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CONGRESSIONAL ACCESS TO INFORMATION: USING LEGISLATIVE WILL AND LEVERAGE

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Presidents and their advisers cite various legal principles when they withhold documents from Congress and refuse to allow executive officials to testify before congressional committees. Congress can marshal its own impressive list of legal citations to defend legislative access to information, even when presidents assert executive privilege. These legal and constitutional principles, finely-honed as they might be, are often overridden by the politics of the moment and practical considerations.

This Essay highlights the political settlements that decide most information disputes. Courts play a role, but it is a mistake to believe that handy cites from judicial opinions will win the day. Efforts to resolve interbranch disputes on purely legal grounds may have to give ground in the face of superior political muscle by a Congress determined to exercise the many coercive tools available to it. By the same token, a Congress that is internally divided or uncertain about its in-

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stitutional powers will lose out in the quest for information. Moreover, both branches are at the mercy of political developments that can arise without warning and tilt the advantage decisively to one side.

This Essay begins with Part I, which reviews the constitutional principles at stake when presidential decisions to withhold documents from Congress collide with the needs of lawmakers for information about the executive branch. Which implied power should yield to the other? Part II analyzes the use of a fundamental legislative tool—the appropriations power—to extract information from the president. Subsequent Parts focus on other forms of congressional leverage: impeachment (Part III), the appointment power (Part IV), congressional subpoenas (Part V), holding executive officials in contempt (Part VI), House resolutions of inquiry (Part VII), the "Seven Member Rule" (Part VIII), investigations conducted by the General Accounting Office (Part IX), and requests to White House aides to testify (Part X), all of which may force executive officials to release documents and discuss matters they would otherwise prefer to keep private and confidential.

I. CONSTITUTIONAL PRINCIPLES IN CONFLICT

No constitutional language authorizes the president to withhold documents from Congress, nor does any provision empower Congress to demand and receive information from the executive branch. The Supreme Court has recognized the constitutional power of Congress to investigate,[1] and the president's power to withhold information,[2] but those powers would exist with or without judicial rulings. Over the past two centuries, Congress and the President have insisted that the powers are necessarily implied in the effective functioning of government. No doubt they are. The difficult and unpredictable issue is how to resolve two implied powers when they collide. Some judicial opinions provide guidance, but most of the disputes are resolved through political accommodations.

A lengthy study in 1949, expressing the executive branch position, asserted that federal courts "have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold . . . information and papers in the public interest, and they

1. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).
2. United States v. Nixon, 418 U.S. 683, 711 (1974).

will not interfere with the exercise of that discretion."[3] That statement, incorrect when written, is even less true today as a result of litigation and political precedents over the past half century. Similarly inaccurate is the claim that "in every instance where a President has backed the refusal of a head of a department to divulge confidential information to either of the Houses of Congress, or their committees, the papers and the information requested were not furnished."[4] Congress and its committees have enjoyed a more successful record than that. Finally, the 1949 study seriously understated the coercive powers of Congress when it claimed that the heads of departments "are entirely unaffected by existing laws which prescribe penalties for failure to testify and produce papers before the House of Representatives or the Senate, or their committees."[5] Congress may hold both executive officials and private citizens in contempt.

What informs the process of congressional access to executive branch information is the constitutional structure of separation of powers and the system of checks and balances. Neither political branch has incontestable authority to withhold information or force its disgorgement. When these executive-legislative clashes occur, they are seldom resolved judicially. Accommodations are usually discovered without the need for litigation. On those rare occasions where these disputes enter the courts, judges typically reject sweeping claims of privilege by elected officials while encouraging the two branches to find a satisfactory compromise.[6] Courts look to legal precedent, "and legal precedent is much too inflexible to apply in individual cases of executive-legislative disputes."[7] The outcome is more likely decided by the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable.

Although the congressional power to investigate is not expressly provided for in the Constitution, the framers understood that legislatures must oversee the executive branch. At the Philadelphia Conven-

3. Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 103 (1949). At the time he wrote his article, Wolkinson was serving as an attorney with the Department of Justice.

4. *Id.* at 104.

5. *Id.* at 107.

6. *E.g.*, United States v. AT&T, 567 F.2d 121, 130 (D.C. Cir. 1977); United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976).

7. Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL'Y 719, 745 (1993).

tion, 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."[8] Charles Pinckney submitted a list of congressional prerogatives, including: "Each House shall be the Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same."[9] The Constitution, however, provided no express powers for Congress to investigate or to punish for contempt. What was left silent would be filled within a few years by implied powers and legislative precedents.

II. THE APPROPRIATIONS POWER

Presidents may have to surrender documents they consider sensitive or confidential to obtain funds from Congress to implement programs important to the executive branch. This congressional leverage appears in a number of early executive-legislative confrontations over the treaty power. Although the House has no formal role in the treaty process, once a treaty is ratified and requires appropriations to carry it out, presidents must turn to the House for support, and share with it whatever documents are necessary to obtain the funds. In some cases, the administration may find it politically smart to share documents with the House while treaty negotiations are underway. This Part also discusses the question of whether treaties or statutes should be used to enter into international agreements.

A. Funding Treaties

One of the problems inherited by President George Washington was the American practice of paying annual bribes ("tributes") to four countries in North Africa: Morocco, Algiers, Tunis, and Tripoli. The United States made regular payments to allow American merchant vessels to operate in those waters without interference.[10] On March 11, 1792, Secretary of State Thomas Jefferson offered advice to Washington on whether he should make a treaty with the Algerians "on the single vote of the Senate, without taking that of the Rep-

8. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 206 (Max Farrand ed., 1937); *see also id.* at 199 (discussing Mason's comments as reported by Madison).

9. *Id.* at 341.

10. GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 45–50 (1997); LOUIS FISHER, PRESIDENTIAL WAR POWER 24 (1995).

resentatives."[11] Jefferson, who generally defended executive prerogatives, did not render narrow legal advice by arguing that the House had no role in the treaty-making process. He analyzed the issue in practical fashion: "We must go to Algiers with cash in our hands. Where shall we get it? By loan? By converting money now in the treasury?"[12] He reasoned that a loan might be obtained on presidential authority, "but as this could not be repaid without a subsequent act of legislature, the Representatives might refuse it. So if money in the treasury be converted, they may refuse to sanction it."[13]

Next, Jefferson said that just as Senators "expect to be consulted beforehand" about a pending treaty, if Representatives need to fund a treaty, "why should not they expect to be consulted in like manner, when the case admits."[14] Here, Jefferson distinguished between the president's latitude in entering into treaties that could be implemented without appropriations (self-executing treaties), and those that were dead in the water unless Congress decided to provide funds:

> A treaty is a law of the land. But prudence will point out this difference to be attended to in making them; viz. where a treaty contains such articles only as will go into execution of themselves, or be carried into execution by the judges, they may be safely made; but where there are articles which require a law to be passed afterwards by the legislature, great caution is requisite.[15]

Jefferson, advising "against hazarding this transaction without the sanction of both Houses," noted that the president concurred.[16] After resolving a potential collision between the president and the House, Jefferson learned about a dispute between the Senate and the House. He found out that the Senate was willing to pay an annual tribute to Algiers "to redeem our captives," but was "unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it."[17] Jefferson said that Senators feared that if the president consulted the House on one occasion, this "would give

11. Thomas Jefferson, *The Anas*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 263, 294 (Albert Ellery Bergh ed., 1905).

12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id.* at 295.

17. *Id.* at 305.

them a handle always to claim it, and would let them into a participation of the power of making treaties, which the Constitution had given exclusively to the President and Senate."[18]

Senators tried to bolster their prerogative with another argument, but this one backfired. If the House voted for a particular sum, Senators warned, "it would not be a secret."[19] Washington decided against trying to circumvent the House by making a loan. Moreover, he "had no confidence in the secrecy of the Senate, and did not choose to take money from the Treasury or to borrow."[20] Washington did not like having to persuade the House to fund a treaty that he thought it should support as a constitutional duty,[21] but Jefferson advised that "wherever the agency of either, or both Houses would be requisite subsequent to a treaty, to carry it into effect, it would be prudent to consult them previously, if the occasion admitted."[22] Advance consultation with the House was necessary, "especially in the case of money, as they held the purse strings, and would be jealous of them."[23]

Washington followed Jefferson's advice. In a message to Congress on December 16, 1793, regarding a treaty with Morocco for the payment of ransom and establishing peace with Algiers, Washington forwarded to both the Senate and the House communications and confidential letters that he asked the lawmakers to keep secret.[24] Later that month, the House went into secret session to debate the treaty, clearing the chamber "of all persons but the members and clerk."[25] Some members objected that "secrecy in a Republican Government wounds the majesty of the sovereign people," but in reply to such arguments it was said that

> because this Government is Republican, it will not be pretended that it can have no secrets. The PRESIDENT OF THE UNITED STATES is the depository of secret transactions; his duty may lead him to delegate those secrets to the members of the House, and the success, safety, and energy of the Government may depend on keeping those

18. *Id.* at 305–06.
19. *Id.* at 306.
20. *Id*.
21. *Id*.
22. *Id.* at 307.
23. *Id*.
24. 4 ANNALS OF CONG. 20–21 (1793).
25. *Id.* at 150.

secrets inviolably.[26]

The galleries were cleared. For several days the House debated, in secret, the confidential documents that Washington had made available to them.[27]

Three years later, on the issue of the Jay Treaty, Washington pursued a different strategy. In his long and honorable career, this action marked a rare occasion where his public statement could be called trite and disingenuous. He now argued that: (1) the House could not be trusted with secret communications, and (2) the treaty-making power—within the legislative branch—lay solely with the Senate. On March 1, 1796, he advised Congress that the Jay Treaty had been ratified.[28] The treaty was controversial in many respects because Jay had departed from his instructions and agreed to various restrictions on American commerce.[29] With its express constitutional responsibilities over foreign commerce, the House had a right to take a close look.

Alexander Hamilton advised Washington not to release the treaty instructions to the House, describing the instructions as "in general a crude mass" that would do "no credit to the administration."[30] Washington knew his political footing was precarious. In a letter to Hamilton, he said that "at present the cry against the Treaty is like that against a mad-dog; and every one, in a manner, seems engaged in running it down."[31] Washington acted, not on constitutional principles, but on a political calculation. Withholding the documents from the House, he knew, would enrage some members. Releasing the documents, he feared, might make matters worse. He decided to take a chance: keep the documents from the House and see what happened. If the votes went against him, he could always take the next step and negotiate a settlement with members of the House.

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26. *Id*.

27. *Id.* at 151–55; *see also* CASPER, *supra* note 10, at 56–57 (illustrating how the House of Representatives handled President Washington's request for secrecy).

28. 5 ANNALS OF CONG. 394 (1796).

29. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 85 (1976).

30. Letter from Alexander Hamilton to George Washington, President of the United States (Mar. 28, 1796), *in* 20 THE PAPERS OF ALEXANDER HAMILTON 83 (Harold C. Syrett ed., 1974).

31. Letter from George Washington, President of the United States, to Alexander Hamilton (July 29, 1795), *in* 34 THE WRITINGS OF GEORGE WASHINGTON 262 (John C. Fitzpatrick ed., 1940).

Representative Edward Livingston took the floor to insist on "every document which might tend to throw light on the subject."[32] In offering a resolution that called for papers, he recognized that the House had no formal role in the treaty process but cautioned that the House possessed "a discretionary power of carrying the Treaty into effect, or refusing it their sanction."[33] Denied information, the House might retaliate by refusing the funds needed to implement the treaty.[34] The House supported his resolution, sixty-two to thirty-seven.[35] While this debate was underway, some House members already had access to the treaty documents. Livingston, as chairman of the House Committee on American Seamen, possessed many of the treaty papers, as did other committee members and "any member of that House who would request it."[36] Also, any House member could have walked over to the office of the secretary of the Senate to see the papers.[37]

Washington offered several reasons for denying the House the documents, citing the need for caution and secrecy in foreign negotiations, as well as the exclusive role of the Senate to participate as a member of the legislative branch in treaty matters.[38] However, members of the House were not requesting documents as part of the treaty process. They did not need the president to tell them the Constitution excludes the House from treaty-making. They knew that. But the treaty had been negotiated, approved by the Senate, and ratified. The House was now requesting documents because it was being asked to provide funds needed to *implement* the treaty. Washington seemed to understand that right. A letter from Hamilton to Washington implies that Washington had initially considered giving the House access to the papers it requested.[39]

Representative Thomas Blount introduced two resolutions (both adopted fifty-seven to thirty-five), stating that although the House of

32. 5 ANNALS OF CONG. 400 (1796).

33. *Id.* at 428.

34. *Id.* at 427–28.

35. *Id.* at 759.

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

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

38. Letter from George Washington, President of the United States, to the Members of the House of Representatives (Mar. 30, 1796), *in* 5 ANNALS OF CONG. 760–61.

39. Letter from Alexander Hamilton to George Washington, President of the United States (Mar. 24, 1796), *in* 20 THE PAPERS OF ALEXANDER HAMILTON 81–82 (Harold C. Syrett ed., 1974); *see also* Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 589–90 (2000) (discussing Hamilton's letter).

Representatives had no role in making treaties, whenever a treaty treated subjects assigned to Congress as a whole,

> it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.[40]

That was the situation when Washington asked Congress to appropriate ninety thousand dollars to implement the Jay Treaty.[41] A resolution introduced by Representative Samuel Maclay stated that unless the House received additional information, "it [would not be] expedient at this time to concur in passing the laws necessary for carrying the said Treaty into effect."[42] The House never voted on Maclay's language. Instead, by a vote of fifty-one to forty-eight, it appropriated funds to implement the treaty.[43] Had the vote gone the other way, President Washington would have been under pressure to submit additional documents to the House.

In 1803, President Jefferson understood that he needed the support of both Houses to implement the treaty he entered into with France for the Louisiana Purchase. Because Congress would have to ratify and pay for it,[44] the treaty "[had to] be laid before both Houses, because both have important functions to exercise respecting it."[45] The House debated a resolution asking Jefferson to submit certain papers and documents relating to the treaty. Some portions of the resolution were adopted, others rejected. The resolution as a whole went down to defeat, fifty-seven to fifty-nine.[46] With or without the resolution, there is little doubt that the administration was willing to provide the House with whatever documents it needed to support the treaty. The House subsequently joined the Senate in passing legisla-

40. 5 ANNALS OF CONG. 771 (1796). For the voting record, see *id.* at 782–83.

41. *Id.* at 991.

42. *Id.* at 971.

43. *Id.* at 1291.

44. Letter from Thomas Jefferson, President of the United States, to John Breckenridge (Aug. 12, 1803), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 410 (Albert Ellery Bergh ed., 1905).

45. *Id.*

46. 13 ANNALS OF CONG. 418–19 (1803).

tion to enable Jefferson to take possession of the Louisiana Territory.[47]

B. *By Treaty or Statute?*

The House can have access to treaty papers under other conditions. If the Senate rejects or fails to ratify a treaty, the president may turn to Congress and try to accomplish the same purpose through regular legislation. For example, after the Senate failed to support a treaty for the annexation of Texas, President John Tyler advised the House that the power of Congress is "fully competent in some other form of proceeding to accomplish everything that a formal ratification of the treaty could have accomplished."[48] He gave the House the rejected treaty "together with all the correspondence and documents which have heretofore been submitted to the Senate in its executive sessions."[49] The papers embraced not only the series made public by order of the Senate, "but others from which the veil of secrecy has not been removed by that body, but which I deem to be essential to a just appreciation of the entire question."[50] In this "treaty" matter the House was fully coequal with the Senate. Congress passed the joint resolution for annexing Texas to the United States, and it became law.[51]

Treaties frequently stipulate that the assistance to be given another country is subject to "the annual authorizations and appropriations contained in United States security assistance legislation."[52] Thus, negotiators from the executive branch may promise a country various levels of economic and military assistance, but what that country receives depends on what Congress decides through the regular legislative process. If the authorizing and appropriating committees in the House want additional documents, the executive branch is in no position to withhold the information by claiming that the treaty power is reserved to the president and the Senate.

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47. Act of Oct. 31, 1803, 2 Stat. 245.

48. 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 323 (James D. Richardson ed., 1897) [hereinafter RICHARDSON].

49. *Id*.

50. *Id*.

51. Joint Resolution of Mar. 1, 1845, 5 Stat. 797. For other joint resolutions used to accomplish a public policy that had failed through the treaty process, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 238 (4th ed. 1997).

