “ought to have a right to have a confidential conversation with his minister, his doctor, his lawyer.”¹⁰³

That argument would carry weight if Clinton had met solely with private attorneys, but his claim was complicated by the presence of four government lawyers at the meeting. Government lawyers are not expected to provide advice to Presidents on private financial and legal matters, and certainly not on the same confidential basis as a private attorney. Lloyd Cutler, when he was appointed Special Counsel to President Clinton, explained: “When it comes to a President’s private affairs, particularly private affairs that occurred before he took office, those should be handled by his own personal private counsel, and in my view not by the White House

⁹⁹ Susan B. Glasser, “Deadline Passes, But Justice Dept. Still Hasn’t Given Papers to Brooks,” Roll Call, September 19, 1991, at 12.

¹⁰⁰ H.Rept. No. 857, 102d Cong., 2d Sess. (1992).

¹⁰¹ *Id.* at 92-93.

¹⁰² S.Rept. No. 104-191, 104th Cong., 1st Sess. 3 (1995); Stephen Labaton, “White House Gives Rationale for Balking at a Subpoena,” *New York Times*, December 13, 1995, at B14; Susan Schmidt, “White House Rejects Subpoena,” *Washington Post*, December 13, 1995, at A1.

¹⁰³ Ruth Marcus and Susan Schmidt, “Legal Experts Uncertain on Prospects of Clinton Privilege Claim,” *Washington Post*, December 14, 1995, at A14.

Counsel.”¹⁰⁴ Moreover, communications between a government attorney and an executive official lack the confidentiality that exists between a private attorney and an executive official. Under law, any government attorney who learns of “[a]ny information, allegation, or complaint” involving government officers and employees shall report such matter to the Attorney General, with certain exceptions.¹⁰⁵ Aware of that statute, government attorneys should alert officials in the government, “even the President, . . . not to expect counsel to keep confidential what a private counsel would in such a situation.”¹⁰⁶

Within a few days, the White House offered to turn over the Kennedy notes if the committee agreed that the meeting was privileged. The committee refused because it learned of other meetings attended by White House officials and private attorneys. As part of the effort to compromise, the White House told the committee that it could assume that whatever material White House officials had obtained about Whitewater, including confidential documents from the Resolution Trust Corporation (RTC), had been turned over to Clinton’s private lawyers during the meeting. Some Republicans regarded it as improper for the White House to pass along confidential RTC or any other law enforcement documents to the President’s private lawyers. Unable to reach an acceptable compromise, the committee voted to send the issue to the Senate floor and from there to federal district court.¹⁰⁷ Clinton objected that he should not be “the first president in history” to give up his right to attorney-client confidentiality.¹⁰⁸

By December 15, the White House had indicated its willingness to drop most of the conditions it had established for turning over the Kennedy notes to the committee. The change occurred hours after the committee voted to ask the full Senate to go to court to enforce the subpoena.¹⁰⁹ As a step toward an accommodation, the chairman of the Senate committee said he would be willing “to send a letter saying we do not feel that there would be any waiver of any privilege, that the administration’s turning over the notes would not be deemed a waiver in our eyes.”¹¹⁰

¹⁰⁴ S.Rept. No. 104-191, at 13.

¹⁰⁵ 28 U.S.C. § 538(b) (2000). The information is reported “unless (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.”

¹⁰⁶ Charles Tiefer, “The Specially Investigated President,” 5 U. Chi. Roundtable 143, 191 n.212 (1998).

¹⁰⁷ Susan Schmidt, “Compromise on Notes Rejected,” Washington Post, December 15, 1995, at A2.

¹⁰⁸ Id.

¹⁰⁹ Susan Schmidt, “White House Eases Stance on Notes,” Washington Post, December 16, 1995, at A19.

¹¹⁰ John Solomon, “D’Amato Yields on Some Terms Set by Clinton,” Washington Post, (continued...)

On December 20, the Senate debated a resolution that directed the Senate Legal Counsel to bring a civil action to enforce the subpoena. The resolution invoked a special statute regarding the authority of the Senate Legal Counsel to sue for subpoena enforcement orders.¹¹¹ In a letter on that same day to the committee, White House Special Counsel Jane Sherburne described various options, stating: “We have said all along that we are prepared to make the notes public; that all we need is an assurance that other investigative bodies will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy.”¹¹² She said that Independent Counsel Kenneth Starr had agreed that he would not argue that turning over the Kennedy notes constituted a waiver of the attorney-client privilege claimed by President Clinton. The White House sought a similar understanding from two House committees with jurisdiction over Whitewater matters. Sherburne asked the Senate for assistance in obtaining from the House the same understanding reached with Starr.¹¹³

The resolution passed the Senate by a vote of 51 to 45.¹¹⁴ On the following day, the White House agreed to give the Kennedy notes to the Senate Whitewater Committee. As part of the agreement, House Banking and Financial Services Committee Chairman Jim Leach announced that the House would not try to later assert that President Clinton had waived his attorney-client privilege.¹¹⁵

The Contempt Power

When the executive branch refuses to release information or allow officials to testify, Congress may decide to invoke its contempt power. Although the legislative power of contempt is not expressly provided for in the Constitution and exists as an implied power, as early as 1821 the Supreme Court recognized that without this power the legislative branch would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”¹¹⁶ If either House votes for a contempt citation, the President of the Senate or the Speaker of the House shall certify the facts to the appropriate U.S. Attorney, “whose duty it shall be to

¹¹⁰(...continued)

December 17, 1995, at A13.

¹¹¹ 141 Cong. Rec. 37705 (1995); Charles Tiefer, “The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client,” 61 Law & Contemp. Prob. 47, 56-57 (1998).

¹¹² Id. at 37730.

¹¹³ Id.

¹¹⁴ Id. at 37761.

¹¹⁵ Susan Schmidt, “Whitewater Notes Being Surrendered,” Washington Post, December 22, 1995, at A1. See Tiefer, “The Specially Investigated President,” 5 U. Chi. Roundtable at 189-93.

¹¹⁶ Anderson v. Dunn, 6 Wheat. (19 U.S.) 204, 228 (1821).

bring the matter before the grand jury for its action.”¹¹⁷ Individuals who refuse to testify or produce papers are subject to criminal contempt, leading to fines and imprisonment.¹¹⁸ Witnesses may invoke their Fifth Amendment right against self-incrimination.

This section begins by covering contempt actions, from 1975 to 1981, against six Cabinet officers who refused to surrender documents to Congress: Secretary of Commerce Rogers C. B. Morton, Health, Education, and Welfare Secretary F. David Mathews, Secretary of State Henry Kissinger, HEW Secretary Joseph A. Califano, Jr., Secretary of Energy Charles W. Duncan, Jr., and Secretary of Energy James B. Edwards. With contempt citations looming, the two branches reached a compromise settlement that gave Congress access to the documents. The remainder of the section focuses on more recent contempt actions, including Secretary of the Interior James Watt, Administrator of the Environmental Protection Agency Anne Gorsuch, White House Counsel Jack Quinn, and Attorney General Janet Reno.