52. Agreement on Friendship, Defense and Cooperation, July 2, 1982, U.S.-Spain, Complementary Agreement Three, art. 2, 34 U.S.T. 3885, 3966.

The coequal role of the House in international agreements was evident in 1994 when President Bill Clinton submitted the Uruguay Round Agreements to Congress as a bill rather than as a treaty. The purpose of the bill was to implement the worldwide General Agreements on Tariffs and Trade (GATT). Although Professor Laurence Tribe testified that the proposal had such an impact on federalism that it required presentation as a treaty rather than a bill,[53] the subject matter of the North American Free Trade Agreement (NAFTA) and GATT—international trade—was certainly within the jurisdiction of Congress as a whole to "regulate Commerce with foreign Nations."[54] The bill was enacted into law on December 8, 1993.[55]

In 2001, the Eleventh Circuit ruled that the issue of whether NAFTA was a "treaty" requiring Senate ratification pursuant to the Treaty Clause, or could instead be enacted as a statute, represented a nonjusticiable political question.[56] It found that the Treaty Clause failed to "outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial treaties."[57]

III. THE IMPEACHMENT POWER

In the struggle for information, Congress has especially strong leverage when it decides to initiate the impeachment process. This leverage exists not only when a president is personally accused of an action that may merit removal from office, but extends more broadly to malfeasance in the administration and to corruption, inefficiency,

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53. *S. 2467, GATT Implementing Legislation: Hearings Before the Senate Comm. on Commerce, Sci., and Transp.*, 103d Cong. 302–12 (1994) (statement of Professor Laurence Tribe, Harvard Law School).

54. U.S. CONST art. I, § 8, cl. 3. *Compare* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805–813 (1995) (challenging originalist accounts that suppose the Treaty Clauses to have a plain meaning that cannot be altered without formal amendment), *with* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1223–49 (1995) (responding to Professors Ackerman and Golove by illustrating that "resort to extraordinary theories of constitutional change threatens to undermine genuine inquiry into the meaning of the Constitution's text").

55. North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301–3473 (2000)).

56. Made in the USA Found. v. United States, 242 F.3d 1300, 1319 (11th Cir.), *cert. denied sub nom.* United Steelworkers of America v. United States, 534 U.S. 1039 (2001).

57. *Id*. at 1315.

criminal activity, unethical conduct, and personal wrongdoing by agency officials.

A. Early Precedents

When President Washington denied the House the papers it requested on the Jay Treaty, he said that the only ground on which the House might have legitimately requested the documents was impeachment, "which the resolution has not expressed."[58] The power of impeachment, said President James Polk, gives to the House of Representatives

> the right to investigate the conduct of all public officers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Department. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge.[59]

Executive privilege may also be politically imprudent in cases where lawmakers make serious charges of administrative malfeasance. President Andrew Jackson told Congress that if it could "point to any case where there is the slightest reason to suspect corruption or abuse of trust . . . . [t]he offices of all the departments will be opened to you, and every proper facility furnished for this purpose."[60] The Supreme Court has noted that the power of Congress to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[61]

B. Contemporary Examples

In 1982, Attorney General William French Smith said that he would not try "to shield [from Congress] documents which contain evidence of criminal or unethical conduct by agency officials from proper review."[62] A year later, President Ronald Reagan remarked:

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58. 5 ANNALS OF CONG. 759 (1796).

59. 4 RICHARDSON, *supra* note 48, at 434.

60. 13 REG. DEB. app. at 202 (1837). For the entire discussion, see *id.* app. at 188–225.

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

62. Letter from William French Smith, Attorney General, to John Dingell, Chairman, House of Representatives Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 97-968, at 37, 41 (1982).

"We will never invoke executive privilege to cover up wrongdoing."[63] He held to that policy in 1986 by allowing his Cabinet officials to discuss with Congress their conversations with him on the Iran-Contra affair, and made available to Congress thousands of sensitive, classified documents.[64] Through this cooperation he hoped to derail any movement toward impeachment. Attorney General Edwin Meese, III, thought the Iran-Contra affair had the potential for "toppling" the president and triggering impeachment proceedings in the House.[65]

White House Counsel Lloyd Cutler, in a memorandum of September 28, 1994, provided guidance for congressional requests to departments and agencies for documents. Congressional requests would be complied with "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch."[66] Although the doctrine of executive privilege would be asserted to protect "the confidentiality of deliberations within the White House," in circumstances that involve communications "relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."[67]

In 1998, the House Committee on Government Reform and Oversight voted to cite Attorney General Janet Reno for contempt for refusing to release memoranda generated within the Department of Justice (DOJ) regarding campaign finance issues. The committee was restricted to reading redacted versions of the memoranda. The contempt citation was not taken up by the House, but later that year, as part of an impeachment effort against President Clinton, the House Judiciary Committee gained access to the unredacted versions, and the House Government Reform Committee later released the memoranda to the general public.[68]

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63. Ronald Reagan, News Conference (Feb. 16, 1983), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1983, at 239 (1984).

64. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433 and S. REP. NO. 100-216, at xvi (1987).

65. THEODORE DRAPER, A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS 521 (1991).

66. Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Departments and Agency General Counsels 1 (Sept. 28, 1994) (on file with the *Duke Law Journal*).

67. *Id*.

68. *See infra* Part VI.E.

IV. THE APPOINTMENT POWER

After submitting the name of a nominee to the Senate, the president may discover that he is left with two options, neither one attractive. One is to surrender sensitive documents to Congress and agree to have executive officials testify before congressional committees. If that choice is unacceptable, the other option is to abandon the nominee. That dilemma is discussed in this Part with regard to the appointments of Richard Kleindienst in 1972 to be Attorney General, and of William Rehnquist in 1986 to be Chief Justice. At any time in the appointment process, a Senator may resort to "holds" on entirely unrelated matters to force the release of executive branch information.

A. Kleindienst Nomination

President Richard Nixon's nomination of Richard Kleindienst in 1972 to be Attorney General precipitated lengthy hearings by the Senate Judiciary Committee. Columnist Jack Anderson charged that Kleindienst had lied in disclaiming any role in the DOJ's out-of-court settlement of antitrust cases against International Telephone and Telegraph Corporation (ITT).[69] The Senate wanted Peter Flanigan, a presidential aide and the chief White House figure involved in the controversy, to testify. However, on April 12, 1972, White House Counsel John Dean wrote to the committee that the doctrine of executive privilege would protect Flanigan and other White House aides from testifying before congressional committees: "Under the doctrine of separation of powers, and long-established historical precedents, the principle that members of the President's immediate staff not appear and testify before congressional committees with respect to the performance of their duties is firmly established."[70]

By party-line votes, the committee rejected three motions.[71] Nevertheless, Senator Sam Ervin made it clear that the Senate should not vote on Kleindienst "so long as those fellows aren't coming up here and the White House is withholding information."[72] With a filibuster looming, the White House within a few days retreated from Dean's

69. *ITT Dispute Fails to Block Kleindienst Confirmation*, 28 CONG. Q. ALMANAC 207, 207 (William B. Dickinson, Jr. ed., 1972).

70. *Sen. Ervin Hints Filibuster on Kleindienst After Panel Rejects Calling of Nixon Aide*, WALL ST. J., Apr. 13, 1972, at 4.

71. *ITT Dispute Fails to Block Kleindienst Confirmation*, *supra* note 69, at 221.

72. *Panel Votes Not to Subpoena Nixon Aides on I.T.T*, N.Y. TIMES, Apr. 13, 1972, at 30.

theory and Flanigan appeared at the hearings on April 20.[73] Following committee action, the Senate confirmed Kleindienst by a vote of sixty-four to nineteen.

B. Rehnquist for Chief Justice

In 1986, President Reagan refused to give the Senate certain internal memoranda that the president's nominee for Chief Justice, William Rehnquist, had written while serving in the DOJ from 1969 to 1971. The memoranda were withheld to protect the confidentiality and candor of the legal advice submitted to presidents and their assistants.[74] The legal theory might have been good but the political setting was not. With Democrats on the Senate Judiciary Committee threatening to subpoena the papers,[75] the dispute prevented action on the nomination of Antonin Scalia to be Associate Justice.[76] In an effort to move those two nominations, President Reagan agreed to allow the committee to read twenty-five to thirty documents that Rehnquist had written while with the DOJ.[77] Later, the committee requested and received additional documents prepared by Rehnquist while in the DOJ.[78] The Senate then confirmed Rehnquist and Scalia.[79]

C. Senate "Holds"

The informal practice of imposing "holds" allows any Senator to request that floor action on a bill or nomination be deferred. The Senate Majority Leader may then decide whether to honor the request. Although there have been objections to "secret holds"—so-called "anonymous" holds—Senators realize that holds are frequently a legitimate means of pursuing legislative interests. Efforts to place

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73. *Nomination of Richard G. Kleindienst of Arizona, to Be Attorney General—Resumed (Part 3): Hearings Before the Senate Comm. on the Judiciary*, 92d Cong. 1585 (1972).

74. Al Kamen & Ruth Marcus, *Reagan Uses Executive Privilege to Keep Rehnquist Memos Secret*, WASH. POST, Aug. 1, 1986, at A1.

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

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

77. Al Kamen & Howard Kurtz, *Rehnquist Told in 1974 of Restriction in Deed*, WASH. POST, Aug. 6, 1986, at Al.

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

79. A similar situation developed two years later when the nomination of Stephen S. Trott for the Ninth Circuit was delayed for four months until the DOJ agreed to give the Senate certain documents. *See* Fisher, *supra* note 39, at 600.

limits on holds, such as requiring Senators to make their actions known to the sponsor of a bill, have been difficult to enforce.[80]

There are many reasons for placing a hold, but often it is to obtain information that the executive branch has refused to release to Congress. In 1993, Senator John Warner announced that he would release his hold on the intelligence authorization bill after receiving assurance from the CIA that it would search its files for information on Department of Defense nominee Morton Halperin. The CIA had previously said that it could not find the documents requested by Republican members of the Senate Armed Services Committee. CIA Director James Woolsey had planned to brief committee Republicans on this issue but apparently was ordered not to do so by White House Counsel Bernard Nussbaum.[81]

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

In 1999, several senators wrote to the State Department, expressing their concern about the Department's treatment of Linda Shenwick, who worked at the U.S. mission to the United Nations (UN). After giving Congress information on mismanagement at the UN, she was threatened with a suspension and transfer to another job.[83] As a way of getting the department's attention, Senator Grassley placed a hold on the nomination of Richard Holbrooke to be U.S. Ambassador to the UN. He explained that if lawmakers did not protect agency whistleblowers, "a valuable source of information to

80. Helen Dewar, *Senate Pact on "Holds" Seems to Be a Dead Letter*, WASH. POST, Nov. 12, 2001, at A23; Helen Dewar, *Senator Seeks to Stamp Out Secretive "Holds,"* WASH. POST, Nov. 17, 2001, at A4.

81. Bill Gertz, *CIA Offer of Help on Nominee Frees Up Authorization Bill*, WASH. TIMES, Nov. 5, 1993, at A5.

82. 143 CONG. REC. S11,631–32 (daily ed. Nov. 4, 1997).

83. 145 CONG. REC. S7587–88 (daily ed. June 24, 1999) (statement of Sen. Grassley); Editorial, *Sen. Grassley's "Hold*," THE HILL, Aug. 11, 1999, at 10.

Congress [would] likely dry up."[84] After being reassured that Shenwick would not be punished by the State Department, Senator Grassley lifted his objections to Holbrooke, who was confirmed, but blocked approval of three other ambassadorial nominees to underscore his intention to protect Shenwick.[85]

V. CONGRESSIONAL SUBPOENAS

The Supreme Court has held that the congressional power of inquiry "is an essential and appropriate auxiliary to the legislative function."[86] As a tool of this inquiry, both Houses of Congress authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the committee's jurisdiction. If a witness from the administration refuses to testify by invoking the Fifth Amendment, Congress can vote to force testimony by granting the witness either partial or full immunity.

"The issuance of a subpoena pursuant to an authorized investigation" is "an indispensable ingredient of lawmaking."[87] To be legitimate, a congressional inquiry need not produce a bill or legislative measure. "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[88]

Committee investigations are appropriate when they satisfy certain standards. Legislative inquiries must be authorized by Congress, pursue a valid legislative purpose, raise questions pertinent to the issue being investigated, and apprise witnesses of the pertinence of the questions asked.[89] Private citizens, more so than agency officers, may invoke certain constitutional protections, such as the First Amend-

84. Chuck Grassley, Letter to the Editor, *Holds Practice Needs Big Changes*, ROLL CALL, Aug. 2, 1999, at 4.

85. George Archibald, *Grassley Shifts Tack; Holbrooke Path Clear*, WASH. TIMES, Aug. 5, 1999, at A6; Helen Dewar, *Holbrooke Nomination Clears Hurdle*, WASH. POST, Aug. 5, 1999, at A4.

86. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

87. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 505 (1975).

88. *Id.* at 509.

89. Wilkinson v. United States, 365 U.S. 399, 408–09 (1961); Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 305 (D.D.C. 1976).

ment rights of free association and free speech.[90] Witnesses may claim the Fifth Amendment privilege against self-incrimination. Also, congressional inquiries may not interfere with adjudicatory proceedings before a department or agency.[91] 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 DOJ.[92] By statute, 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. The contempt power is covered in detail in Part VI.

This Part begins by discussing testimony and documents that may be released as a result of Congress offering immunity to a witness. Particular examples of committee subpoenas are then treated: Representative John Moss against the Federal Trade Commission; a House subcommittee requesting documents regarding DOJ policy on seizing suspects abroad; another conflict between a House committee and the DOJ, this time involving the Inslaw affair; a Senate committee requesting documents on Whitewater; and congressional access to executive documents on presidential pardons.

A. Immunity

A witness before a congressional committee may invoke the Fifth Amendment right not "to be a witness against himself."[93] By majority vote of either House or a two-thirds vote of a committee,

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90. *See Wilkinson*, 365 U.S. at 409 (noting the possible constitutional protections afforded to accused persons where objections are made to the questions presented by a congressional committee).

91. *See* Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966) (holding that an inquiry by the House of Representatives into a matter previously remanded to the Federal Trade Commission was an "improper intrusion into the adjudicatory processes of the commission").

92. *See* JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 83–85 (1988) (discussing challenges to the sufficiency of congressional subpoenas); James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. LEGIS. 145, 145–47 (1984) (discussing Nixon and Reagan Administration arguments for withholding information from Congress). *See generally* JAMES HAMILTON, THE POWER TO PROBE 57–78 (1977) (describing the origin and development of the congressional subpoena power and the use of executive privilege as a means to evade this power); Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975) (analyzing the historical development of congressional subpoena power and the use of executive privilege by President Nixon).

93. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

Congress may nevertheless 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 Colonel 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.[94]

In such situations, Congress decides whether it is more important to inform itself and the public rather than have a successful prosecution. Lawrence Walsh, the independent counsel for Iran-Contra, described this setting of national priorities:

> If the Congress decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power. . . . The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need.[95]

B. The Ashland *Case*

On October 6, 1975, in his capacity as a member of Congress, John Moss asked the Federal Trade Commission to make available to him data gathered by the commission pertaining to lease extensions on federal lands. The FTC denied the request because 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

94. United States v. North, 910 F.2d 843, 872–73 (D.C. Cir. 1990); *see also* United States v. Poindexter, 951 F.2d 369, 373 (D.C. Cir. 1991) (emphasizing the principle that the prosecution must show a legitimate source for evidence "wholly independent of compelled testimony").

95. Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. 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, 438–49 (1995).

mandatory disclosure under subsections (b)(4) and (b)(9) of the Freedom of Information Act."[96] Moss, pointing out that the statute specifically provided that it did not authorize the withholding of information from Congress, made a second request, this time as chairman of the Subcommittee on Oversight and Investigation, for the material.

After the commission agreed to furnish Moss with the information, Ashland Oil went to court to enjoin the FTC from releasing the data. At that point the subcommittee issued a subpoena for the FTC chairman to appear and bring the requested documents. The full House then passed a resolution authorizing Moss to intervene and appear in the case to secure the information needed for his subcommittee. A federal district court agreed that the data at issue constituted "trade secret" information within the purview of section 6(f) of the Federal Trade Commission Act but ruled that Ashland Oil had failed to show that release of the material to the subcommittee would irreparably injure the company. The court rejected the argument that the transfer of the data from the FTC to the subcommittee would lead "inexorably to either public dissemination or disclosure to Ashland's competitors."[97] Courts must assume that congressional committees "will exercise their powers responsibly and with due regard for the rights of affected parties."[98]

That decision was affirmed by the D.C. Circuit.[99] 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."[100] The commission had agreed to provide Moss with the material after receiving the letter in his capacity as subcommittee chairman.