The contempt action against Gorsuch revealed a weakness in the procedures that Congress relies on for contempt, especially when the Justice Department has already taken a position on legal and constitutional issues. Citing an executive official for contempt requires the executive branch—through a U.S. Attorney—to bring the action. In the Gorsuch case, which showcased executive privilege doctrines advanced by the Justice Department, that action was slow in coming and required a federal judge to nudge it along to encourage an accommodation between the two branches.

Actions from 1975 to 1981

From 1975 to the start of the Reagan Administration, Congress several times threatened to hold executive officials in contempt for refusing to cooperate with congressional committees. In the face of statutory and constitutional reasons offered by the Administration for withholding information from Congress, in the end the committees persisted and gained access to the requested documents. To minimize some of these disputes in the future, Congress amended statutory language to clarify the right of legislative committees to agency information.

Rogers C. B. Morton

A 1975 tug of war between the branches, with Congress the eventual victor, concerned reports compiled by the Department of Commerce identifying the U.S. companies that had been asked to join a boycott—organized by Arab nations—of

¹¹⁷ 2 U.S.C. § 194 (2000).

¹¹⁸ *Id.*, § 192. As a result of sentencing classification of offenses, the \$1,000 maximum in § 192 has been increased to \$100,000 (treatment of Class A Misdemeanor in 18 U.S.C. §§ 3559, 3571 (2000)). See also Todd D. Peterson, “Prosecuting Executive Branch Officials for Contempt of Congress,” 66 N.Y.U. L. Rev. 563 (1991), and John C. Grabow, *Congressional Investigations: Law and Practice* 86-99 (1988).

companies doing business with Israel. Secretary of Commerce Rogers Morton refused to release the documents to a House Interstate and Foreign Commerce subcommittee, citing the following language from Section 7(c) of the Export Administration Act of 1969: “No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.”¹¹⁹

In his letter of July 24, 1975, to the subcommittee, Morton said he understood the need to provide Congress “with adequate information on which to legislate,” but concluded that “disclosing the identity of reporting firms would accomplish little other than to expose such firms to possible economic retaliation by certain private groups merely because they *reported* a boycott request, whether or not they complied with that request.”¹²⁰ On July 28, the subcommittee issued a subpoena. On August 22, in a letter to the committee, Morton again reiterated his refusal to release the documents, explaining that his decision was not based “on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress.”¹²¹ In other words, based on discretionary authority granted him by Congress, he would deny information to a legislative committee. He said he was prepared to make copies of the documents available, “subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved.”¹²²

At subcommittee hearings on September 22, Rep. John Moss, chairman of the subcommittee seeking the documents, told Secretary Morton that Section 7(c) did not “in any way refer to the Congress nor does the Chair believe that any acceptable interpretation of that section could reach the result that Congress by implication had surrendered its legislative and oversight authority under Article I and the Rules of the House of Representatives.”¹²³

Morton told Moss that he had been advised by Attorney General Edward Levi not to make the documents available to the committee.¹²⁴ In a letter dated September 4, 1975, Levi had advised Morton that the subpoena did not override the confidentiality requirement of Section 7(c), and that the committee was not entitled

¹¹⁹ Letter of July 24, 1975, from Secretary Morton to John E. Moss, chairman of the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Relations, reprinted, “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 153 (1975).

¹²⁰ *Id.* at 153-54 (emphasis in original).

¹²¹ *Id.* at 158.

¹²² *Id.*

¹²³ *Id.* at 4.

¹²⁴ *Id.* at 6.

to receive the information “unless, in exercising the discretion granted by § 7(c), you determine that withholding them would be ‘contrary to the national interest.’”¹²⁵ Levi cited some earlier opinions by Attorneys General that “proceeded under the general assumption—which I share—that statutory restrictions upon executive branch disclosure of information are presumptively binding even with respect to requests or demands of congressional committees.”¹²⁶

On November 11, the subcommittee voted 10 to 5 to find Morton in contempt for failure to comply with the subpoena of July 28.¹²⁷ The prospect of contempt proceedings provided sufficient incentive for Morton to release the material to the subcommittee.¹²⁸ To avoid this problem in the future, Congress passed legislation in 1977 to specify that Section 7(c) does not authorize the withholding of information from Congress, and that any information obtained under the Export Administration Act “shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act which is submitted on a confidential basis unless the full committee determines that the withholding thereof is contrary to the national interest.”¹²⁹

David Mathews

On the same day that the House Subcommittee on Oversight and Investigation decided to cite Morton for contempt, it met to consider a separate contempt citation against HEW Secretary F. David Mathews.¹³⁰ The subcommittee, concerned that some hospitals were receiving Medicare payments automatically without meeting federal standards for the Medicare program, wanted letters Mathews had received from the Joint Commission on Accreditation of Hospitals (JCAH).¹³¹

In turning first to his agency general counsel for legal advice, Mathews was told not to release the documents to the subcommittee. In a letter of October 17, 1975, the general counsel limited his analysis to statutory construction. He interpreted a

¹²⁵ “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” at 173. Levi’s opinion is also reprinted at 43 Op. Att’y Gen. 29 (1975).

¹²⁶ “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” at 173-74.

¹²⁷ *Id.* at 137.

¹²⁸ 1975 CQ Almanac, at 343-44. See also 121 Cong. Rec. 3872-76, 36038-39, 40230, 40768-69 (1975).

¹²⁹ 91 Stat. 241, § 113 (1977), amending 83 Stat. 845, § 7(c) (1969). Contempt actions against Morton, Duncan, Watt, and Gorsuch are also explored by Peter M. Shane, “Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information,” 44 Adm. L. Rev. 197, 202-12 (1992).

¹³⁰ “Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.,” 95th Cong., 2d Sess. 55 (Comm. Print No. 95-76, 1978).

¹³¹ “Mathews Subpoena,” CQ Weekly Report, November 22, 1975, at 2527.

confidentiality section in the Social Security Act as “on its face an absolute pledge of confidentiality” because it contained no exceptions, either for Congress or the judiciary.¹³² On the same day that Mathews received this legal guidance, he wrote to the subcommittee that he had been advised that “it would be a violation of the law for me to furnish you these JCAH documents given in confidence.”¹³³

The subcommittee subpoenaed the material, setting a deadline of 10 a.m. on November 12. On the day of the deadline, Attorney General Levi advised Mathews to produce the documents to the subcommittee. Levi read the statutory language “on a confidential basis” as placing in the HEW Secretary a discretionary authority to assure that the information is “not to be made public but may be conveyed to the Congress on proper request.”¹³⁴ Levi’s analysis of the statutory provision “on its face” differed fundamentally from Mathew’s general counsel. Levi said this about the reliance on the confidentiality provision:

It seems to me unlikely that reliance included some belief that the information could be kept out of the hands of the Congress, since it was apparent upon the face of the statute, that Congress knew the existence of these documents and the identity of their sole possessor. It was obvious that the Congress could as easily subpoena the information from JCAH itself as from HEW. Or, to place the matter in its present context: It is apparent that if we now find, by reason of the statute, the Committee on Interstate and Foreign Commerce cannot obtain the information from HEW, they can immediately subpoena it from JCAH itself. There hardly seems any purpose to be served by such a circuitous procedure, and I think it would be unreasonable to assume that in enacting the vague and weak confidentiality provision of this statute, and referring specifically to JCAH, the Congress intended it.¹³⁵

Mathews, by making the information available to the subcommittee, removed the threat of a contempt citation.¹³⁶

Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Secretary of State Henry Kissinger, directing him to provide: “All documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees

¹³² Id. at 60-61 (letter of October 17, 1975, from Acting General Counsel John Barrett to Secretary Mathews).

¹³³ Id. at 59-60 (letter of October 17, 1975, from Mathews to Rep. John E. Moss, Chairman of the Oversight and Investigations Subcommittee).

¹³⁴ Id. at 56 (letter of November 12, 1975, from Levi to Mathews).

¹³⁵ Id.

¹³⁶ “Mathews Subpoena,” CQ Weekly Report, November 22, 1975, at 2527.

from January 20, 1961 to the present.” The Forty Committee made recommendations to the President on specific covert actions.¹³⁷

The subpoenaed documents were referred to the White House for review. Attorney General Levi examined the documents and concluded that executive privilege could be appropriately invoked. A letter to Kissinger on November 14, from White House Counsel Philip Buchan, confirmed in writing the President’s instruction to Kissinger to decline compliance with the subpoena.¹³⁸ At stake were ten documents, dating from 1962 through 1972, consisting of recommendations from State Department officials to the Forty Committee, its predecessor (the 303 Committee), or to the President.¹³⁹

When Kissinger failed to provide the documents by the deadline established in the subpoena (November 11), the committee met in open session on November 14 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.¹⁴⁰ Kissinger responded that the subpoena raised “serious questions all over the world of what this country is doing to itself and what the necessity is to torment ourselves like this month after month.”¹⁴¹

Acting on the advice of the Justice Department, President Gerald Ford invoked executive privilege on November 14 to keep the material from the committee. In a letter to the committee dated November 19 and released November 20, he said that release of the documents, which included “recommendations from previous Secretaries of State to previous Presidents,” would jeopardize the internal decisionmaking process.¹⁴² 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 ability of our Republic to govern itself effectively.”¹⁴³ Recognizing that Congress had constitutional responsibilities “to investigate fully matters relating to contemplated legislation,”¹⁴⁴ 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

¹³⁷ H.Rept. No. 94-693, 94th Cong. 4-5 (1975).

¹³⁸ “Kissinger’s Tenure, U.S. Foreign Policy Are Clouded by House Panel’s Citations,” *Wall Street Journal*, November 17, 1975, at 5.

¹³⁹ H.Rept. No. 94-693, at 13.

¹⁴⁰ *Id.* at 2. See “Kissinger Contempt Citation,” *CQ Weekly Report*, November 15, 1975, at 2506.

¹⁴¹ George Lardner, Jr., “Committee Votes Contempt Action for Kissinger,” *Washington Post*, November 15, 1975, at A6.

¹⁴² *Public Papers of the Presidents, 1975, II*, at 1867.

¹⁴³ *Id.* at 1887.

¹⁴⁴ *Id.*

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Kennedy, Johnson, and Nixon.”¹⁴⁵ 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 National Security Adviser.¹⁴⁶ As to those materials, “there has been a substantial effort by the NSC staff to provide these documents.”¹⁴⁷

Kissinger calling the contempt proceeding “an absurdity”¹⁴⁸ and “frivolous,” warning 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.”¹⁴⁹ On December 9, three committee members and two staff members visited the White House to determine which documents would be made available.¹⁵⁰ 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.¹⁵¹ On December 10, the committee chairman announced that the White House was in “substantial compliance” with the subpoena and that the contempt action was “moot.”¹⁵²

Joseph A. Califano, Jr.

In 1978, a subcommittee of the House Committee on Interstate and Foreign Commerce began an investigation into the manufacturing process used by drug companies to make generic drugs and price brand-name drugs. The panel looked into charges that drug companies merely put trade names on drugs manufactured by generic drug firms and sold them at much higher prices. One way to claim manufacturing responsibility was for a trade name company to put an employee in a generic drug house while the product was being manufactured. Rep. Al Gore explained the subcommittee’s interest: “What we are seeking to do is to determine whether or not the public is being fleeced by a process whereby brand name drug companies are getting generic drugs and calling them special brand name drugs simply because they resort to the rule of having one of their employees stationed at the generic drug plant as the drugs are being made.”¹⁵³

¹⁴⁵ Id. at 1889.

¹⁴⁶ Id. at 1889-90.

¹⁴⁷ Id. at 1890.

¹⁴⁸ John M. Crewdson, “Three-Court Contempt Citation of Kissinger Defended in House,” *New York Times*, November 18, 1975, at 15.

¹⁴⁹ Judy Gardner, “Pike Pushes Kissinger Contempt Citations,” *CQ Weekly Report*, November 22, at 2572.

¹⁵⁰ “Contempt Vote on Kissinger is Linked to Data Ford Gives,” *New York Times*, December 10, 1975, at 12.

¹⁵¹ Pat Towell, “Contempt Action Against Kissinger Dropped,” *CQ Weekly Report*, December 13, 1975, at 2712.

¹⁵² Id. at 2711

¹⁵³ “Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.,” 95th Cong., (continued...)

In order to learn more about this “man-in-the-plant” strategy, the subcommittee requested documents from the Department of Health, Education, and Welfare (HEW). The subcommittee had both oversight and legislative interests. A bill (H.R. 12980) had been introduced to limit or eliminate the man-in-the-plant practice.¹⁵⁴ In July, subcommittee chairman John Moss sent several letters to HEW Secretary Joseph A. Califano, Jr. for the documents. Califano’s involvement added a rich irony. A few years earlier, when Moss sought trade secret data from the FTC, the dispute eventually went to court in the case of *Ashland Oil, Inc. v. FTC*, discussed earlier. The private attorney the subcommittee hired to represent its interest in court was Califano. He and Moss now found themselves on opposite sides of a similar dispute.