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96. Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 300 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 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." 5 U.S.C. § 552(b)(4), (b)(9) (2000).

97. *Ashland Oil*, 409 F. Supp. at 308.

98. *Id*.

99. Ashland Oil, Inc. v. FTC, 548 F.2d 977, 979 (D.C. Cir. 1976).

100. *Id*. For additional analysis of *Ashland*, see Paul C. Rosenthal & Robert S. Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. LEGIS. 74, 79–83 (1977).

C. DOJ Opinion: 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 Barr, head of the Office of Legal Counsel (OLC) in the DOJ, State Department Legal Adviser Abraham Sofaer, and Oliver Revell, Associate Deputy Director of Investigations in the FBI.[101] Although OLC concluded in 1980 that the FBI had no authority to make such arrests,[102] Barr explained that OLC had reexamined its position, and issued an opinion on June 21, 1989, partially reversing the 1980 opinion.[103] Notwithstanding publication of the first opinion, Barr insisted that the second "must remain confidential."[104] In withholding the 1989 opinion, he agreed to explain OLC's conclusions and its legal reasoning.[105]

The subcommittee issued a subpoena on July 25, 1991, to obtain the 1989 memorandum, arguing that it needed the memorandum to determine whether it was necessary for Congress to legislate in this area.[106] Initially the administration decided to fight the subpoena.[107] Attorney General Dick Thornburgh wrote to the subcommittee on November 28, explaining why it could not have the 1989 opinion.[108] However, the department eventually decided to allow one or more

101. *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 2 (1991) (statement of Rep. Don Edwards) [hereinafter *FBI Authority to Seize: Hearing*].

102. 4B OPINIONS OF THE OFFICE OF LEGAL COUNSEL: 1980, at 543 (Margaret Colgate Love ed., 1985).

103. *FBI Authority to Seize: Hearing*, *supra* note 101, at 3 (statement of William P. Barr, Assistant Attorney General, U.S. Department of Justice).

104. *Id.* at 4.

105. *Id.* at 5.

106. Joan Biskupic, *Panel Challenges Thornburgh Over Right to Documents*, 49 CONG. Q. WKLY REP. 2033, 2080 (1991).

107. David Johnston, *Administration to Fight House Panel's Subpoena*, N.Y. TIMES, July 30, 1991, at A12.

108. *See* Letter from Dick Thornburgh, Attorney General, U.S. Department of Justice, to Don Edwards, Chairman, House of Representatives Subcommittee on Civil and Constitutional Rights 1–2 (Nov. 28, 1989), *reprinted in FBI Authority to Seize: Hearing*, *supra* note 101, at 92–93 ("[T]he OLC opinion that [was] requested implicated a particularly compelling confidentiality interest.").

committee members to review the legal memorandum.[109]

D. DOJ Documents: The Inslaw Affair

On December 5, 1990, Representative Jack Brooks, chairman of the House Judiciary Committee, convened a hearing to review the refusal of Attorney General Thornburgh to provide the committee with access to all documents regarding a civil dispute brought by Inslaw, a computer company. Inslaw charged that the DOJ had stolen a computer program the company had designed to keep track of civil and criminal cases.[110]

On July 25, 1991, the House Judiciary Committee issued a subpoena to Thornburgh. Brooks said he wanted the documents in order to explore whether the department had acted illegally by engaging in criminal conspiracy. Thornburgh insisted that the Inslaw documents amounted to "privileged attorney work products" for the civil dispute that could not be shared with the committee.[111] When the committee failed to receive the materials, Brooks said that the committee would consider contempt of Congress proceedings against the department.[112]

At that point several hundred documents were delivered to the committee, which later released a formal investigative report on the Inslaw affair.[113] The committee gained access to sensitive files of the Office of Professional Responsibility in the DOJ, took sworn statements from Justice officials and employees without a department attorney present, and received more than four hundred documents related to "ongoing litigation and other highly sensitive matters and 'protected' under the claims of attorney-client and attorney work product privileges."[114]

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109. *Justice Yields to House, Averting Showdown*, 49 CONG. Q. WKLY REP. 2179, 2179 (1991); *see also* David Johnston, *Both Sides Softening Stance on Documents on Foreign Arrests*, N.Y. TIMES, Aug. 1, 1991, at B7 (noting the decision by the DOJ to consider granting House subcommittee members limited access to the memorandum).

110. *The Attorney General's Refusal to Provide Congressional Access to "Privileged" Inslaw Documents: Hearing Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 101st Cong. 1 (1990) (statement of Rep. Jack Brooks).

111. Paul M. Barrett, *Thornburgh, Brooks Clash Over Charge of Wrongdoing at Justice Department*, WALL ST. J., Dec. 10, 1990, at B7A.

112. Susan B. Glasser, *Deadline Passes, but Justice Dept. Still Hasn't Given Papers to Brooks*, ROLL CALL, Sept. 19, 1991, at 12.

113. H.R. REP. NO. 102-857 (1992).

114. *Id.* at 92–93.

E. Whitewater Notes

In 1995, the Special Senate Committee to Investigate Whitewater Development Corporation and Related Matters (the Senate Whitewater Committee) issued a subpoena for certain documents. The White House announced that it would withhold material about a November 5, 1993, meeting involving senior presidential aides and private lawyers, on the ground that the documents were protected by the lawyer-client privilege and executive privilege. William Kennedy, who at the time was an associate White House counsel, took extensive notes at the meeting.[115] 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."[116] That argument would apply if a president met with his private lawyer, but the issue was complicated by the presence of government lawyers at the meeting.

Within a few days, the White House offered to turn over the Kennedy notes if the committee agreed that the meeting was privileged. The committee refused because it learned of other meetings attended by White House officials and private attorneys. Unable to reach an acceptable compromise, the committee voted to send the issue to the Senate floor and from there to federal district court.[117] On December 20, 1995, the Senate began consideration of a resolution directing the Senate Legal Counsel to bring a civil action to enforce the subpoena. The resolution invoked a special statute regarding the authority of the Senate Legal Counsel to sue for subpoena enforcement orders.[118] 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."[119] The resolution passed the Senate by a vote of fifty-

115. Susan Schmidt, *White House Rejects Subpoena; Whitewater Notes Called Confidential*, WASH. POST, Dec. 13, 1995, at A1; *White House Gives Rationale for Balking at a Subpoena*, N.Y. TIMES, Dec. 13, 1995, at B14.

116. Ruth Marcus & Susan Schmidt, *Legal Experts Uncertain on Prospects of Clinton Privilege Claim*, WASH. POST, Dec. 14, 1995, at A14.

117. Susan Schmidt, *Compromise on Notes Rejected; Senate Whitewater Panel Votes to Enforce Subpoena Resisted by White House*, WASH. POST, Dec. 15, 1995, at A2.

118. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROB. 47, 56–57 (Spring 1998).

119. 141 CONG. REC. 18,963–64 (1995) (statement of Jane Sherburne, Special Counsel to the President).

one to forty-five.[120] On the following day, the White House agreed to give the notes to the Senate Whitewater Committee.[121]

F. Presidential Pardons

Congressional subpoenas can be effectively rebutted by the administration when they involve matters exclusively committed to the president. When the House Government Reform Committee in 1999 sought records of private deliberations that led President Clinton to offer clemency to sixteen members of the FALN (the Spanish acronym for Armed Forces of National Liberation), a Puerto Rican terrorist group, the White House refused. White House Deputy Counsel Cheryl Mills told the committee that the president's constitutional authority to grant clemency "[was] not subject to legislative oversight."[122] Actually, that is an overstatement. Congress conducted considerable oversight of the FALN clemency decision and received about ten thousand pages of documents related to the decision.[123] Several senior administration officials testified, including Deputy Attorney General Eric Holder and Pardon Attorney Robert Adams.[124]

Two years later, Congress and the White House again battled over access to documents concerning presidential pardons. The subject this time was the pardons issued by President Clinton during his last day in office, particularly the pardon of Marc Rich. The House Government Reform Committee held hearings on February 8 and March 1, 2001, taking testimony from former Deputy Attorney Gen-

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120. *Id.* at 18,993.

121. *Whitewater Notes Being Surrendered; White House Ends Stand with Hill*, WASH. POST, Dec. 22, 1995, at A1. *See* Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143, 189–93 (1998) (observing that White House Counsel cannot give the President representation subject to an absolute attorney client privilege).

122. Letter from Cheryl Mills, Deputy Counsel to the President, to Dan Burton, Chairman, House of Representatives Committee on Government Reform (Sept. 16, 1999), *reprinted in* H.R. REP. NO. 106-488, at 115 (1999).

123. *Id.*; *see also Clemency for FALN Members: Hearings Before the Senate Comm. on the Judiciary*, 106th Cong. 97 (1999) (statement of Eric Holder, Deputy Attorney General, U.S. Department of Justice) (noting that the DOJ had delivered more than twenty-two thousand pages to the Senate Committee on the Judiciary). *See generally Clemency for the FALN: A Flawed Decision?: Hearings Before the House Comm. on Gov't Reform*, 106th Cong. (1999) (discussing the history of the FALN and the President's decision to grant sixteen FALN members clemency).

124. *See Clemency for FALN Members: Hearings Before the Senate Comm. on the Judiciary* at, 106th Cong. 96–148 (1999) (relating testimony and panel discussion by Deputy Attorney General Eric Holder and Pardon Attorney Roger Adams concerning the president's decision-making process in granting FALN members clemency).

eral Holder, former White House Counsel Jack Quinn, former counsel to the President Beth Nolan, former deputy counsel to the President Bruce Lindsey, and former White House Chief of Staff John Podesta.[125] A number of documents—including letters, notes, e-mails, and telephone logs—that explain the process leading to the Rich pardon are reprinted in the hearings.[126] Additional documents on the Rich pardon are reprinted in a subsequent committee report.[127]

VI. 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, the Supreme Court recognized as early as 1821 that, without this power, the legislative branch would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[128] If either House votes for a contempt citation, the president pro tempore of the Senate or the Speaker of the House shall certify the facts to the appropriate U.S. Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[129] Individuals who refuse to testify or produce papers are subject to criminal contempt, leading to fines of not more than one thousand dollars and imprisonment up to one year.[130]

This Part begins by covering contempt actions from 1975 to 1981, including legislative demands for documents from five executive officials: Secretary of Commerce Rogers Morton; Secretary of State Henry Kissinger; Secretary of Health, Education, and Welfare Joseph Califano, Jr.; Secretary of Energy Charles Duncan, Jr.; and Secretary of Energy James Edwards. The next four Sections cover contempt actions against Secretary of the Interior James Watt, Administrator of

125. *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the House Comm. on Gov't Reform*, 107th Cong. 192, 309 (2001).

126. *E.g.*, *id.* at 75, 80–87, 115, 185, 247, 250, 259, 265, 305, 330, 350–51, 368, 971–72.

127. H.R. REP. NO. 107-454, at 463–708 (2002).

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

129. 2 U.S.C. § 194 (2000).

130. *Id.* § 192; *see also* GRABOW, *supra* note 92, at 86–99 (1988) (discussing the scope of the congressional contempt power); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 567–68 (1991) (discussing civil contempt sanctions, civil actions, criminal contempt sanctions, and other methods of enforcing congressional subpoenas).

the Environmental Protection Agency Anne (Gorsuch) Burford, White House Counsel Jack Quinn, and Attorney General Janet Reno.

A. 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, the committees eventually obtained access to the requested documents. To minimize such disputes in the future, Congress amended language in a number of statutes to clarify legislative access to agency information.

1. *Rogers 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 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*.[131]

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

131. Letter from Rogers Morton, Secretary of Commerce, to John E. Moss, Chairman, House of Representatives Subcommittee on Oversight and Investigations (July 24, 1979), *reprinted in Contempt Proceedings Against Secretary of Commerce, Rogers C.B. Morton: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong. 152, 153 (1975) [hereinafter *Morton Comtempt Proceedings*].

complied with that request."[132] 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."[133] However, he said he was prepared to make copies of the documents available, "subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved."[134]

At subcommittee hearings on September 22, Representative John Moss, chairman of the subcommittee seeking the documents, told 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."[135] Morton told Moss that he had been advised by Attorney General Edward Levi not to make the documents available to the committee.[136] On November 11, the subcommittee voted ten to five to find Morton in contempt for failure to comply with the subpoena of July 28.[137] The prospect of contempt proceedings provided sufficient incentive for Morton to release the material to the subcommittee.[138]

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 subcom-

132. *Id.* at 153–54.

133. Letter from Rogers Morton, Secretary of Commerce, to Harley O. Staggers, Chairman, House of Representatives Committee on Interstate and Foreign Commerce (Aug. 22, 1975), *reprinted in Morton Contempt Proceedings*, *supra* note 131, at 158.

134. *Id*.

135. *Morton Contempt Proceedings*, *supra* note 131, at 4 (statement of Rep. John E. Moss).

136. *Id.* at 6. For Levi's Sept. 4, 1975, letter to Morton, see *id.* at 173–75.

137. *Id.* at 137 (statement of Rep. John E. Moss).

138. *Arab Boycott Records*, 31 CONG. Q. ALMANAC 343, 343–44 (Carolyn Mathiasen ed., 1975); *see also* 121 CONG. REC. 3872–76 (1975) (providing background information for the Morton contempt story); *id.* at 36,038–39 (statement of Rep. James H. Scheuer) (discussing the contempt resolution aimed at Morton and passed by the subcommittee); *id.* at 40,230 (statement of Rep. John E. Moss) (noting Secretary Morton's full compliance with the subcommittee's subpoena issues on July 18, 1975); *cf.* at 40,768–69 (statement of Rep. Phillip Burton) (observing "a victory for Congress" in the compliance of Secretary Morton).

> mittee 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.[139]

2. *Henry Kissinger*. In 1975, the House Select Committee on Intelligence issued a subpoena to Secretary of State Henry Kissinger, directing him to provide documents relating to covert actions.[140] After he refused, the committee voted ten to two to proceed to a contempt citation.[141] President Gerald Ford invoked executive privilege to keep the material from the committee, explaining that release of the documents, which included "recommendations from previous Secretaries of State to previous Presidents," would jeopardize the internal decisionmaking process.[142] Nevertheless, under pressure of a contempt citation, an accommodation was reached. Three committee members and two staff members visited the White House and listened to an NSC aide read verbatim from documents concerning the covert actions.[143] The committee, stating that the White House was in "substantial compliance" with the subpoena, announced that the contempt action was "moot."[144]

3. *Joseph Califano, Jr*. In 1978, a subcommittee of the House Committee on Interstate and Foreign Commerce began an investigation of the manufacturing process used by drug companies for making generic drugs and pricing brand-name drugs. The panel looked into charges that drug companies merely put trade names on drugs manufactured by 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 prod-

139. Export Administration Amendments of 1977, Pub. L. No. 95-52, sec. 113(a), 91 Stat. 235, 241 (codified as amended at 50 U.S.C. app. § 2406(c)(10) (1994). 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 ADMIN. L. REV. 197, 202–12 (1992).

140. H.R. REP. NO. 94-693, at 4–5 (1975).

141. *Id.* at 2.

142. Gerald R. Ford, News Conference (Nov. 14, 1975), *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD, 1975, at 1867 (1977).

143. *Kissinger Contempt Citations*, 31 CONG. Q. ALMANAC 406, 407 (Carolyn Mathiasen ed., 1975).

144. *Id.* at 407–08. For further details on this dispute, see Fisher, *supra* note 39, at 619–20.

uct was being manufactured. To learn more about this "man-in-the-plant" strategy, the subcommittee requested documents from the Department of Health, Education, and Welfare (HEW). Legislation had been introduced to limit or eliminate the man-in-the-plant practice.[145]

In July, the subcommittee sent several letters to Secretary of HEW Joseph Califano, Jr., for the documents. After 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 memorandum dated August 9, the DOJ took the position that language in the Food, Drug, and Cosmetic Act, which prohibited FDA employees from disclosing trade secret information, justified the withholding of the material from the subcommittee. The memorandum 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.[146]

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 DOJ's legal analysis.[147] Subcommittee chairman John Moss made it clear that the blackened-out material did not comply with the subpoena. Califano explained that his refusal to release the unredacted material had nothing to do with separation of powers or executive privilege, but rather, with statutory language

145. *Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.: Business Meeting of the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong. 1–2 (Comm. Print No. 95-76, 1978) [hereinafter *Califano Contempt Proceedings*] (statement of Rep. Jim E. Moss).