Failing to receive the material, the subcommittee agreed on July 27 to subpoena Califano. The full committee signed the subpoena on August 4. In a memo dated August 9, the Justice Department advised HEW that language in the Food, Drug, and Cosmetic Act, prohibiting FDA employees from disclosing trade secret information, justified the withholding of the material from the subcommittee. Section 301(j) of that statute prohibited the “using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority [of specified sections] of this title concerning any method or process which as a trade secret is entitled to protection.”¹⁵⁵ The Justice Department memo argued:

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

. . . Indeed, it is significant that section 301(j) explicitly provides for disclosure to one of the coordinate branches of government, *i.e.*, the courts, but makes no comparable provision for disclosure to committees of the Congress.¹⁵⁶

This memo relied in part on Attorney General Levi’s memo in 1975 on the Rogers Morton contempt action. If that position were to stand, Congress would lose access to documents covered by many other statutes. At that time, about a hundred statutory sections contained confidentiality provisions that could be interpreted by the executive branch to deny committees information they needed for legislation and oversight.¹⁵⁷ The subcommittee therefore felt an obligation to challenge the Justice Department analysis. As Gore put it to Califano:

¹⁵³(...continued)

2d Sess. 42 (Comm. Print No. 95-76, 1978).

¹⁵⁴ Id. at 1-2.

¹⁵⁵ 21 U.S.C. § 331(j) (1976).

¹⁵⁶ Id. at 7, 10 (letter from Acting Attorney General Michael J. Egan to HEW Under Secretary Hale Champion).

¹⁵⁷ Id. at 13 (memorandum of August 7, 1978 from Morton Rosenberg, Legislative Attorney for the Congressional Research Service, to Rep. John Moss).

Mr. Secretary, in our society, laws, principles, and rights are often in conflict. We have two in conflict in this instance.

On the one hand we have article I of the U.S. Constitution. On the other we have section 301(j) of the Federal Food and Drug Cosmetic Act.

You have chosen to place more importance on section 301(j) of the Federal Food and Drug Cosmetic Act than on article I of the U.S. Constitution.¹⁵⁸

The purpose of Section 301(j), Gore said, was to prevent FDA employees from giving confidential trade secrets to competitor drug companies, not to keep from Congress information that is readily available to the HEW Secretary.¹⁵⁹ At a meeting with the subcommittee on August 16, Califano produced some material but also stated that any documents relating to trade secret information and the manufacturing process would be blackened out because of the Justice Department legal analysis.¹⁶⁰ Chairman Moss made it clear that the blackened-out material did not comply with the subpoena.¹⁶¹ Califano explained that his refusal to release the unredacted material had nothing to do with separation of powers or executive privilege, but rather with the statutory language that prohibited the release of trade secret information. Congress, he said, “has the power to change that statute.”¹⁶² Califano said he had no question about the committee keeping information confidential: “Your record is impeccable.”¹⁶³

During the discussion with Califano, one subcommittee members asked whether the confrontation between the two branches could be averted if the subcommittee subpoenaed the companies directly for the manufacturing process information. Subcommittee counsel John McElroy Atkisson answered that it would be possible, and that the companies would have no legal ground for defying such subpoenas, but said it “flies in the teeth of the idea . . . that the Congress would exclude itself from the very same information conveniently in the hands of the Secretary which is only down the block here.”¹⁶⁴ Chairman Moss added that the Justice Department analysis opened “a pandora’s box” to a hundred similar statutes that could be used to deny information to Congress. Moreover, accepting Califano’s suggestion to rewrite the statute would take the committee from an option that enjoys privileged status in the House (a contempt citation) to the process of amending a statute, which is not privileged and could take a year or two.¹⁶⁵

¹⁵⁸ Id. at 43.

¹⁵⁹ Id.

¹⁶⁰ Id. at 4.

¹⁶¹ Id. at 5.

¹⁶² Id. at 18.

¹⁶³ Id. at 48.

¹⁶⁴ Id. at 49.

¹⁶⁵ Id. at 49, 51.

Moss told Califano that he was “without legal justification in your refusal to comply with the subcommittee’s subpoena.”¹⁶⁶ Califano persisted in his refusal, stating that he was “bound to follow the opinion of the Attorney General.”¹⁶⁷ The subcommittee then voted 9 to 8 on August 16 to find Califano in contempt for failing to comply with the subpoena.¹⁶⁸ A month later, the subcommittee dropped the contempt action after Califano turned over the materials that had been subpoenaed. Califano explained that a further review by the department of the withheld material disclosed that some information had been “inappropriately deleted” from documents given to the panel.¹⁶⁹

On August 17, on the day after the subcommittee voted for contempt, Califano asked the Justice Department to further consider its interpretation of Section 301(j). On September 8, Attorney General Griffin Bell cited additional legislative history in affirming the position of Acting Attorney General Egan that the section prohibited Califano from furnishing trade secret data to Congress or its committees.¹⁷⁰ Notwithstanding that legal analysis, Califano gave the disputed materials to the subcommittee.

Charles W. Duncan, Jr.

On April 2, 1980, President Carter imposed a fee on imported oil and gasoline in an effort to reduce domestic consumption. A subcommittee of the House Government Operations Committee requested in writing, on April 8, certain categories of material from the Department of Energy (DOE). With no documents delivered, the subcommittee held a hearing on April 16 to investigate the delay. Thomas Newkirk, the department’s Deputy General Counsel for Regulation, told the subcommittee that he was “not prepared to submit the documents at this time” because White House Counsel Lloyd Cutler was reviewing a pile of documents “between a foot and 18 inches high.”¹⁷¹ Newkirk thought the documents might be subject to the claim of executive privilege because they revealed the “deliberative process underlying the President’s decision to impose the gasoline conservation

¹⁶⁶ Id. at 19.

¹⁶⁷ Id.

¹⁶⁸ Id. at 87. See “House Panel Votes Contempt Citation Against Califano,” *Wall Street Journal*, August 17, 1978, at 5; Mary Russell, “House Panel Backs Contempt Citation After Califano Refuses to Yield Data,” *Washington Post*, August 17, 1978, at A2; “Moss v. Califano” (editorial), *Washington Post*, August 18, 1978, at A18.

¹⁶⁹ “House Unit Ends Bid To Cite for Contempt HEW Chief Califano,” *Wall Street Journal*, September 22, 1978, at 10.

¹⁷⁰ 43 Op. Att’y Gen. 116 (1978).