146. Memorandum from Michael J. Egan, Acting Attorney General, U.S. Department of Justice, to Hale Champion, Under Secretary, U.S. Department of Health, Education, and Welfare 5 (Aug. 9, 1978), *reprinted in Califano Contempt Proceedings*, supra note 145, at 7, 10.

147. *Califano Contempt Proceedings*, supra note 145, at 4 (statement of Joseph Califano, Secretary of Health, Education, and Welfare).

that prohibited the release of trade secret information. Congress, he said, "has the power to change that statute."[148]

The subcommittee then voted nine to eight to find Califano in contempt for failing to comply with the subpoena.[149] A month later, the subcommittee dropped the contempt action after Califano turned over the materials that had been subpoenaed. He explained that a further review by the department of the withheld material disclosed that some information had been "inappropriately deleted" from documents given to the panel.[150]

4. *Charles 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."[151] Newkirk thought the documents might be subject to the claim of executive privilege because they revealed the "deliberative process underlying the president's decision to impose the gasoline conservation fee."[152] The subcommittee voted unanimously to instruct Newkirk to deliver the documents by five o'clock that evening.[153]

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148. *Id.* at 18.

149. *Id.* at 87; Mary Russell, *House Panel Backs Contempt Citation After Califano Refuses to Yield Data*, WASH. POST, Aug. 17, 1978, at A2; *House Panel Votes Contempt Citation Against Califano*, WALL ST. J., Aug. 17, 1978, at 6; *see also* Editorial, Moss v. Califano, WASH. POST, Aug. 18, 1978, at A18 (contending that the House vote forces a "senseless confrontation" between the DOJ and Congress and is representative of "the worst kind of congressional caprice").

150. *House Unit Ends Bid to Cite for Contempt HEW Chief Califano*, WALL ST. J., Sept. 22, 1978, at 10.

151. *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 96th Cong. 3, 27 (1980) [hereinafter *The Petroleum Import Fee: Hearings*] (statement of Thomas Newkirk, Deputy General Counsel for Regulation, U.S. Department of Energy).

152. *Id.* at 5.

153. *Id.* at 35 (statement of Rep. Paul N. McCloskey).

After the department failed to meet the deadline, the subcommittee voted unanimously on April 22 to subpoena the materials from Secretary of Energy Charles Duncan, Jr. On the following day, the subcommittee received twenty-eight documents as well as 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."[154] 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 he did not rest his case on executive privilege.[155] By a vote of nine to zero, the subcommittee subpoenaed Duncan to appear before the subcommittee on April 29 and bring the requested documents.[156]

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."[157] 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."[158] Representative Paul McCloskey (the ranking minority member) objected that "the idea that two members of a nine-member committee should be trusted and some should not be is repugnant to the rules of the House."[159] After further efforts to reach an accommodation failed, the subcommittee voted eight to zero to hold Duncan in contempt for not complying with the April 24 subpoena.[160]

The subcommittee held another hearing on May 14, with Duncan again in attendance. Representative Toby Moffett, subcommittee chairman, announced that

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154. Letter from Charles Duncan, Secretary of Energy, to Toby Moffett, Chairman, House of Representatives Subcommittee on Environment, Energy, and Natural Resources (Apr. 23, 1980), *reprinted in The Petroleum Import Fee: Hearings*, *supra* note 151, at 100.

155. *The Petroleum Import Fee: Hearings*, *supra* note 151, at 98–100 (statement of Thomas Newkirk, Deputy General Counsel for Regulation, U.S. Department of Energy).

156. *Id.* at 116–17; Richard D. Lyons, *House Unit Subpoenas Duncan*, N.Y. TIMES, Apr. 25, 1980, at D3.

157. *The Petroleum Import Fee: Hearings*, *supra* note 151, at 122 (statement of Charles W. Duncan, Jr., Secretary of Energy).

158. *Id.* at 123.

159. *Id.* (statement of Rep. Paul N. McCloskey).

160. *Id.* at 139; Richard D. Lyons, *House Unit Cites Duncan for Gas-Tax Contempt*, N.Y. TIMES, Apr. 30, 1980, at D18.

> 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.[161]

On the previous day, a federal district court had struck down President Carter's April 2 proclamation as invalid, either under the president's inherent power or under statutory authority.[162] A White House spokesman said that he did not think executive privilege was ever formally asserted, either by President Carter or Duncan, although there was consideration of doing so.[163] In any event, the subcommittee received the material it requested.[164]

5. *James Edwards*. The following year, at the start of the Reagan administration, Secretary of Energy James Edwards narrowly avoided a contempt citation from the House Government Operations Committee. The dispute involved legislative access to documents regarding contract negotiations between the DOE and the Union Oil Company to build an oil shale plant in Colorado. Committee members were concerned that the department was moving too hastily in awarding billions of dollars in federal subsidies to major oil companies, particularly prior to the Reagan administration's plans to create a Synthetic Fuels Corporation.[165] Failing to obtain the requested materials, the Environment, Energy and Natural Resources Subcommittee voted six to four on July 23 to hold Edwards in contempt.

The issue was complicated by division within the administration. Edwards wanted to sign the contract, but Office of Management and Budget (OMB) Director David Stockman opposed federal subsidies

161. *The Petroleum Import Fee: Hearings*, *supra* note 151, at 142 (statement of Rep. Toby Moffett); *see also* Dale Tate, *President's Oil Import Fee Assailed in Congress, Court*, 38 CONG. Q. WKLY. REP. 1307, 1308 (1980) (noting that on May 14, 1980, the subcommittee "held a hearing in which [Secretary] Duncan appeared and the [submitted] packet of [executive] memos was discussed"); Elder Witt, *Carter Foiled in First Tilt with Executive Privilege*, 38 CONG. Q. WKLY. REP. 1352, 1352 (1980) (observing that Secretary Duncan submitted requested import fee documents to the subcommittee after it unanimously voted to cite Duncan for contempt).

162. Indep. Gasoline Marketers Council v. Duncan, 492 F. Supp. 614, 620–21 (D.D.C. 1980).

163. *Executive Privilege, Revisited*, 38 CONG. Q. WKLY. REP. 1753, 1753 (1980).

164. The subcommittee's confrontation with Secretary Duncan, including correspondence, appears in H.R. REP. NO. 96-1099, at 18–30, 33–56 (1980).

165. *DOE's Enforcement of Alleged Pricing Violations by the Nation's Major Oil Companies: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong. 2, 57–60 (1981).

to the synthetic fuels program and had taken steps to block the contract with Union Oil.[166] 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 DOE and Union Oil had been signed. President Reagan agreed to the project and officials from the DOE and Union signed the contract. Thirteen boxes of documents on the contract negotiations were delivered to the committee.[167]

B. James Watt

In 1981, Secretary of the Interior James Watt refused to give a House subcommittee thirty-one 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 Smith that the documents dealt with "sensitive foreign policy considerations."[168] The confrontation escalated to a recommendation by the Committee on Energy and Commerce, voting twenty-three to nineteen, that Watt be cited for contempt.[169]

Attorney General Smith insisted that "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."[170] This argument made no sense. The first major investigation by Congress—of General St. Clair's defeat—was not conducted for the purpose of legislation. Courts have consistently held that the investigative power is available not merely to legislate or when a "potential" for legislation exists, but even for pursuits down blind al-

166. *See* Martin Schram, *Reagan Overrides Stockman, Backs Edwards on Synfuel*, WASH. POST, July 30, 1981, at A2 (observing the "strong objections" of OMB Director David Stockton to a Union Oil synthetic fuels contract, and noting Stockton's work with the House Energy and Natural Resources Subcommittee to "outflank" Secretary Edwards).

167. Andy Plattner, *Edwards' Contempt Citation Headed Off by Approval of Synthetic Fuel Contract*, 39 CONG. Q. WKLY. REP. 1425, 1425 (1981).

168. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 2 (Comm. Print 1981) [hereinafter EXECUTIVE PRIVILEGE: WATT].

169. *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations and the House Comm. on Energy and Commerce*, 97th Cong. 379 (1982); William Chapman, *Hill Panel Votes to Cite Watt for Contempt*, WASH. POST, Feb. 26, 1982, at A1.

170. EXECUTIVE PRIVILEGE: WATT, *supra* note 168, at 3.

leys.[171] Moreover, Congress could easily circumvent Smith's argument by introducing a bill whenever it wanted to conduct oversight.

Smith also claimed that all of the documents at issue "[were] either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate[d] to sensitive foreign policy considerations."[172] However, foreign policy is not an exclusive power of the president or the executive branch. Congress had a constitutionally based need for the information: its power to "regulate Commerce with foreign Nations."[173]

Despite Smith's initial legal position regarding the "fundamental" importance of the deliberative process, the documents were eventually shared with the subcommittee. On February 9, 1982, the subcommittee voted eleven to six to hold Watt in contempt.[174] By that time, all but seven of the thirty-one subpoenaed documents had been given to the subcommittee.[175] The remaining documents were reviewed by subcommittee members on the conditions that subcommittee staff could not assist, and that members could not photocopy the documents but could take notes.[176]

C. Gorsuch Contempt

The examples above describe subcommittee and committee threats to hold an executive official in contempt. In 1982, the House actually voted on contempt. Anne (Gorsuch) Burford, Administrator of the Environmental Protection Agency (EPA), refused to release certain documents. The administration told the House Public Works Committee, which asked for documents on EPA's enforcement of the

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171. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975) (observing that "[t]he very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys and into non-productive enterprises' and that 'there need be no predictable end result' to a 'valid legislative inquiry'").

172. EXECUTIVE PRIVILEGE: WATT, *supra* note 168, at 2.

173. U.S. CONST. art. I, § 8, cl. 3.

174. William Chapman, *House Subcommittee Votes to Cite Watt for Contempt*, WASH. POST, Feb. 10, 1982, at A1.

175. *Watt Says Congress Likely to Hold Him in Contempt*, WASH. POST, Feb. 11, 1982, at A9.

176. *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations and the Comm. on Energy and Commerce*, 97th Cong. 385–86 (1982) (statement of John D. Dingell, Chairman, House of Representatives Subcommittee on Oversight and Investigations); H.R. REP. NO. 97-898, at 8 (1982); Margot Hornblower, *White House Avoids Hill Showdown Over Documents*, WASH. POST, Mar. 17, 1982, at A5; Phillip Shabecoff, *Data That Caused Citing of Watt Will Be Provided to House Group*, N.Y. TIMES, Mar. 17, 1982, at A21.

"Superfund" program, that it could not see documents in active litigation files.[177] In a memorandum to Gorsuch, President Reagan explained that the documents could not be released to the committee because they represented "internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites" by the EPA or the DOJ.[178] Were Congress to accept such arguments, it would have to agree to postpone legislative investigations for however many years it would take the government to complete enforcement and litigation actions. The House of Representatives voted 259 to 105 to hold Gorsuch in contempt.[179] The administration eventually agreed to release "enforcement sensitive" documents to Congress.[180]

D. Contempt Move Against Quinn

The House Committee on Government Reform and Oversight conducted an investigation of the 1993 firings of seven Travel Office employees at the Clinton White House. The committee received the documents it requested from the DOJ and other federal agencies, but in September 1995, the White House informed the panel that President Clinton might claim executive privilege and refuse to turn over some or all of 907 documents.[181]

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.[182] On May 9, the committee voted twenty-seven to nineteen to hold White House Counsel Jack Quinn in contempt. It also voted to hold two others in contempt: former White House Director of Administration David

177. H.R. REP. NO. 97-968, at 15, 21 (1982).

178. *Id.* at 42.

179. 128 CONG. REC. 31,776 (1982).

180. H.R. REP. NO. 98-323, at 18–40 (1983); H.R. REP. NO. 97-968, at 15. 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, 1334. *See generally* United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983) ("The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties.").

181. Ann Devroy, *Clinton May Assert Executive Privilege*, WASH. POST, Sept. 8, 1995, at A11.

182. Susan Schmidt, *House Prober Presses Demand for Travel Office Documents*, WASH. POST, May 3, 1996, at A2.

Watkins and his aide, Matthew Moore.[183] Committee Chairman William Clinger "said he would delay the next step, sending the action citation to the House floor for a vote," to leave open the possibility of an accommodation with the White House.[184] He offered to have Quinn come to the committee before floor action.[185] The administration released the disputed documents to the committee just hours before the House was scheduled to take up the contempt vote. The White House also provided an eleven-page list of about two thousand Travel Office documents for which it made a claim of executive privilege.[186]

E. Contempt Action Against Reno

In July 27, 1998, the DOJ refused to turn over two internal documents that urged Attorney General Janet Reno to appoint an independent counsel in the campaign finance investigation. The House Government Reform and Oversight Committee had subpoenaed a twenty-seven-page memorandum to Reno by FBI Director Louis Freeh and a ninety-four-page report by Charles LaBella, former head of the department's campaign finance task force.[187] After this refusal, the House committee voted twenty-four to nineteen 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."[188]

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183. *Proceedings Against John M. Quinn, David Watkins, and Matthew Moore: Business Meeting as Part of the Committee Investigation into the White House Travel Office Matter by the House Comm. on Gov't Reform and Oversight*, 104th Cong. 3, 88 (Comm. Print 1996) [hereinafter *Business Meeting: Quinn*]; R.H. Melton, *House Panel Votes for Contempt Citation*, WASH. POST, May 10, 1996, at A4.

184. David Johnston, *Panel Acts to Gain Travel Office Papers*, N.Y. TIMES, May 10, 1996, at A26.

185. *Business Meeting: Quinn*, *supra* note 183, at 46.

186. Ann Devroy & John E. Yang, *White House Gives Congress 1,000 Pages of Travel Office Papers*, WASH. POST, May 31, 1996, at A10; Eric Schmidt, *White House Gives Committee More Papers in Dismissal Case*, N.Y. TIMES, May 31, 1996, at A20. The contempt actions against Quinn, Watkins, and Moore are summarized in H.R. REP. NO. 104-598, at 5–9 (1996). *See generally* HOUSE COMM. ON GOV'T REFORM AND OVERSIGHT, 104TH CONG., REPORT ON CORRESPONDENCE BETWEEN THE WHITE HOUSE AND CONGRESS IN THE PROCEEDINGS AGAINST JOHN M. QUINN, DAVID WATKINS, AND MATTHEW MOORE, 104th Cong. (Comm. Print 1996).

187. Robert Suro, *Justice Dept. Defies House Subpoena for Campaign Finance Probe Memos*, WASH. POST, July 28, 1998, at A8.

188. George Lardner, Jr., *House Panel Votes to Hold Reno in Contempt*, WASH. POST, Aug. 7, 1998, at A1.

Reno, offering to give the committee a confidential briefing on the documents, accused the panel of "political tampering with her prosecutorial independence."[189] A few weeks later, she gave Committee Chairman Dan Burton access to heavily redacted versions of the memoranda, leaving him roughly thirty percent to read.[190] Burton asked Reno to allow three former prosecutors and a former White House deputy counsel to review the memoranda and give their opinions to him and to the House Republican leadership. She rejected that proposal.[191] 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.[192] 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. On December 2, 1998, U.S. District Judge Norma Holloway Johnson granted the committee limited access to the two memoranda.[193] On June 6, 2000, the House Government Reform Committee released the Freeh and LaBella memoranda along with other DOJ documents related to the refusal to appoint an independent counsel to investigate campaign finance issues of the 1996 presidential election.[194]

VII. HOUSE RESOLUTIONS OF INQUIRY

A House resolution of inquiry "is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific fac-

189. Sumana Chatterjee, *Panel Steps Up Confrontation Over Campaign Finance Memos, Voting to Cite Reno for Contempt*, 56 CONG. Q WKLY. REP. 2175, 2175 (1998). For background documents on the contempt citation against Reno, see H.R. REP. NO. 105-728 (1998).