¹⁷¹ “The Petroleum Import Fee: Department of Energy Oversight,” hearings before a Subcommittee of the House Government Operations Committee, 96th Cong., 2d Sess. 3, 27 (1980).

fee.”¹⁷² The subcommittee voted unanimously to instruct Newkirk to deliver the documents by 5 o’clock that evening.¹⁷³

After the department failed to meet the deadline, the subcommittee voted unanimously on April 22 to subpoena the materials from Energy Secretary Charles W. Duncan, Jr. On the following day, the subcommittee received 28 documents but also a letter from Duncan explaining that to the extent the subcommittee request involved “deliberative materials underlying a major Presidential decision,” it would “seriously undermine the ability of the Chief Executive and his Cabinet Officers to obtain frank legal and policy advice from their advisors.”¹⁷⁴ Newkirk appeared before the subcommittee on April 24 to state that the department would not comply in full with the subcommittee’s request of April 8, but did not rest his case on executive privilege.¹⁷⁵ By a vote of 9-0, the subcommittee subpoenaed Duncan to appear before the subcommittee on April 29 and bring the requested documents.¹⁷⁶

Duncan, appearing at the April 29 hearing, told the subcommittee: “I must decline to turn over the documents and I do not have them with me at this time.”¹⁷⁷ However, he also offered to allow the subcommittee chairman and the ranking minority member to review the documents “in confidence to assist in defining that request.”¹⁷⁸ Rep. Paul McCloskey (the ranking minority member) objected that “the idea that two members of a nine-member committee should be trusted and some should not be is repugnant to the rules of the House.”¹⁷⁹ After further efforts to reach an accommodation failed, the subcommittee voted 8 to 0 to hold Duncan in contempt for not complying with the April 24 subpoena.¹⁸⁰

The subcommittee held another hearing on May 14, with Secretary Duncan again in attendance. Rep. Toby Moffett, subcommittee chairman, announced that “at long last the subcommittee has been provided with every document it feels it needs to conduct its inquiry. Subcommittee members and staff have seen every document specifically demanded under the subpoena we issued April 24, and any document we deemed useful to this investigation has now been produced.”¹⁸¹ On the previous day,

¹⁷² Id. at 5.

¹⁷³ Id. at 35. See Richard L. Lyons, “On Capitol Hill,” *Washington Post*, April 18, 1980, at A5.

¹⁷⁴ “The Petroleum Import Fee,” hearings, at 100.

¹⁷⁵ Id. at 98-100.

¹⁷⁶ Id. at 116-17; Richard D. Lyons, “House Unit Subpoenas Duncan,” *New York Times*, April 25, 1980, at D3.

¹⁷⁷ “The Petroleum Import Fee,” hearings, at 122.

¹⁷⁸ Id. at 123.

¹⁷⁹ Id.

¹⁸⁰ Id. at 139. See “House Unit Cites Duncan For Gas-Tax Contempt,” *New York Times*, April 30, 1980, at D18.

¹⁸¹ “The Petroleum Import Fee,” hearings, at 142. See also Dale Tate, “President’s Oil (continued...) ”

a federal district court had struck down Carter's April 2 proclamation as invalid, either under the President's inherent power or under statutory authority.¹⁸² A White House spokesman said that he didn't think executive privilege was ever formally asserted, either by President Carter or Secretary Duncan, although there was consideration of doing so.¹⁸³ In any event, the subcommittee received the material it requested.¹⁸⁴

James B. Edwards

The following year, at the start of the Reagan Administration, Secretary of Energy James B. Edwards narrowly avoided a contempt citation from the House Government Operations Committee. The dispute involved legislative access to documents regarding contract negotiations between the Energy Department and the Union Oil Company to build an oil shale plant in Colorado. Committee members were concerned that the department was moving too hastily in awarding billions of dollars in federal subsidies to major oil companies, particularly prior to the Reagan Administration's decision whether to create a Synthetic Fuels Corporation.¹⁸⁵ Failing to obtain the requested materials, the Environment, Energy and Natural Resources Subcommittee voted 6 to 4 on July 23 to hold Edwards in contempt.

The issue was complicated by disagreement within the Administration. Edwards wanted to sign the contract, but OMB Director David Stockman opposed federal subsidies to the synthetic fuels program and had taken steps to block the contract with Union Oil.¹⁸⁶ The full committee was scheduled to vote on the contempt citation on the morning of July 30, 1981. Edwards said he would not produce the documents until the contract between the Energy Department and Union Oil had been signed. President Reagan agreed to the project and officials from the Energy Department and Union signed the contract. Thirteen boxes of documents on the contract negotiations were delivered to the committee.¹⁸⁷

¹⁸¹(...continued)

Import Fee Assailed in Congress, Court," CQ Weekly Report, May 17, 1980, at 1308; Elder Witt, "Carter Foiled in First Tilt With Executive Privilege," CQ Weekly Report., May 17, 1980, at 1352.

¹⁸² Independent Gasoline Marketers Council v. Duncan, 492 F.Supp. 614 (D.D.C. 1980).

¹⁸³ "Executive Privilege, Revisited," CQ Weekly Report, June 21, 1980, at 1753.

¹⁸⁴ The subcommittee's confrontation with Secretary Duncan, including correspondence, is discussed in H.Rept. No. 96-1099, 96th Cong., 2d Sess. 18-30, 33-56 (1980).

¹⁸⁵ "DOE's Enforcement of Alleged Pricing Violations by the Nation's Major Oil Companies," hearing before a Subcommittee of the House Committee on Government Operations, 97th Cong., 1st Sess. 2, 57-60 (1981).

¹⁸⁶ Martin Schram, "Reagan Overrides Stockman, Backs Edwards on Synfuel," Washington Post, July 30, 1981, at A2.

¹⁸⁷ Andy Plattner, "Edwards' Contempt Citation Headed Off by Approval of Synthetic Fuel Contract," CQ Weekly Report, August 1, 1981, at 1425.

James Watt

In 1981, Interior Secretary James Watt refused to give a House subcommittee 31 documents relating to a reciprocity provision in the Mineral Lands Leasing Act. The specific country involved was Canada. Watt based his decision on the judgment of Attorney General William French Smith that the documents were “either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations.”¹⁸⁸ It marked President Reagan’s first claim of executive privilege.¹⁸⁹ The confrontation escalated to a recommendation by the House Committee on Energy and Commerce to cite Watt for contempt.

Attorney General Smith insisted that “the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interests when specific legislative proposals are in question.”¹⁹⁰ Congressional oversight, he said, “is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws.”¹⁹¹ That argument lacked historical and legal support. The first major investigation by Congress—of General St. Clair’s defeat—was not conducted for the purpose of legislation. The Supreme recognizes that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”¹⁹² Courts have consistently held that the investigative power is available not merely to legislate or when a “potential” for legislation exists, but even for pursuits down blind alleys.¹⁹³ Moreover, Congress could easily circumvent Smith’s argument by introducing a bill whenever it wanted to conduct oversight.

Smith’s second major argument for withholding the documents was based on the need to protect the deliberative process, especially “predecisional, deliberative memoranda.” Even after decisions have been made, disclosure of documents to Congress “could still deter the candor of future Executive Branch deliberations.”¹⁹⁴ While Exemption 5 of FOIA exempts from public disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other

¹⁸⁸ 43 Op. Att’y Gen. 327, 328 (1981). See also “Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior,” prepared for the use of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. 2 (Comm. Print, Nov. 1981) (hereafter “Executive Privilege: Watt”).

¹⁸⁹ Martha M. Hamilton, “Executive Privilege Invoked to Back Watt,” *Washington Post*, October 15, 1981, at D12.

¹⁹⁰ 43 Op. Att’y Gen. at 331.

¹⁹¹ *Id.*

¹⁹² *Watkins v. United States*, 353 U.S. 178, 187 (1957).

¹⁹³ *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975).

¹⁹⁴ 43 Op. Att’y Gen. at 330.

than an agency in litigation with the agency,”¹⁹⁵ Congress specifically provided in FOIA that the listed exemptions are “not authority to withhold documents from Congress.”¹⁹⁶ Congress has often gained access to predecisional, deliberative memoranda in the executive branch.¹⁹⁷

As a third point, Smith argued that the documents “relate to sensitive foreign policy considerations.”¹⁹⁸ However, foreign policy is not an exclusive power of the President or the executive branch. In seeking the documents from Watt, Congress had a constitutionally-based need for the information: Its power to “regulate Commerce with foreign Nations.”¹⁹⁹ Throughout its history, Congress has legislated on international trade, foreign assistance, arms sales, and other matters of foreign policy.

In response to Smith’s legal position, the subcommittee prepared a contempt citation against Watt.²⁰⁰ Some of the documents, during this period, were shared with the subcommittee. On February 9, 1982, the subcommittee voted 11 to 6 to hold Watt in contempt.²⁰¹ By that time, all but seven of the 31 subpoenaed documents had been given to the subcommittee.²⁰² On February 25, the full committee voted 23 to 19 for contempt.²⁰³ White House Counsel Fred Fielding offered to brief committee members on the seven documents, but lawmakers rejected his offer.²⁰⁴

Although Watt said he would rather go to jail than surrender the remaining materials,²⁰⁵ those documents were reviewed by subcommittee members. The Administration established several conditions. The documents would be delivered to a room in the Rayburn House Office Building, where committee members would have four hours to examine the documents and take notes. Lawmakers could not photocopy the documents or show them to committee staff. Also, the committee

¹⁹⁵ 5 U.S.C. § 552(b)(5) (2000).

¹⁹⁶ *Id.* at § 552(d).

¹⁹⁷ Memorandum from House General Counsel Stanley M. Brand, November 10, 1981, to Rep. John Dingell, in “Executive Privilege: Watt,” at 7-8.

¹⁹⁸ 43 Op. Att’y Gen. at 328.

¹⁹⁹ U.S. Const., art. I, § 8, cl. 3.

²⁰⁰ “House Subcommittee Moving to Cite Interior Secretary Watt for Contempt,” *Washington Post*, November 27, 1981, at A9.

²⁰¹ William Chapman, “House Subcommittee Votes to Cite Watt for Contempt,” *Washington Post*, February 10, 1982, at A1.

²⁰² “Watt Says Congress Likely to Hold Him in Contempt,” *Washington Post*, February 11, 1982, at A9.

²⁰³ Philip Shabecoff, “House Panel Finds Watt in Contempt,” *New York Times*, February 26, 1982, at D16.

²⁰⁴ William Chapman, “Hill Panel Votes to Cite Watt for Contempt,” *Washington Post*, February 26, 1982, at A5.

²⁰⁵ Eleanor Randolph, “Watt Says He’d Rather Go to Jail Than Give Papers to Subcommittee,” *Los Angeles Times*, February 11, 1982, at 10.

agreed not to release any information that might harm the national interest in dealing with Canada.²⁰⁶

A newspaper account reports that the ranking Republican on the subcommittee, Marc L. Marks, concluded there was “nothing sensitive in these documents. Watt would have given over the papers had the White House not intervened.”²⁰⁷ During a committee meeting, Marks attributed the impasse with Watt to “an irrational decision made by the White House, put into effect by a President who I cannot believe understood the ramifications of what he was doing.”²⁰⁸ Marks regretted the decision to exclude staff, calling it “illegal because . . . the first person that we are going to turn to that everybody expects us to turn to discuss what the papers show, will naturally be our staff person.”²⁰⁹ Rep. Mike Synar pointed out that “23 members of the Interior Department and other departments saw these documents. We found in one case it was a law student, an intern at the time, who later became an official.”²¹⁰

Gorsuch Contempt

The accommodation over the Watt documents should have formed a better understanding between Congress and the Justice Department. Indeed, when the oversight subcommittee of the House Public Works Committee sought documents on the EPA’s enforcement of the “Superfund” program, it was advised by the agency that there would be no objection “so long as the confidentiality of the information in those files was maintained.”²¹¹ The subcommittee had been investigating the \$1.6 billion program established by Congress to clean up hazardous-waste sites and to prosecute companies responsible for illegal dumping.

Shortly thereafter the Reagan Administration decided that Congress could not see documents in active litigation files. The Administration’s reversal appeared to be triggered by requests from other committees for comparable documents. Another oversight panel from the House Energy and Commerce Committee wanted access to the same type of information. The Administration expressed concern that executive

²⁰⁶ “Contempt of Congress,” hearings before the House Committee on Energy and Commerce, 97th Cong. 385-94 (1982); H.Rept. No. 898, 97th Cong., 2d Sess. (1982); Margot Hornblower, “White House Avoids Hill Showdown Over Documents,” *Washington Post*, March 17, 1982, at A5; Philip Shabecoff, “Data That Caused Citing of Watt Will Be Provided to House Group,” *New York Times*, March 17, 1982, at A21.

²⁰⁷ Margot Hornblower, “White House Avoids Hill Showdown Over Documents,” *Washington Post*, March 17, 1982, at A5.

²⁰⁸ “Contempt of Congress,” hearings, at 386.

²⁰⁹ *Id.* at 389.

²¹⁰ *Id.*

²¹¹ H.Rept. No. 968, 97th Cong., 2d Sess. 11 (1982).



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By William N. LaForge

Testifying Before Congress

branch control would be undermined by these multiple requests.²¹² Both oversight subcommittees had reason to suspect that the major chemical companies were not paying their full share of the costs, requiring taxpayers to pick up the balance.²¹³

EPA Administrator Anne Gorsuch, acting under instructions from President Reagan (meaning the Justice Department), refused to turn over “sensitive documents found in open law enforcement files.” Reagan’s memorandum to her, dated November 30, 1982, claimed that those documents represented “internal deliberative materials containing enforcement strategy and statements of the government’s positions on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites” by the EPA or the Department of Justice.²¹⁴ On December 2, the Administration withheld 64 documents from the subcommittee.²¹⁵ The Administration’s initial position in the Watt dispute had not changed. It still assumed that since documents shared with Congress might find their way into the public realm, they should not be shared at all. Following that logic, congressional oversight would have to be put on hold for years until the government completed its enforcement actions.