190. Sumana Chatterjee, *Reno Still Faces Citation for Contempt*, 56 CONG. Q WKLY. REP. 2330, 2330 (1998).

191. Amy Keller, *Burton Pushes Contempt Against Reno: Chairman Plans to Give Hyde Documents for Potential Impeachment Inquiry*, ROLL CALL, Sept. 21, 1998, at 3.

192. Editorial, *The Contempt Citation*, WASH. POST, Sept. 22, 1998, at A16.

193. Robert Suro & Ruth Marcus, *Justice Memos May Yield Very Little*, WASH. POST, Dec. 3, 1998, at A18.

194. George Lardner, Jr., *Memos: Reno Was Warned*, WASH. POST, June 7, 2000, at A1.

tual information in the possession of the executive branch."[195] It is the practice to use the verbs "request" in asking for information from the president and "direct" when addressing department heads. "The resolution of inquiry is privileged" and "may be considered at any time after it is properly reported or discharged from committee."[196] The privileged status applies only to requests for facts within the administration's control and not for opinions or investigations.[197] If a resolution of inquiry "is not reported to the House within 14 legislative days after its introduction, a motion to discharge the committee" is privileged.[198] Typically, the House debates a resolution of inquiry for no more than one hour before voting on it.

There is no counterpart in current Senate practice for resolutions of inquiry, although there are precedents dating to the end of the 19th century and an effort in 1926.[199] Nothing prevents the Senate from passing such resolutions, but apparently the Senate is satisfied with the leverage it has through other legislative means, including the nomination process and Senate "holds." Unlike the House, the Senate has no special practices for expediting consideration through committee discharge or nondebatable motions, and "[r]esolutions are not generally privileged for immediate consideration."[200]

House resolutions of inquiry sometimes give the administration discretion in providing factual information to Congress. For example, in 1971, the House considered a resolution directing the secretary of state to furnish certain information respecting U.S. operations in Laos, but the language of the resolution included the phrase "to the extent not incompatible with the public interest."[201] The House tabled

195. 7 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, ch. 24, § 8 (1977).

196. *Id.*

197. *Id.*; CHARLES W. JOHNSON, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 106-320, at 618 (2001).

198. JOHNSON, *supra* note 197, at 618.

199. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 799, 1205 (1992) ("Various Resolutions 'requesting' the heads of departments to transmit to the Senate certain information have been amended before they were adopted, to read: 'direct' instead of 'request.'"). In 1884, such a change was ordered by the President pro tempore. *Id.* at 799. In 1926, a resolution requesting certain documents from the Secretary of State related to the World Court was challenged on a point of order. *Id.* at 1205. When the sponsor of the resolution asked for unanimous consent to proceed, there was objection. 67 CONG. REC. 2,658 (1926).

200. S. DOC. NO. 101-28, at 1204.

201. 117 CONG. REC. 23,800 (1971).

this resolution, 261 to 118.[202] In 1979, in the midst of an energy crisis, a resolution of inquiry requesting certain facts from the president regarding shortages of crude oil and refined petroleum products, refinery capacity utilization, and related matters, was adopted 340 to 4.[203]

A more recent use of a resolution of inquiry occurred in 1995, after the Clinton administration offered a multibillion dollar rescue package for the Mexican peso. As initially introduced by Representative Marcy Kaptur, the resolution (House Resolution 80) did not contain discretion for the administration.[204] It requested the president, within fourteen days after the adoption of the resolution, to submit information to the House of Representatives concerning actions taken through the exchange stabilization fund to strengthen the Mexican peso and stabilize the economy of Mexico. The House Banking Committee voted thirty-seven to five to report the resolution, but with a substitute directing the president to submit the documents "if not inconsistent with the public interest."[205] On March 1, the House adopted the committee substitute and agreed to the resolution, 407 to 21.[206]

Although the resolution established a deadline of fourteen days, White House Counsel Abner Mikva sent a letter to Speaker Newt Gingrich "that the Administration would not be able to provide" the documentary material until May 15, or two months after the date set in the resolution.[207] By April 6, the Treasury Department had supplied Congress with "more than 3,200 pages of unclassified documents and 475 pages of classified documents," with additional materials promised.[208] The White House said it was in "substantial compliance" with the resolution.[209]

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202. *Id.* at 23,807; *Laos Secrets: House Defeat of Disclosure Move*, 29 CONG. Q WKLY. REP. 1463, 1463 (1971).

203. H.R. 291, 97th Cong. (1979).

204. H.R. 80, 102d Cong. (1995).

205. 141 CONG. REC. 6409 (1995).

206. *Id.* at 6422.

207. Carroll J. Doherty, *House GOP Considers Stance on Bailout of Mexico*, 53 CONG. Q WKLY. REP. 880, 880 (1995).

208. Mike Mills, *Treasury Says Congress Given Papers on Mexico*, WASH. POST, April 7, 1995, at F1.

209. *Clinton Leads Mexico Bailout Effort*, 51 CONG. Q. ALMANAC 10-16, 10-17 (1995).

VIII. THE "SEVEN MEMBER RULE"

In 2001, seventeen Democrats and one Independent in the House invoked a seldom-used statute, first enacted in 1928, that requires executive agencies to furnish information if requested by seven members of the House Committee on Government Reform or five members of the Senate Committee on Governmental Affairs. After the administration challenged the constitutionality of this statutory provision, a federal district court ruled in favor of the lawmakers. This case, under appeal to the Ninth Circuit as of this writing, raises the question of what Congress needs to do to gain access to executive branch documents. May it act by committee, or by a subgroup within a committee, or does congressional access requires action at least by a full chamber and perhaps even action by both chambers and presentation of a bill or resolution to the president?

A. Origin of the Statute

In 1928, as part of a statute to discontinue certain reports required by law to be made to the legislative branch, Congress added a section requiring "[e]very executive department and independent establishment of the government," upon request of "any seven members" of the House Committee on Expenditures in the Executive Departments, or "any five members" of the Senate Committee on Expenditures in the Executive Departments, to "furnish any information requested of it relating to any matter within the jurisdiction of said committee."[210] As presently codified, the statutory language requires an "Executive agency," on request of seven members of the House committee or five members of the Senate committee, to submit "any information requested of it relating to any matter within the jurisdiction of the committee."[211]

The statutory language clearly gives seven members in the House and five members in the Senate, from the designated committees, the right to ask for certain executive information within the jurisdiction of their committee. The dispute between the executive and legislative branches is the *type* of information that must be given to Congress. Part of the House legislative history suggests that the legislative

210. Act of May 27, 1928, ch. 901, § 2, 45 Stat. 986, 996 (1928).

211. 5 U.S.C. § 2954 (2000). The codified language refers to the House Committee on Government Operations (now the Committee on Government Reform) and the Senate Committee on Governmental Affairs.

authority for requesting information is limited to what had been previously sent to Congress in agency reports, but was now being discontinued: "To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information."[212] Yet language on the same page of this House report suggests a much larger universe of information sought:

> The reports come in; they are not valuable enough to be printed, they are referred to committees, and that is the end of the matter. The departmental labor in preparation is a waste of time and the files of Congress are cluttered up with a mass of useless reports. If *any information* is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired.[213]

The House bill authorized access to executive branch information only by seven members of the designated House committee. In reporting the bill, the Senate decided to grant access also to five members of its expenditure committee.[214] The Senate report includes the language of the House report, but adds language that can be read to limit the request for agency information to what had been reported in the past in obsolete or useless reports: "This section makes it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body."[215] Debate on the Senate floor reinforces that impression. The provision would enable either committee to "reinstate any report that was found to be needed."[216]

Two legal issues emerge: the type of information that the two committees are entitled to receive, and the legal remedies available to Congress if an agency fails to comply. The statutory language is broad, whereas parts of the legislative history suggest a narrower field of information. As for remedies, what happens if an agency decides to

212. H.R. REP. NO. 1757, at 6 (1928).

213. *Id.* (emphasis added). Floor debate in the House merely quotes the language of the section giving seven members of the House committee the right to request information from the executive branch. 69 CONG. REC. 9417 (1928).

214. S. REP. NO. 1320, at 1 (1928).

215. *Id.* at 4.

216. 69 CONG. REC. 10,613 (1928) (statement by Senator Sackett).

ignore a request from seven members of the House committee or five members of the Senate committee? Would those committee members have to go to the full committee for support, or to the full chamber, or could they take their dispute directly to court?

B. The Waxman Request

Acting under the 1928 legislation, Representative Henry Waxman, ranking member of the House Committee on Government Reform, wrote to Secretary of Commerce Donald Evans on April 6, 2001, requesting the department to provide the adjusted census data produced as part of the 2000 census.[217] Sixteen Democrats and one Independent from the committee joined Waxman in signing the letter. Waxman explained that the Census Bureau compiled two sets of data. One population count, determined through the use of census forms returned by mail and by interviews conducted at addresses where no census form was returned, had been made public. A second set of data, using statistical techniques to correct for errors in the population count, was not released to the public. Relying on news reports, Waxman said that the unadjusted numbers released to the public "missed at least 6.4 million people and counted at least 3.1 million people twice."[218]

Waxman offered several reasons why his committee needed the information. The committee wanted the second set of data because it was "actively considering whether to amend the law regarding the timing and release of adjusted and unadjusted census data."[219] Second, the information "could have an enormous impact on the allocation by Congress of more than $185 billion in population-based federal grant funds."[220] Third, the information "could have a significant bearing on the appropriateness of congressional redistricting efforts currently being undertaken by state governments."[221] Waxman requested the adjusted data on or before April 20, 2001.

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217. Letter from Henry A. Waxman, Ranking Minority Member, House of Representatives Committee on Government Reform, et al., to Donald L. Evans, Secretary of Commerce 1 (Apr. 6, 2001) (on file with the *Duke Law Journal*).

218. *Id*.

219. *Id.* at 2.

220. *Id.* at 2–3.

221. *Id.* at 3.

After receiving no response from the Commerce Department, Waxman wrote another letter to Evans, dated May 16, 2001.[222] Through phone calls from committee staff members, Waxman learned that the matter was under "active consideration" by the department's Office of General Counsel. He told Evans that if he did not receive a written response by the end of the week, he would conclude that the department had made a decision not to respond.[223]

C. District Court Decision

On May 21, Waxman and fifteen other members of the committee filed suit in federal district court, requesting declaratory and injunctive relief.[224] Three months later, Waxman and the other plaintiffs filed a memorandum of law in support of a motion for summary judgment.[225] The brief argued that the Seven Member Rule compelled disclosure of the information, that no exemption was claimed or applicable, and that the use of "shall" in the statute mandated executive agencies to submit information requested by members of the committee.[226] Instead of identifying parts of the legislative history that suggested a limited reach to agency information, the brief cited the statutory adjective "any" (modifying "information") as evidence that the committee could request a broad range of information.[227] As to legislative history, the brief looked to language that encouraged lawmakers to make particularized, individual requests for information needed by the committee.[228]

Did Waxman and his colleagues have standing to sue in court? They referred to the Administrative Procedure Act as granting a cause of action, and empowering the district court to "compel agency action unlawfully withheld or unreasonably delayed."[229] It was a matter, they said, of enforcing a statutory right. Notwithstanding *Raines*

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222. Letter from Henry A. Waxman, Ranking Minority Member, House of Representatives Committee on Government Reform, to Donald L. Evans, Secretary of Commerce 1 (May 16, 2001) (on file with the *Duke Law Journal*).

223. *Id*.

224. Complaint for Declaratory and Injunctive Relief, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002). Representatives Paul E. Kanjorski and Jim Turner, who had signed the April 6, 2001, letter to Evans, did not sign the Complaint.

225. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

226. *Id.* at 1.

227. *Id*.

228. *Id.* at 1–2.

229. *Id.* at 18 (quoting 5 U.S.C. §§ 551(13), 706(1) (2000)).

v. Byrd, which denied standing to lawmakers who sued in their lawmaking capacity,[230] the sixteen members said they were not suing in their lawmaking capacity, but rather to enforce a statutory right granted to them.[231]

The DOJ filed its opposition to the plaintiff's motion on November 26.[232] The brief described the issue as consisting of two disputes: one "between the Executive and Legislative branches over access to information" possessed by executive officials, and another "between the minority and majority members of the House Committee on Government Reform."[233] Consequently, the district court "should decline to wade into this political thicket" and allow the controversy to be "sorted out in the political realm."[234] Moreover, even if the court decided the case, the plaintiffs' interpretation of the statute—singling out the words "shall" and "any"—ignored "entirely Congress's readily ascertainable purpose."[235] The government interpreted the statute as preserving "access to a limited universe of agency reports for members of two of Congress' numerous committees."[236] The broader interpretation pressed by plaintiffs "would raise serious doubts about the constitutionality of the statute."[237] The brief warned that "[g]ranting unlimited access to agency files may cause unwarranted interference with the Executive function to 'take care that the laws be faithfully executed.'"[238] The plaintiffs' interpretation, said the government's brief, was "constitutionally suspect, because this absolute power is proposed to be lodged not in any committee, or subcommittee, but in a mere fraction of the membership of only two of Congress' more than 40 full committees."[239]

On January 22, 2002, the district court ruled in favor of the plaintiffs. District Judge Lourdes Baird rejected the government's recommendation that the dispute should be "sorted out in the political

230. 521 U.S. 811, 818 (1997).

231. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 20, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

232. Secretary's Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

233. *Id.* at 1.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 2.

238. *Id.* at 18 (quoting U.S. CONST. art. II, § 3).

239. *Id.* at 19.

realm" because "there is no room for compromise and cooperation."[240] The circumstances of the case "indicate[d] that judicial intervention has become necessary to solve this inter-branch dispute."[241] Unlike some of the other cases cited by the government, where courts advised members of Congress that they could get relief by persuading their colleagues to repeal an objectionable statute, Judge Baird concluded that "Plaintiffs' rights cannot be vindicated by congressional repeal of a statute; rather, their rights may actually be vindicated by the effectuation of a statute."[242] She therefore denied the government's motion to dismiss.

Moving to the merits, Judge Baird ruled that the plain language of the Seven Member Rule "mandates that the Secretary release the requested data to Plaintiffs."[243] She cited Supreme Court decisions stating that "if no ambiguity in the plain statutory language is discerned, as in the instant situation, legislative history need not be consulted."[244] Nevertheless, "out of an abundance of caution,"[245] she examined what lawmakers had said in committee reports and floor statements. Although it was clear that Congress intended either House to obtain information contained in discontinued reports, "such a recognition does not necessarily mean that the provision was designed to merely accomplish that narrow aim."[246] Because of ambiguity in the legislative history, she followed "the text rather than the legislative history."[247]

Regarding the constitutional doubts raised by the government, Judge Baird recognized "the settled rule that a valid constitutional claim of Executive Privilege can defeat a congressional demand for information."[248] However, only after the government made an express claim of executive privilege would it be necessary for a court to consider "whether the disclosure provisions of the act exceeds the constitutional power of Congress to control the actions of the executive

240. Order Denying Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment; Order Granting Plaintiffs' Motion for Summary Judgment at 9, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

241. *Id.* at 10.

242. *Id.* at 12.

243. *Id.* at 15.

244. *Id.* at 16 (citing Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 808–09 n.3 (1989)).

245. *Id*.

246. *Id.* at 18.

247. *Id*.

248. *Id.* at 19.

branch."[249] She examined the government's claim that a constitutional issue exists because the congressional power to request information is not lodged in a committee or subcommittee but rather in a fraction of one committee. Baird noted that many committees and subcommittees give a single member of Congress (the chairman) the power to issue a subpoena.[250] Based on the available facts, she ordered Evans to release the requested census data to the plaintiffs.[251]

D. Request for Reconsideration

Following Judge Baird's decision, the government filed a memorandum in support of a motion for reconsideration.[252] For the first time, the government charged that the plaintiffs lacked Article III standing to sue and had no right of action in court either under the Seven Member Rule or the Administrative Procedure Act.[253] Moreover, the government now contended that the Seven Member Rule is a "rule of proceeding" within the meaning of Article I, section 5, clause 2, of the Constitution, and "has been superceded by House rules and is therefore no longer judicially enforceable."[254] It reiterated its position that Congress may not constitutionally delegate its investigatory powers to a few lawmakers and allow them to sue the executive branch to compel compliance with a request for information.[255]

The plaintiffs opposed the motion for reconsideration, pointing out that Ninth Circuit law "makes clear that reconsideration is an 'extraordinary remedy' that may not be used to 'raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation.'"[256] The plaintiffs also found the government at error when it argued that Congress could not delegate to sub-parties the authority to acquire information, pointing to powers delegated to the General Accounting Office to gather information from the executive branch (covered in Part IX of this Essay) and the subpoena powers that may be exercised by committees, subcommittees, and even indi-

249. *Id.* at 20.

250. *Id.* at 20–21.

251. *Id.* at 21.

252. Secretary's Memorandum in Support of Motion for Reconsideration, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

253. *Id.* at 1.

254. *Id.* at 2.

255. *Id.* at 19.

256. Plaintiffs' Response to Defendant's Motion for a Stay at 1, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

vidual committee chairmen.[257] Similarly, the plaintiffs found no merit in the argument that the Seven Member Rule had been superseded by subsequent House rules.[258]

In a brief opinion on March 21, 2002, Judge Baird denied the motion for reconsideration. She pointed out that although the plaintiffs discussed the standing issue in their opening brief, the government had not addressed that issue.[259] The government, in its initial brief, had also failed to raise arguments as to whether the plaintiffs possessed a judicially enforceable right of action, and whether the Seven Member Rule had been superseded by House rules.[260]

E. Briefs for the Ninth Circuit

In its appeal to the Ninth Circuit, the DOJ repeated some of the arguments that had failed in the district court: (1) the Seven Member Rule "marks a sharp departure from the settled means by which Congress seeks information from the executive branch," (2) those precedents preclude "small minorities from compelling disclosure of information when the majority believes that disclosure would be inappropriate or even harmful," and (3) there is a "general presumption that disputes between the branches will be resolved by political rather than judicial means."[261] The brief states that Congress "intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch."[262] How could there be a political resolution if the decision to release information to Congress is left solely to the discretion of the executive branch? The government also argued that the lawmakers lacked standing to bring the suit, but that if the Ninth Circuit were to grant standing, the lawmakers should have access only to what would be permitted under a restrictive reading of the 1928 statute: information from discontinued reports.[263]

The government brief acknowledges that Congress has authorized committees, subcommittees, and even committee chairmen to is-

257. *Id.* at 17–18.

258. *Id.* at 19–20.

259. Civil Minutes—General at 3, Waxman v. Evans, No. 01-04530 (C.D. Cal. Jan. 22, 2002).

260. *Id*.

261. Brief for the Appellant at 5–6, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

262. *Id.* at 6.

263. *Id.* at 7–8.

sue subpoenas,[264] but that enforcement of a subpoena requires a vote by the full chamber and dependence on a U.S. Attorney to file an action in federal court.[265] Allowing Waxman and the other lawmakers to file an enforcement action in their own name would be contrary to "[t]hat longstanding approach."[266] Toward the end of its brief, the government concludes that action even by a full House would be insufficient. Relying on *INS v. Chadha*,[267] the government stated that requests by Congress for information from the executive branch, because they affect the legal rights and duties of executive officials outside the legislative branch, would require bicameral action and presentment of a bill to the president for his signature or veto.[268]

The brief for Waxman and the other lawmakers argued that "[u]nder settled Ninth Circuit precedent, adjusted census data is not privileged and must be made available to anyone under the Freedom of Information Act."[269] The brief repeated the district court's position that the case did not involve a claim of executive privilege, and that it was unlikely for the president to assert such a claim because the Seven Member Rule "applies only to agency records, and does not reach records of the President, his personal advisors, or White House staff."[270] As to the government's position that the Seven Member Rule merely allows lawmakers to ask for information, but not receive it, the Waxman brief stated that the government "points to no evidence" to support the theory that when Congress enacted section 2954 "it intended to render the provision unenforceable."[271]

Whereas the government asserts that section 2954 allows members of the two committees to request only documents from discontinued reports, the Waxman memorandum relied on legislative history to argue for a broader universe of information: "If any information is desired by any Member or committee upon a particular subject that information can be better secured by a request made by

264. *Id.* at 21.

265. *Id.* at 22–23.

266. *Id.* at 23.

267. 462 U.S. 919 (1983).

268. Brief for the Appellant at 5–6, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

269. Brief for the Appellees at 2, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

270. *Id.* at 4.

271. *Id.* at 13.

an individual Member or committee, so framed as to bring out the special information desired."[272]

With regard to the government's argument that "Congress intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch," the Waxman brief stated that this argument "defies logic" and "depends on the submission that, when Congress enacted § 2954, it intended to render the provision a toothless tiger that agencies were free to ignore with impunity. . . . That submission is [at] war with the plain text of § 2954."[273] The government urged the court to dismiss lawsuits brought by members of Congress when the issue is essentially an intra-branch conflict, but the Waxman brief states that the dispute raised by Waxman "is not with congressional colleagues . . . . [P]laintiffs do not seek to enact, amend or repeal legislation. They seek to enforce an existing statutory command against a federal officer . . . ."[274]

Finally, the Waxman brief addresses the government's claim that under *INS v. Chadha*,[275] legislative demands for information from the executive branch must comply with bicameralism and presentment. The distinction here is that "[a]lthough the Supreme Court has held that Congress may not *legislate* without action by both Houses . . . it has never suggested that the Constitution places comparable limits on Congress' oversight and investigatory powers."[276] The Supreme Court has recognized the power of individual congressional committees to investigate and issue subpoenas.[277]

The House of Representatives submitted two amici briefs: one by the Office of General Counsel, and the other by the House Democratic Leadership. The first argued that executive-legislative struggles over access to information should be left to the political process, not to the courts. The second supports the district court ruling that section 2954 mandates disclosure of the census data to Waxman and the other plaintiffs. The Office of General Counsel submitted its brief to the leadership of both parties, but the two Democratic leaders de-

272. *Id.* at 20 (quoting H.R. REP. NO. 70-1757, at 6 (1928)).

273. *Id.* at 34.

274. *Id.* at 50.

275. 462 U.S. 919 (1983)

276. Brief for the Appellees at 54-55, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

277. *Id.* at 55 (citing McGrain v. Daugherty, 273 U.S. 135, 158, 160–61 (1927)).

cided not to join. Thus, the brief represents only the views of the three Republican members of the bipartisan group: Speaker Dennis Hastert, Majority Leader Dick Armey, and Majority Whip Tom Delay.[278]

The House General Counsel brief points out that congressional efforts to obtain executive documents take place "almost entirely outside the judicial arena,"[279] through political negotiation, accommodation, compromise, and resort to subpoenas and contempt citations.[280] The district court's decision "would radically change the manner in which executive/legislative information access disputes are resolved," and would conflict with House rules "designed to maintain institutional control over the House's investigatory authority."[281] After reaching those judgments, the brief stated that Congress should be able to obtain executive documents needed for legislative and oversight functions, that the Department of Commerce construed section 2954 too narrowly, and that executive agencies have an obligation to respond in good faith to legislative requests under the 1928 statute.[282]

The two Democratic members, Minority Leader Dick Gephardt and Minority Whip Nancy Pelosi, filed a separate amicus brief, arguing that the procedure for holding someone in contempt of Congress (requiring action by the full House or Senate) is distinct from statutes that mandate release of executive branch information to Congress.[283] The brief placed section 2954 in the "tradition of statutes mandating the public release of unprivileged Executive information, without resort to contempt powers or processes."[284] During the period from 1920 to 1927, each House consolidated oversight of executive branch expenditures in a single committee devoted to expenditure oversight, "capable of fully looking over the Executive Branch's documents."[285] Dismissing claims in the House General Counsel brief that the district court's ruling would "radically," "profoundly," and "drastically"

278. Brief of Amicus Curiae Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Reversal at 1 n.1, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

279. *Id.* at 1.

280. *Id.* at 2.

281. *Id.* at 3.

282. *Id*.

283. Brief of Amicus Curiae House Democratic Leadership at 3, Waxman v. Evans, No. 02-55825 (9th Cir. docketed May 10, 2002).

284. *Id.* at 4.

285. *Id.* at 7.

change executive-legislative relations over information access disputes,[286] the Democratic brief describes section 2954, like the Freedom of Information Act, "as a sensible mandatory disclosure statute for documents not subject to executive privilege."[287]

IX. THE GAO INVESTIGATIONS

Congress relies on the General Accounting Office (GAO) to investigate executive agencies for inefficient and possibly corrupt practices. Various statutory authorities direct the GAO to examine agency documents and papers. If agencies withhold documents, the GAO has a number of options, including going to court. This Part reviews the statutory authorities, the difficulties that the GAO may encounter in gaining access to agency records, and the current collision between the GAO and Vice President Dick Cheney with regard to documents requested about the operation of the energy task force.

A. Statutory Authorities

Congress created the GAO in 1921 to strengthen legislative control over executive agencies. The enabling statute directed the Comptroller General, as head of the GAO, to investigate "all matters related to the receipt, disbursement, and use of public money."[288] To enable the Comptroller General to perform that function, departments and establishments were to "furnish" information regarding the powers, duties, activities, organization, financial transactions, and methods of business "as he . . . from time to time require[d] of them."[289] The Comptroller General and his assistants were to "have access to and the right to examine any books, documents, papers, or records of any such department or establishment."[290]

Comparable language appears in current law. The Comptroller General "shall investigate all matters related to the receipt, disbursement, and use of public money."[291] However, the scope of that investigative power is qualified by other statutory provisions. "When an agency record is not made available to the Comptroller General

286. *Id.* at 13.

287. *Id.* at 15–16.

288. Budget and Accounting Act of 1921, ch. 18, § 312(a), 42 Stat. 20, 25 (codified as amended at 31 U.S.C. § 712(1) (2000)).

289. *Id.* § 313, 42 Stat. at 26.

290. *Id*.

291. 31 U.S.C. § 712 (2000).

within a reasonable time," the Comptroller General may issue what is called a "demand letter," which is a written request to the agency head, who has twenty days to describe the record withheld and the reason for its withholding. If the Comptroller General is not given an opportunity to inspect the record within the twenty-day period, the Comptroller General may file a report with the president, the OMB Director, the Attorney General, the agency head, and Congress. Moreover, the Comptroller General may bring a civil action in federal court to require the agency head to produce a record and may subpoena a record of a person "not in the United States Government."[292]

The Comptroller General may not bring a civil action or issue a subpoena if any of the following conditions is met: (1) the record relates to activities the president designates as "foreign intelligence or counterintelligence activities"; (2) the record is specifically exempted from disclosure to the Comptroller General by a statute that "without discretion requires that the record be withheld from the Comptroller General" and that also either establishes particular criteria for withholding the record from the Comptroller General or refers to particular types of records to be withheld from the Comptroller General; or (3) no more than twenty days after the Comptroller General files a report regarding the withholding of a record, the president or the OMB Director certifies to the Comptroller General and Congress both that the record could be withheld under Exemptions 5 or 7 of the Freedom of Information Act "and disclosure reasonably could be expected to impair substantially the operations of the Government."[293] These procedures, however, do not "authorize information to be withheld from Congress."[294]

B. Problems of Access

A 1960 Senate document provided examples over the previous five years in which the Defense Department, the State Department, and the National Aeronautics and Space Administration (NASA) had withheld information from the GAO. These conflicts were reported

292. *Id.* § 716(b)–(c)(1).

293. *Id.* § 716(d). Exemption 5 of the FOIA refers to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," while Exemption 7 covers certain records or information compiled for law enforcement purposes. 5 U.S.C. § 552(b)(5), (b)(7) (2000).

294. 31 U.S.C. § 716(e)(3) (2000).

to the Senate Committee on Government Operations and to other committees, sometimes leading to a resolution of the dispute and sometimes not.[295] In the case of the State Department, Congress subsequently passed legislation to assist the GAO in obtaining documents, even to the point of providing for a cutoff of agency funds thirty-five days after a refusal has been made to the GAO or pertinent congressional committees, unless the information is delivered or the president certifies that he has forbidden its release and given his reasons.[296]

In 1972, Deputy Comptroller General Robert Keller told a congressional committee that the GAO had received good cooperation in obtaining access to executive records except from the Department of State, the Department of Defense, and certain activities of the Department of Treasury (the Federal Deposit Insurance Corporation and the Emergency Loan Guarantee Board). He said that the GAO had been "experiencing increasing difficulties in obtaining access to information" for programs involving U.S. relations with foreign countries.[297] In 1975, Comptroller General Elmer Staats told a House committee that the GAO did not know how much the United States spent on intelligence. The GAO had stopped auditing CIA expenditures in 1962 after being unable to obtain information, and had difficulty in getting information from other intelligence agencies, including the National Security Agency and the Defense Intelligence Agency.[298]

A 1979 study by Joseph Pois, a lawyer and professor of public administration, includes a chapter on the GAO's access to information in executive agency and contractors' files and records. Much of the chapter is devoted to the GAO's continuing difficulty in obtaining documents from the Defense Department. Even when the GAO ul-

295. *See* COMPTROLLER GEN. OF THE U.S., REPORT ON REFUSALS TO THE GENERAL ACCOUNTING OFFICE OF ACCESS TO RECORDS OF THE EXECUTIVE DEPARTMENTS AND AGENCIES, S. DOC. NO. 86-108 (1960) (discussing individual cases in which information had or had not been provided to the GAO).

296. *See* Mutual Security Appropriation Act of 1960, Pub. L. No. 86-383, § 111(d), 73 Stat. 717, 720 (establishing funding cutoffs for failure to provide information); Mutual Security Act of 1959, Pub. L. No. 86-108, § 401(i), 73 Stat. 246, 254 ("All documents . . . which relate to the operation or activities of the International Cooperation Administration shall be furnished to the General Accounting Office . . . ."); S. DOC. NO. 86-108, at 11–12 (discussing the provisions of the 1959 and 1960 acts).

297. 118 CONG. REC. 18,121 (1972).

298. Lawrence Meyer, *GAO Is Unable to Give Costs of Intelligence*, WASH. POST, Aug. 1, 1975, at A2.

timately prevailed or negotiated an acceptable compromise, lengthy delays "detract[ed] from the timeliness" and usefulness of the eventual report.[299]

More recent studies describe the problems that the GAO encounters in seeking information from the executive branch. A 1996 GAO report on National Intelligence Estimates (NIEs) stated that the scope of the study "was significantly impaired" by a lack of cooperation from the CIA, the National Intelligence Council, and the Departments of Defense and State. Officials from Defense and State referred the GAO to the CIA, which declined to cooperate, explaining that GAO review of certain NIEs would be contrary to oversight arrangements that Congress had established.[300] The GAO requested statutory authority to expand its oversight role of CIA but has not received it.

At House hearings in 1997, a GAO official described the problems that he and his colleagues had encountered in conducting a review of counternarcotics activities in Colombia. A lengthy screening program within the State Department delayed by several months delivery of documents to the GAO. Moreover, the department "denied . . . access to some documents and deleted or redacted information from others."[301] The experience contrasted with State Department cooperation the previous two years when the GAO conducted counternarcotics reviews in Colombia, Mexico, Bolivia, and Peru.[302]

In 1997, a subcommittee of the House Appropriations Committee held hearings on the GAO's investigation of allegations that there had been 938 overnight guests in the Executive Residence of the White House. The subcommittee wanted to know whether the $550,000 in overtime pay for thirty-six full-time White House employees (maids, butlers, chefs, housekeepers, doormen, etc.) was related to these overnight stays. Seven months after the subcommittee had ordered the investigation, the GAO was unable to comply be-

299. JOSEPH POIS, WATCHDOG ON THE POTOMAC: A STUDY OF THE COMPTROLLER GENERAL OF THE UNITED STATES 115–59 (1979).

300. NAT'L SEC. AND INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, FOREIGN MISSILE THREATS: ANALYTIC SOUNDNESS OF CERTAIN NATIONAL INTELLIGENCE ESTIMATES 15 (1996) (GAO/NSIAD-96-225, B-274120).

301. *International Drug Control Policy: Colombia: Hearing Before the Subcomm. on Nat'l Sec., Int'l Affairs, and Criminal Justice of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 70 (1997) (statement of Henry L. Hinton, Jr., Assistant Comptroller General, U.S. General Accounting Office).