By a vote of 9 to 2, a subcommittee of the House Public Works Committee decided to cite Gorsuch for contempt.²¹⁶ The full committee did likewise, after it rejected a Justice Department proposal to give briefings on the contents of the documents.²¹⁷ The House of Representatives voted 259 to 105 to support the contempt citation. Although partisan overtones were present, 55 Republicans joined 204 Democrats to build the top-heavy majority.²¹⁸ Pursuant to the statutory procedures for contempt citations, the Speaker certified the facts and referred them to the U.S. Attorney for presentation to a grand jury.

The Justice Department, anticipating the House vote, moved quickly: “Immediately after the House vote and prior to the delivery of the contempt citation,”²¹⁹ the department chose not to prosecute the case. Instead, it asked a district court to declare the House action an unconstitutional intrusion into the President’s authority to withhold information from Congress.²²⁰ U.S. Attorney

²¹² Id. at 15, 21.

²¹³ Id. at 7-9.

²¹⁴ Id. at 42, 76.

²¹⁵ 8 O.L.C. 101, 107 (1984).

²¹⁶ Mary Thornton, “House Subcommittee Votes to Cite EPA Administrator for Contempt,” *Washington Post*, December 3, 1982, at A6.

²¹⁷ 8 O.L.C. at 107.

²¹⁸ 128 Cong. Rec. 31746-76 (1982).

²¹⁹ Stanley M. Brand and Sean Connelly, “Constitutional Confrontations: Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials,” 36 *Cath. U. L. Rev.* 71, 79 (1986).

²²⁰ Dale Russakoff, “Prosecution of Gorsuch Ruled Out,” *Washington Post*, December 12, (continued...)

Stanley S. Harris, responsible for bringing the case to a grand jury, listed his name on the Justice Department complaint and advised Congress that “it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved.”²²¹

The Justice Department occupied an unusual ethical position. First it had advised Gorsuch to withhold the documents, and now it decided not to prosecute her for adhering to the department’s legal analysis. In court, the department argued that the contempt action marked an “unwarranted burden on executive privilege” and an “interference with the executive’s ability to carry out the laws.” Counsel for the House of Representatives urged the court not to intervene, requesting it to dismiss the case.²²²

The court dismissed the government’s suit on the ground that judicial intervention in executive-legislative disputes “should be delayed until all possibilities for settlement have been exhausted.”²²³ The court urged both parties to devote their energies to compromise and cooperation, not confrontation.²²⁴ After the court’s decision, which the Justice Department chose not to appeal, the Administration agreed to release “enforcement sensitive” documents to the House Public Works Committees, beginning with briefings and redacted copies and eventually ending with the unredacted documents. The unredacted documents could be examined by committee members and up to two staff persons.²²⁵

One of the casualties of the House investigation into the Superfund program was former EPA official Rita M. Lavelle. The House Energy and Commerce Committee voted unanimously to hold her in contempt for defying a committee subpoena to testify.²²⁶ The House voted 413 to zero to hold her contempt.²²⁷ She was sentenced in 1984 to 6 months in prison, 5 years’ probation, and a fine of \$10,000 for lying to Congress about her management of the Superfund program. She was the only EPA official indicted in the scandal, but more than 20 other top officials, including Anne

²²⁰(...continued)
1982, at A1.

²²¹ H.Rept. No. 98-323, 98th Cong., 1st Sess. 49 (1983).

²²² Al Kamen, “Attacked by Lawmakers, Executive Branch Defends Privilege,” *Washington Post*, February 2, 1983, at A3.

²²³ *United States v. House of Representatives*, 556 F.Supp. 150, 152 (D.D.C. 1983)

²²⁴ *Id.* at 153.

²²⁵ H.Rept. No. 323, 98th Cong., 1st Sess. 18-20 (1983). For further details on the Gorsuch affair, see Ronald L. Claveloux, “The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy,” 1983 *Duke L. J.* 1333 (1983).

²²⁶ Cass Peterson, “House Panel Votes to Cite Rita Lavelle,” *Washington Post*, April 27, 1983, at A3; Joseph A. Davis, “House Panel Votes to Cite Rita Lavelle for Contempt,” *CQ Weekly Report*, April 30, 1983, at 839.

²²⁷ 129 Cong. Rec. 12717-25 (1983).

Gorsuch, left the EPA amid allegations of perjury, conflict of interest, and political manipulation of the agency.²²⁸

Following the Gorsuch contempt, the Office of Legal Counsel wrote an opinion on May 30, 1984, concluding that as a matter of statutory interpretation and separation of powers analysis, a U.S. Attorney is not required to bring a congressional contempt citation to a grand jury when the citation is directed against an executive official who is carrying out the President’s decision to invoke executive privilege.²²⁹ The memo regarded the threat of criminal prosecution from a congressional contempt citation as an “unreasonable, unwarranted, and therefore intolerable burden” on the President’s exercise of constitutional authority, and that Congress “has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks.”²³⁰ The memo cautioned that its analysis was “limited to the unique circumstances that gave rise to these questions late in 1982 and early 1983,”²³¹ and that “prudence” should limit the conclusions in the memo “to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis.”²³²

Travelgate and Jack Quinn

The House Committee on Government Reform and Oversight conducted an investigation of the 1993 firings of seven Travel Office employees in the Clinton White House. Although President Clinton had full authority to fire these employees, the manner of their discharge led to investigations by Congress, the General Accounting Office, the press, and the independent counsel. On May 19, 1993, they were dismissed with the charge that they followed poor management practices. Dee Dee Myers, Clinton’s press secretary, also stated that the FBI had been asked to examine the records in the Travel Office, suggesting that the employees might have been guilty of criminal action as well. The way the White House replaced the seven employees soon raised charges of nepotism and cronyism.²³³

The House Committee on Government Reform and Oversight received the documents it requested from the Justice Department and other federal agencies, but in September 1995 the White House informed the panel that President Clinton might

²²⁸ “Burford Resigns From EPA Post Under Fire,” 1983 CQ Almanac 332-35; Al Kamen, “Lavelle Gets Prison Term, \$10,000 Fine,” Washington Post, January 10, 1984, at A2.

²²⁹ 8 O.L.C. 101 (1984).

²³⁰ *Id.* at 102.

²³¹ *Id.*

²³² *Id.* at 103.

²³³ “Complaint by Clinton Friend Led to Ouster of Travel Staff,” New York Times, May 21, 1993, at A1. See Louis Fisher, *Constitutional Conflicts between Congress and the President* 78-79 (1997 ed).

claim executive privilege and refuse to turn over some or all of 907 documents.²³⁴ In January 1996, the committee subpoenaed the records from the White House, and in May it announced that it would hold the White House in contempt unless it turned over the materials.²³⁵ White House Counsel Jack Quinn wrote to Committee Chairman William F. Clinger, Jr.: “Let me be blunt: this threat can only be characterized as a desperate political act meant to resuscitate interest in a story that long ago died.” Quinn objected to a legislative inquiry that had become, he said, “a tiresome fishing expedition” and a “wild good chase.”²³⁶ On May 9, the committee voted 27 to 19 to hold Quinn in contempt as well as two others: former White House Director of Administration David Watkins and his aide, Matthew Moore.²³⁷

Clinger offered to delay the next step—sending the contempt citation to the House for a vote—to leave open the possibility of an accommodation with the White House.²³⁸ He offered to have Quinn come to the committee before floor action.²³⁹ Thereafter, the Administration released about 1,000 pages of documents to the committee just hours before the House was scheduled to take up the contempt vote.