302. *Id.* at 73 (statement of Henry L. Hinton, Jr., Assistant Comptroller General, U.S. General Accounting Office).

cause information had been withheld by the White House. The information was denied to the GAO to "preserve the privacy of the First Family."[303] However, in previous years the GAO had audited the Executive Residence without difficulty.[304]

On March 6, 2001, the GAO reported to the House Committee on International Relations regarding its study about U.S. participation in UN peacekeeping operations. After the Departments of State and Defense and the National Security Council had failed to provide the GAO access to the records it requested, the Comptroller General issued "demand letters" to the heads of each agency. After almost nine months of effort, the GAO obtained from the Department of State "reasonable access" to records. Following the demand letter, the Department of Defense provided some material, but the GAO had access to only about one-quarter of the Defense records it had requested, and many of those were heavily redacted. The NSC responded by denying the GAO "full and complete access to the records."[305]

Access to FBI records continues to be a problem for the GAO. A report of June 20, 2001, disclosed that of all the law enforcement-related agencies, the problem of gaining access to FBI records has been the "most sustained and intractable."[306] The GAO's experience with the FBI "is by far our most contentious among law enforcement agencies."[307]

C. The GAO-Cheney Face-off

The GAO's statutory procedure for issuing a demand letter and taking a dispute to civil court were both used in 2001 and 2002 in an effort to obtain information from Vice President Dick Cheney about

303. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998 (Part 6: GAO Investigation of the White House): Hearings Before a Subcomm. of the House Comm. on Appropriations*, 105th Cong. 7 (1997).

304. *Id.* at 11.

305. Letter from Susan S. Westin, Managing Director, International Affairs and Trade, U.S. General Accounting Office, and Anthony H. Gamboa, Acting General Counsel, U.S. General Accounting Office, to Henry J. Hyde, Chairman, House of Representatives Committee on International Relations, and Benjamin Gilman, Chairman, House of Representatives Subcommittee on the Middle East and South Asia 2 (on file with the *Duke Law Journal*).

306. U.S. GEN. ACCOUNTING OFFICE, TESTIMONY BEFORE THE SENATE COMM. OF THE JUDICIARY, GAO'S WORK AT THE FBI: ACCESS TO DATA, DOCUMENTS, AND PERSONNEL 1 (2001) (GAO-01-888T) (statement of Norman J. Rabkin, Managing Director, Tax Administration and Justice Issues).

307. *Id.* at 6.

his energy task force. Starting with little fanfare, the dispute escalated in intensity and publicity after Enron's bankruptcy in December 2001. As Enron executives came under fire for unethical and possibly criminal conduct, newspaper headlines began to suggest that Cheney's refusal to release documents to the GAO might somehow be an obstruction of justice. That was a misconception, but misconceptions carry weight and they are very difficult to correct. The controversy did damage to both Cheney and the GAO. Several leading Republicans in the House and the Senate ripped the accounting agency and threatened deep cuts in its budget. The costs were so high that both sides looked for a graceful exit through some type of face-saving compromise.

A complicating factor in the GAO-Cheney standoff is Cheney's claim that the agency wanted to interfere with the "deliberative process" required for the executive branch. The GAO insists that it only wants "facts" about the "development" and "formulation" of energy policy. At what point does a GAO inquiry into the development and formulation of energy policy begin to shade into an investigation of the deliberative process? One analyst thought that if the GAO were to prevail in this contest, it "could strengthen the ability of Congress, or even a single lawmaker, to find out details not only about the policy deliberations of federal agencies, but also about discussions in the West Wing."[308] That seems to me an overstatement, but the filing of a lawsuit is fraught with uncertainties for both sides.

1. *The Legislative Request*. The dispute began on April 19, 2001, when Representatives John Dingell and Henry Waxman wrote to Comptroller General David Walker, asking him to determine who served on the energy policy task force chaired by Vice President Cheney. It was their understanding that the task force had met in private with "exclusive groups of non-governmental participants—including political contributors—to discuss specific polices [sic], rules, regulations, and legislation."[309] Dingell and Waxman, serving as ranking members of two committees with jurisdiction over federal energy policy (respectively, the House Committee on Energy and Commerce, and the House Committee on Government Reform), told Walker that they questioned the "apparent efforts of the task force to shield its membership and deliberations from public scrutiny."[310] The

308. Jill Barshay, *Risk Enough for All in* Walker v. Cheney, 60 CONG. Q. WKLY. REP. 562, 562 (2002).

word "deliberations" would trigger a major dispute between the two legislators and the vice president's office.

The April 19 letter directed the GAO to produce a list of all task force members and staff, including their name, title, office, or employer represented. Moreover, the lawmakers wanted a list of all task force meetings, including the date, location, and duration of each meeting; the attendees at each task force meeting; the criteria used by the task force to determine which nonfederal entities were invited to the meetings; the direct and indirect costs incurred by the task force; and other matters.[311]

On the same day, Dingell and Waxman wrote to Andrew Lundquist, executive director of the task force. They said it was their understanding that private meetings had been held at federal facilities "with the participation of both federal employees and private citizens and groups, including political contributors."[312] It was their concern that the closed-door meetings "[would] violate the letter and the spirit of the Federal Advisory Committee Act (FACA)."[313] Attached to the letter were questions relating to the task force meetings, including some of the information requested of the GAO, but also much more specific data: the purpose and outcome of each meeting; whether transcripts or detailed minutes of the meeting were kept; and whether invitations had been extended to governors, state public utility commissioners, representatives of organized labor, representatives of consumer advocacy groups, and small business representatives.[314] This information, including "copies of all documents and records produced or received by the task force," was to be delivered to the two lawmakers by May 4, 2001.[315]

On the date of the deadline, Vice President Cheney's counsel, David Addington, wrote to the two House committees, identifying both the chairmen (W. J. "Billy" Tauzin and Dan Burton) and the

309. Letter from John Dingell, Ranking Member, Committee on Energy and Commerce, and Henry Waxman, Ranking Member, Committee on Government Reform, to David Walker, Comptroller General, General Accounting Office 1 (Apr. 19, 2001) (on file with the *Duke Law Journal)*.

310. *Id*.

311. *Id.* at 2.

312. Letter from John Dingell, Ranking Member, Committee on Energy and Commerce, and Henry Waxman, Ranking Member, Committee on Government Reform, to Andrew Lundquist, U.S. Department of Energy 1 (Apr. 19, 2001) (on file with the *Duke Law Journal*).

313. *Id*.

314. *Id.* at 3–5.

315. *Id.* at 1.

two ranking minority members, Dingell and Waxman. It was Addington's position that FACA did not apply to the task force because it "does not apply to a group 'composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.'"[316] However, "[as] a matter of comity between the legislative and executive branches," he provided information on the composition of the task force and pointed out that task force members "have met with many individuals who are not Federal employees to gather information relevant to the Group's work, but such meetings do not involve deliberations or any effort to achieve consensus on advice or recommendations."[317] The task force had met with "a broad representation of people potentially affected by the Group's work," including individuals from companies or industries from various sectors, such as electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing; environmental, wildlife, and marine advocacy; state and local utility regulation and energy management; research and teaching at universities; research and analysis at policy organizations (think tanks); energy consumers; a major labor union; and about three dozen members of Congress and their staff.[318]

Addington's letter provided the dates and locations of all task force meetings and the general purpose and outcome of the meetings.[319] With regard to questions about whether the meetings were noticed in advance, open to the public, and on the record, an attachment to the letter explained that section 3(2) of FACA provides that the term "advisory committee" excludes "any committee that is composed wholly of full-time, or permanent full-time, officers or employees of the Federal Government."[320]

On May 15, 2001, Dingell and Waxman wrote to Lundquist and told him it was inappropriate to refuse the records they requested. Lundquist's actions, they said, "only serve[d] to deepen public suspi-

316. Letter from David Addington, Counsel to the Vice-President, to W.J. "Billy" Tauzin, Chairman, Committee on Energy and Commerce, et al. 1 (May 4, 2001) (on file with the *Duke Law Journal*).

317. *Id.* at 1, 3.

318. *Id.* at 3–4.

319. *Id.* at 4.

320. *Id*. Actually, the exemption in FACA reads: "any committee which is composed wholly of full-time officers or employees of the Federal Government." Federal Advisory Committee Act, Pub. L. No. 92-463, § 3(2)(C), 86 Stat. 770, 770. (1972), *reprinted in* 5 U.S.C. app. § 3(2)(C) (2000).

cion over the Administration's apparent efforts to shield the membership and deliberations of the task force and its staff from public scrutiny."[321] To help Lundquist "better understand" their request for records, they attached a definition that included such items as minutes, drafts, notes, logs, diaries, video recordings, e-mails, voicemails, and computer tapes.[322] In subsequent months, the GAO would back away from the breadth of that definition and scale down its request.

2. *Challenging the GAO's Legal Authority*. The dispute sharpened on May 16, 2001, when Addington wrote to Anthony Gamboa, the GAO's General Counsel, raising questions about a GAO fax transmittal sheet that asked to interview officials of the energy task force and the group's support staff. The fax explained that it was the GAO's intent "'to review the composition and workings of the President's Energy Policy Development Group.'"[323] To Addington, the GAO was seeking to inquire

> into the exercise of the authorities committed to the Executive by the Constitution, including the authority to "require the Opinion, in writing, of the principal Officer in each of the executive Depart-

321. Letter from John Dingell, Ranking Member, Committee on Energy and Commerce, and Henry Waxman, Ranking Member, Committee on Government Reform, to Andrew Lundquist, Executive Director, National Energy Policy Development 1 (May 15, 2001) (on file with the *Duke Law Journal*).

322. *Id.* at 2–3. The letter defined "records" in the

> broadest sense [, meaning] any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

323. Letter from David S. Addington, Counsel to the Vice President, to Anthony Gamboa, General Counsel, General Accounting Office 1 (May 16, 2001) (on file with the *Duke Law Journal*) (quoting Fax Transmittal Sheet from Margaret J. Reese, Assistant Director for Natural Resources and Environment, U.S. General Accounting Office, to the National Energy Policy Development Group (May 8, 2001)).

> ments, upon any Subject relating to the Duties of their respective Offices," to "take Care that the Laws be faithfully executed," and, with respect to Congress, to "recommend to their Consideration such Measures as he shall judge necessary and expedient."[324]

After citing these constitutional duties, Addington said it appeared that the GAO "may intend to intrude into the heart of Executive deliberations, including deliberations among the President, the Vice President, members of the President's Cabinet, and the President's immediate assistants, which the law protects to ensure the candor in Executive deliberations necessary to effective government."[325] He closed by urging Gamboa to ask the Comptroller General to examine whether "the proposed inquiry is appropriate, in compliance with the law, and, especially in light of the information already provided as a matter of comity, a productive use of resources."[326] Addington recommended that Walker "not proceed with the proposed inquiry."[327] If Walker decided to go forward, Addington asked Gamboa to send a statement of the GAO's legal authority.[328]

It took the GAO two weeks to prepare a memorandum on its legal authorities. In the meantime, Dingell and Waxman wrote to Addington that they were "dismayed" by his letter questioning the GAO's authority to conduct an investigation.[329] Congressional oversight of the executive branch, they said, "includes the ability to examine all deliberations."[330] They asked whether the administration was relying on executive privilege, which can be invoked only by the president. If that was the intent, they wanted to receive clarification directly from President George W. Bush.[331] Executive privilege was not invoked in this instance. Dingell and Waxman closed by stating that "it is a shame" that the Cheney task force "has begun deliberations" with such a "determined attitude of secrecy and stonewalling."[332] They said that Congress and the public had a "right to know

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324. *Id*.

325. *Id*.

326. *Id.* at 2.

327. *Id*.

328. *Id*.

329. Letter from John Dingell, Ranking Member, Committee on Energy and Commerce, and Henry Waxman, Ranking Member, Committee on Government Reform, to David Addington, Counsel to the Vice President 1 (May 22, 2001) (on file with the *Duke Law Journal*).

330. *Id.*

331. *Id*.

332. *Id.* at 2.

how the energy policy was developed, including what special interests were consulted, what influence they had, and how competing interests were reconciled."[333]

Over time, the emphasis on "deliberations" by Dingell, Waxman, and the GAO would be replaced by asking how the policy was developed and formulated. The GAO seemed to think that an inquiry into *policy formulation* is not as intrusive as one into *policy deliberation*. Distinctions in this area are difficult to understand. For example, when Gamboa wrote to Addington on June 1, 2001, explaining the GAO's legal authority to conduct the investigation, the subject of the letter is entitled "GAO's Review of the Development of the Administration's National Energy Policy."[334] The key word is now *development*. As to Addington's concern that the GAO was intruding "into the heart of Executive deliberations," Gamboa insisted that the GAO's legal authority "extends to deliberative process information."[335] However, in the particular investigation of the Cheney task force, Gamboa said "we are not inquiring into the deliberative process but are focused on gathering factual information regarding the process of developing President Bush's National Energy Policy."[336] Gamboa denied that the GAO "at [that] time" was requesting an interview with Cheney "or cabinet officials."[337] He did want the GAO to interview Lundquist and "other officials" involved in the energy task force.[338]

The first mention of Enron Corporation appears in a June 5, 2001, letter from Waxman to Representative Dan Burton, chairman of the House Committee on Government Reform. Waxman cites a May 25, 2001, *New York Times* article reporting that the head of Enron, Kenneth Lay, had met with Cheney for thirty minutes earlier in the Spring and states that the task force report "includes much of what Mr. Lay advocated during their meeting."[339] The article points

333. *Id.*

334. Letter from Anthony Gamboa, General Counsel, U.S. General Accounting Office, to David Addington, Counsel to the Vice President 1 (June 1, 2001) (on file with the *Duke Law Journal*).

335. *Id.*

336. *Id*.

337. *Id* at 2.

338. *Id.*

339. Letter from Henry A. Waxman, Ranking Member, Committee on Government Reform, to Dan Burton, Chairman, Committee on Government Reform 1 (June 5, 2001) (on file with the *Duke Law Journal)*.

out that Enron was a major donor to Republican causes.[340] Waxman told Burton that Congress and the public "have the right to know how the Administration develops policy in important areas such as energy issues, and the extent to which large donors are influencing such policy."[341] He urged Burton to hold hearings on the Cheney task force to examine a number of matters, including "meetings attended by non-federal participants," the purpose of each meeting, and "what was discussed."[342]

On June 7, 2001, Addington wrote to Gamboa and commented upon the three statutes identified by the GAO as the legal basis for its inquiry. Addington concluded that two of the statutes provided no legal basis for the inquiry, and the third statute provided a legal basis for only a limited inquiry. The first statute requires the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law" when a committee of Congress with jurisdiction over the program or activity "requests the evaluation."[343] Addington said that this statutory provision did not justify the GAO inquiry because (1) the task force functioned under executive authorities granted by the Constitution and thus was not a program or activity carried out "under existing law," and (2) the Dingell-Waxman request did not "constitute a 'request' from a 'committee of Congress with jurisdiction over the program or activity.'"[344]

The second statute provided that each agency shall give the Comptroller General information that the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency, allowing the Comptroller General to inspect an agency record to get the information.[345] Addington said that this provision of law provided only "the means for conducting an otherwise authorized investigation," but even those investigations are limited by other legal authorities and privileges, "such as the constitutionally-based Executive privilege."[346] President Bush did not invoke executive privilege in this dispute.

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340. *Id.*

341. *Id.* at 3.

342. *Id*.

343. Letter from David S. Addington, Counsel to the Vice President, to Anthony Gamboa, General Counsel, U.S. General Accounting Office 1 (June 7, 2001) (on file with the *Duke Law Journal*) (quoting 31 U.S.C. § 717(b)(3) (2000)).

344. *Id.* at 2.

345. *Id.* (quoting 31 U.S.C. § 716(a) (2000)).

346. *Id*.

The third provision of law authorizes the Comptroller General to investigate "all matters related to the receipt, disbursement, and use of public money."[347] Addington promised to provide Gamboa with the direct and indirect costs incurred by Vice President Cheney and the task force staff. Addington also attached a presidential memorandum of January 29, 2001, establishing the Cheney task force. The memorandum lists the officers of the task force, its mission, required reports, and funding by the Department of Energy.