Contempt Action Against Reno

Late in 1997, Attorney General Janet Reno responded to a subpoena from the House Government Reform and Oversight Committee, chaired by Rep. Dan Burton. She declined to give the committee a memorandum sent to her by FBI Director Louis J. Freeh, who had urged the appointment of an independent counsel to investigate allegations of criminal conduct in campaign finance. Justice Department officials said that both Reno and Freeh advised the committee that it was inappropriate to provide a congressional committee with a departmental document that included analysis about an ongoing investigation. They agreed on the need to withhold the document because of “the need to protect the confidentiality and independence of an ongoing investigation and our prosecutorial decisionmaking.”²⁴⁰

²³⁴ Ann Devroy, “Clinton May Assert Executive Privilege,” *Washington Post*, September 8, 1995, at A11.

²³⁵ Susan Schmidt, “House Prober Presses Demand for Travel Office Documents,” *Washington Post*, May 3, 1996, at A2.

²³⁶ “Correspondence Between the White House and Congress in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore,” a report by the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 409 (Comm. Print, May 1996).

²³⁷ Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore,” House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 88 (Comm. Print, June 1996) (hereafter “Business Meeting: Quinn”); R. H. Melton, “House Panel Votes for Contempt Citation,” *Washington Post*, May 10, 1996, at A4.

²³⁸ “Panel Moves to Gain Travel Office Files,” *New York Times*, May 10, 1996, at A26.

²³⁹ “Business Meeting: Quinn,” at 46.

²⁴⁰ Roberto Suro, “Reno Declines To Hand Over Freeh Memo,” *Washington Post*, December 9, 1997, at A6.

On July 27, 1998, the Justice Department refused to turn over two internal documents that recommended the appointment of an independent counsel in the campaign finance investigation. The House committee had subpoenaed a 27-page memo to Reno by Freeh and a 94-page report by Charles G. LaBella, former head of the department's campaign finance task force. Instead of turning over the two documents, the Justice Department offered to brief the committee members on the contents of the memos. Chairman Burton rejected the proposal.²⁴¹

After the department's refusal to release the documents, the House committee voted 24 to 19 on August 6 to cite Reno for contempt. She warned that release of the documents would "provide criminals, targets and defense lawyers alike with a road map to our investigations."²⁴² She offered to brief the committee in public session "on the legal rationale" presented in the two memos, but only after she had made a decision on whether to seek an independent counsel.²⁴³ At a news conference, she said that for a committee to ask for an internal department document before she reached a decision "is a form of "political tampering that no prosecutor in America can accept."²⁴⁴

The following month, Reno gave Chairman Burton access to heavily redacted versions of the memos, leaving him roughly thirty percent to read.²⁴⁵ Burton asked Reno to allow three former prosecutors and a former White House deputy counsel to review the memos and give their opinions to him and to the House Republican leadership. She rejected that proposal.²⁴⁶ She did agree, however, to allow six other Republican members of the committee to view the redacted copy, but insisted that Burton withdraw the subpoena and drop the contempt citation.²⁴⁷ After these attempts to find common ground failed, Burton moved forward with the contempt citation. Although the committee recommended holding Reno in contempt, the matter was not taken to the floor for House action.

As part of the impeachment action against President Clinton, members of the House Judiciary Committee were allowed to read the Freeh and LaBella documents.

²⁴¹ Roberto Suro, "Justice Dept. Defies House Subpoena for Campaign Finance Probe Memos," *Washington Post*, July 28, 1998, at A8.

²⁴² George Lardner, Jr., "House Panel Votes to Hold Reno in Contempt," *Washington Post*, August 7, 1998, at A1.

²⁴³ *Id.* at A21.

²⁴⁴ Sumana Chatterjee, "Panel Steps Up Confrontation Over Campaign Finance Memos, Voting to Cite Reno for Contempt," *CQ Weekly Report*, August 8, 1998, at 2175. For background documents on the contempt citation against Reno, see "Contempt of Congress," report by the House Committee on Government Reform and Oversight, H.Rept. No. 105-728, 105th Cong., 2d Sess. (September 17, 1998).

²⁴⁵ Sumana Chatterjee, "Reno Still Faces Citation for Contempt," *CQ Weekly Report*, September 5, 1998, at 2330.

²⁴⁶ Amy Keller, "Burton Pushes Contempt Against Reno," *Roll Call*, September 21, 1998, at 3.

²⁴⁷ "The Contempt Citation" (editorial), *Washington Post*, September 22, 1998, at A16.

On December 2, 1998, U.S. District Judge Norma Holloway Johnson granted the committee limited access to the two memos.²⁴⁸ On June 6, 2000, the House Government Reform Committee released the Freeh and LaBella memos along with other Justice Department documents related to the refusal to appoint an independent counsel to investigate campaign finance issues of the 1996 presidential election.²⁴⁹

²⁴⁸ Robert Suro and Ruth Marcus, “Justice Memos May Yield Very Little,” Washington Post, December 3, 1998, at A18.

²⁴⁹ George Lardner, Jr., “Memos: Reno Was Warned,” Washington Post, June 7, 2000, at A1.

Conclusions

Committee subpoenas and contempt citations have been effective instruments for gaining access to executive branch documents that are initially withheld. The pressure that builds from these two techniques generally results in the Administration offering new accommodations to satisfy legislative needs. Although both branches at times seek assistance from the courts, the general message from federal judges is that an agreement hammered out between the two branches is better than a directive handed down by a court.

The executive-legislative conflicts described in this report offer several lessons about access to information. Congress has as much right to agency documents for oversight purposes as it does for legislation. Executive claims of “deliberative process,” “enforcement sensitive,” “ongoing investigation,” or “foreign policy considerations” have not been, in themselves, adequate grounds for keeping documents from Congress. On the issue of withholding information from Congress, there are often sharp differences within an Administration, especially between the Justice Department and the agencies.

Further, these case studies show that statutory language that authorizes withholding information from the public is not a legitimate reason for withholding information from Congress. Sharing sensitive information with congressional committees is not the same as sharing information with the public. Courts assume that congressional committees will exercise their powers responsibly. Legislative committees have demonstrated that they have reliable procedures for protecting confidentiality. Finally, congressional capacity to subpoena agency documents from private organizations is not an adequate substitute for receiving them directly from the agency.

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