3. *The Demand Letter*. Three weeks later, Gamboa sent Addington a ten-page letter defending the GAO's legal authority to conduct the inquiry. Gamboa argued that the three statutes and their legislative histories provided adequate authority to justify the inquiry.[348] As to responding to a request from Dingell and Waxman instead of a committee, Gamboa maintained that the GAO's "Congressional Protocols" (practice rather than law) placed requests from "committee leaders" among the GAO's top priorities for response.[349] Gamboa told Addington that the Comptroller General was "prepared to issue a demand letter" if he did not receive timely access to the information outlined in the GAO letter of June 1, 2001.[350]

Comptroller General Walker sent the demand letter on July 18, 2001, requiring Cheney to respond within twenty days. Walker said that his study "focuse[d] on factual information, not the deliberative process."[351] However, the factual information was requested to understand "the development of the Administration's" energy policy.[352] At what point does factual information edge into the deliberative process? Walker asked for: (1) the names, titles, and offices represented by the attendees at each of the nine meetings conducted by the task force; (2) the names, titles, and offices of the six professional staff assigned to Cheney's office to support the task force; (3) the dates and locations of meetings between task force staff and individuals from

347. *Id.* at 3 (quoting 31 U.S.C. § 712 (2000)).

348. Letter from Anthony Gamboa, General Counsel, U.S. General Accounting Office, to David S. Addington, Counsel to the Vice President 10 (June 22, 2001) (on file with the *Duke Law Journal*).

349. *Id.* at 8.

350. *Id.* at 2.

351. Letter from David Walker, Comptroller General, U.S. General Accounting Office, to Richard Cheney, Vice President of the United States 1 (July 18, 2001) (on file with the *Duke Law Journal*).

352. *Id*.

the private sector; (4) the names, titles, and offices of those individuals; (5) the purpose and agenda of those meetings; (6) minutes or notes; (7) how the task force determined who would be invited to these meetings; (8) the same information (dates, locations, names, titles, offices, purpose and agenda, minutes or notes, and criteria for invitations) for the meetings that Cheney had; and (9) direct and indirect costs of the task force.[353] Much of this requested information (such as minutes or notes) would be dropped from subsequent GAO requests.

Cheney, refusing to release the names, said that if he responded to the GAO's request "any member of Congress can demand to know who I meet with and what I talk to them about on a daily basis."[354] He stated that after meeting with outside groups, those private interests "were not in the meetings where we put together the policy and made the recommendations to the president. That's the big difference."[355] In a letter of August 2, 2001, Cheney told the House of Representatives that Walker had exceeded his lawful authority by trying to "unconstitutionally interfere with the functioning of the Executive Branch."[356]

An appendix to the letter gave reasons for Cheney's refusal. First, it said that the GAO was not evaluating the "results" of the task force; it was "attempting to inquire into the process by which the results of the Group's work were reached."[357] Second, the statutes giving the GAO authority to obtain documents from executive agencies did not apply because the term "agency" as used in those statutes "does not include the Vice President of the United States, who is a constitutional officer of the Government."[358] Third, the GAO would unconstitutionally interfere with the functioning of the executive branch. Its proposed inquiry as to how the president, the vice president, and other senior advisers "execute the function of developing recommendations for policy and legislation" involved "a core constitutional function of the Executive Branch."[359]

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353. *Id.* at 1–2.

354. Joseph Curl, *Cheney Refuses Demand by GAO*, WASH. TIMES, July 27, 2001, at A1.

355. *Id*.

356. Letter from Richard B. Cheney, Vice President of the United States, to the House of Representatives 1 (Aug. 2, 2001) (on file with the *Duke Law Journal*).

357. *Id.* app. 2.

358. *Id.*

359. *Id.*

Here the administration uses the same word that the GAO had highlighted in its earlier letters: the development of policy.[360] A statement by the GAO on August 6, 2001, insisted that the information it requested from the administration "is purely factual in nature and relates solely to the process used by the group."[361] How does one distinguish between the "process used" and the "deliberative process?"

The GAO issued its "last best offer" to Cheney on August 17, 2001. Walker explained that the records sought "would not reveal communications between the President and his advisers and would not unconstitutionally interfere with the functioning of the executive branch."[362] He said he was not asking for "any communications involving the President, the Vice President, or the President's senior advisers."[363] Walker now boiled down his request to four categories: (1) the names of those present at the task force meetings, (2) the names of the professional staff assigned to the task force, (3) who the task force met with, including the date, subject, and location of the meetings, and (4) the direct and indirect costs incurred in developing the energy policy.[364] Walker reminded Cheney that in a previous letter the GAO had offered to eliminate the earlier request for minutes and notes and for the information presented by private individuals. As a "matter of comity," Walker now excluded those two items from his request.[365]

Walker's letter to Cheney triggered a provision in law that authorizes the president or the Director of the Office of Management and Budget to "certify" that the information requested by the GAO could not be made available for various reasons, including that "disclosure reasonably could be expected to impair substantially the operations of the Government."[366] Certification would permanently block a GAO lawsuit, and yet the administration chose not to issue a certification. Bottom line: if GAO wants to go to court, proceed.

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360. Gamboa, *supra* note 334, at 1; Gamboa, *supra* note 348, at 1.

361. U.S. General Accounting Office, GAO Statement (Aug. 6, 2001).

362. Letter from David M. Walker, Comptroller General, U.S. General Accounting Office, to Richard Cheney, Vice President of the United States 1 (Aug. 17, 2001) (on file with the *Duke Law Journal*).

363. *Id.* at 4.

364. *Id.* at 2.

365. *Id*.

366. 31 U.S.C. § 716(d)(1)(C) (2000).

4. *Going to Court*. By September 7, 2001, after the requested materials were not delivered, Walker began to prepare for the lawsuit. He said he expected to file suit by the end of the month.[367] However, the terrorist attacks of September 11 caused the GAO to delay filing out of deference to an administration hard-pressed by the crisis.[368] With the administration strained by the need to obtain emergency legislation and to prosecute the war in Afghanistan, Walker decided to wait.

Two developments early in 2002 rekindled the GAO-Cheney dispute. First, after Enron declared bankruptcy in December 2001, the press began to highlight the meetings it had with the energy task force. Second, the administration for some reason disclosed that Cheney and his aides had met with Enron six times in 2001.[369] If that type of information could be released by the administration, why not the rest? When exceptions are made to a principle, the principle can begin to look a little threadbare.

On January 24, 2002, Dingell and Waxman wrote to Walker, urging him to proceed with a lawsuit. The need for the information "has only increased over time, particularly with recent questions concerning the influence of officials of Enron in the development of the National Energy Policy."[370] Walker announced the following day that he would sue the White House if it did not comply with his demands.[371] Newspaper headlines and subheads kept the spotlight on Enron. A subhead in the *Washington Post* declared: "Hill Probes Enron Influence on Task Force."[372] Cheney, defending his position on *Fox News Sunday*, argued that "what's really at stake here is the ability of the president and the vice president to solicit advice from any-

367. *GAO Prepares to Sue Cheney Over Records*, WASH. POST, Sept. 8, 2001, at A13; Joseph Kahn, *Agency Likely to Sue White House to Force Disclosure*, N.Y. TIMES, Sept. 8, 2001, at A10.

368. Michael Grunwald & Ellen Nakashima, *Amid War, GAO Puts Legal Fight with Cheney on Hold*, WASH. POST, Nov. 9, 2001, at A35.

369. Mike Allen, *Cheney, Aides Met with Enron 6 Times in 2001*, WASH. POST, Jan. 9, 2002, at A3.

370. Letter from John D. Dingell, Ranking Member, House of Representatives Committee on Energy and Commerce, and Henry A. Waxman, Ranking Member, House of Representatives Committee on Government Reform, to David M. Walker, Comptroller General, U.S. General Accounting Office 2 (Jan. 24, 2002) (on file with the *Duke Law Journal*).

371. Dana Milbank & Dan Morgan, *GAO Vows to Sue for Cheney Files*, WASH. POST, Jan. 26, 2002, at A1.

372. *Id*.

body they want in confidence—get good, solid, unvarnished advice without having to make it available to a member of Congress."[373]

Some Republicans began to desert the administration. Walker said that Senator Fred Thompson and Representative Christopher Shays wanted the White House to release the information.[374] Thompson, after deciding that the law favored the administration, thought release of the records would be politically wise.[375] Similarly, Representative Dan Burton concluded that Cheney's legal position was stronger than the GAO's, but counseled that the administration should release the records to secure public trust.[376] Senator Charles Grassley advised the White House to release the information.[377]

On January 30, 2002, Walker announced that he would file a case in district court to obtain the documents he requested from the energy task force.[378] It was necessary to take this action, he said, because Congress

> has a right to the information we are seeking in connection with its consideration of comprehensive energy legislation and its ongoing oversight activities. Energy policy is an important economic and environmental matter with significant domestic and international implications. It affects the lives of each and every American. How it is formulated has understandably been a longstanding interest of the Congress. In addition, the recent bankruptcy of Enron has served to increase congressional interest in energy policy . . . .[379]

On the same day, Dingell and Waxman wrote to Cheney to clarify what they considered to be misconceptions about the GAO inquiry. They agreed that the president and the vice president are "generally entitled to confidentiality when discussing federal policies with

373. Dana Milbank, *Cheney Refuses Records' Release*, WASH. POST, Jan. 28, 2002, at A1.

374. *Id*.

375. Richard A. Oppel, Jr. & Robert Pear, *Enron's Many Strands: G.O.P. Senators Divide over Disclosing Information on Enron-White House Contacts*, N.Y. TIMES, Jan. 30, 2002, at C6.

376. Jill Barshay, *supra* note 308, at 563.

377. Oppel & Pear, *supra* note 375.

378. Letter from David M. Walker, Comptroller General, U.S. General Accounting Office, to Henry Waxman, Ranking Minority Member, House of Representatives Committee on Government Reform 3 (Jan. 30, 2002) (on file with the *Duke Law Journal*).

379. *Id.* at 2.

senior White House staff."[380] However, "confidentiality for discussions among the President and the Vice President and their top aides does not extend to external communications to the White House from outside groups."[381] Included in the letter were ten recent precedents where the GAO sought and received records of communications between outside groups and the White House.[382] Dingell and Waxman noted that President Bush "did not make—and could not reasonably have made—the certification required under section 716 for withholding the information."[383]

With Cheney taking a pounding in the press, Walker was not coming off unscathed either. Part of the criticism directed at Walker was the use of language that was unusual, if not unprecedented, for a Comptroller General. Because the GAO is a nonpartisan agency funded by Congress, it is usually extremely cautious and circumspect in making public statements. Yet when Cheney said the task force could not be scrutinized because he headed it in his capacity as vice president, Walker replied: "If all you have to do is create a task force, put the vice president in charge, detail people from different agencies paid by taxpayers, outreach to whomever you want and then you can circumvent Congressional oversight, that's a loophole big enough to drive a truck through."[384] After hearing Cheney object that the GAO was overstepping its bounds, Walker remarked: "Talk is cheap."[385]

These and other comments prompted charges that the GAO was conducting an overzealous and partisan inquiry. To House Majority Leader Dick Armey, "GAO is being pressured here on a partisan political basis, and they are wrong."[386] Senator Ted Stevens, the ranking member of the Appropriations Committee, said he was "appalled" at the GAO's pursuit of the White House documents. He argued that

380. Letter from John D. Dingell, Ranking Member, Committee on Energy and Commerce, and Henry Waxman, Ranking Member, Committee on Government Reform, to Richard Cheney, Vice President of the United States 3 (Jan. 30, 2002) (on file with the *Duke Law Journal*).

381. *Id.* at 2.

382. *Id.* at 4–6.

383. *Id.* at 7.

384. Stephen Labaton & Richard A. Oppel, Jr., *Enron's Many Strands: Bush Says Privacy Is Needed on Data from Enron Talks*, N.Y. TIMES, Jan. 29, 2002, at A1.

385. Elizabeth Bumiller, *Enron's Many Strands: Cheney Is Set to Battle Congress to Keep His Enron Talks Secret*, N.Y. TIMES, Jan. 28, 2002, at A1.

386. Dave Boyer, *GOP Terms GAO's Request a Partisan Hunt*, WASH. TIMES, Jan. 30, 2002, at A4.

the principle of separation of powers prevented such investigations,[387] and warned that the lawsuit could mark the decline of the GAO.[388]

The GAO finally filed its long-delayed lawsuit on February 22.[389] Other suits, filed under the Freedom of Information Act (FOIA), also sought documents on the administration's energy policy. On February 27, a federal judge ordered the Energy Department to turn over 7,500 pages of documents related to the Cheney task force.[390] On March 6, another federal judge in a FOIA case ordered seven government agencies to release thousands of documents related to the Cheney task force.[391] Several other courts are involved in lawsuits seeking documents from the task force.[392] In addition to information that may be made available from litigation, reporters are talking directly to private groups involved in the task force meetings. A lengthy article in the *New York Times* identifies the energy companies that met with the task force and contributions they made to the Republican and Democratic Parties in the 2000 election.[393] Some of the industry officials who met with the task force expressed surprise at the effort to keep the names secret: "Within the industry, there's this feeling like, 'Don't we already know who was there?'"[394]

On December 9, 2002, District Judge John D. Bates dismissed the GAO complaint by holding that the Comptroller General lacked standing to bring the suit.[395] The Comptroller General, said the court, had suffered no personal injury, and any institutional injury would exist only "in his capacity as an agent of Congress—an entity that itself has issued no subpoena to obtain the information and given no expression of support for the pursuit of this action."[396]

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387. *Id*.

388. Jill Barshay, *GAO's Walker Says He Hopes to Avoid Court Fight with Cheney over Energy Task Force Documents*, 60 CONG. Q. WKLY. REP. 396, 396 (2002).

389. Don Van Natta, Jr., *Agency Files Suit for Cheney Papers on Energy Policy*, N.Y. TIMES, Feb. 23, 2002, at A1.

390. Dana Milbank & Ellen Nakashima, *Energy Dept. Ordered to Release Documents*, WASH. POST, Feb. 28, 2002, at A1.

391. Don Van Natta, Jr., *Judge Orders More Papers on Task Force Released*, N.Y. TIMES, Mar. 6, 2002, at A18.

392. *Judges Knock Cheney Panel Court Efforts*, WASH. POST, Mar. 1, 2002, at A5.

393. Don Van Natta, Jr. & Neela Banerjee, *Top G.O.P. Donors in Energy Industry Met Cheney Panel*, N.Y. TIMES, Mar. 1, 2002, at A1.

394. *Id*.

395. Walker v. Cheney, No. Civ.A. 02-0340 JDB, 2002 WL 31741823, at *20 (D.D.C. Dec. 9, 2002) (mem.).

396. *Id*. at *19.

To obtain documents from the executive branch, Congress must be willing to use its considerable leverage and press its advantage. In this dispute, Congress and its committees decided not to do that, and Judge Bates interpreted the congressional silence as a grave weakness to GAO's position. Comptroller General Walker found himself, politically and institutionally, isolated.

5. *Lieberman's Subpoenas*. Throughout this period, none of the committees or subcommittees of Congress had issued a subpoena for documents concerning the energy task force. On March 22, 2002, the Senate Committee on Governmental Affairs, chaired by Democratic Senator Joseph Lieberman, issued twenty-nine subpoenas to Enron to document its relationship to the administration's energy task force.[397] At the same time, Lieberman said he would write letters to the White House seeking information about its contacts with Enron, instead of resorting to subpoenas.[398] In response to Lieberman's letter, White House Counsel Alberto Gonzales directed more than one hundred staff members to complete a questionnaire that would detail communications between the administration and Enron in the months just before the company's collapse.[399] These White House efforts were made under the threat of a subpoena that Lieberman held in reserve.[400]

As the weeks rolled by, Lieberman expressed dissatisfaction with the lack of progress.[401] Although White House Counsel Gonzales asked that the subpoena not be issued,[402] Lieberman decided on May 22, 2002, to subpoena the documents—the first congressional subpoenas served on the Bush administration.[403] Four hours after the subpoenas were delivered, the White House faxed Lieberman a six-page letter showing that Enron executives had a number of meetings and phone calls with White House officials that had been previously dis-

397. Dana Milbank, *Senate Panel Says Enron Must Detail Policy Role*, WASH. POST, Mar. 23, 2002, at A1.

398. *Id*.

399. *White House Staff to Answer Enron Questionnaire*, WASH. POST, Apr. 30, 2002, at A2.

400. *Lieberman Angered by Response on Enron*, WASH. POST, May 4, 2002, at A5; Richard A. Oppel, Jr., *Senator Presses for Information on Enron*, N.Y. TIMES, May 4, 2002, at C3.

401. Mike Allen, *Subpoena Urged on Enron Records*, WASH. POST, May 18, 2002, at A7; Richard A. Oppel, Jr., *Senate Democrats Escalate Efforts to Get White House to Disclose Enron Contacts*, N.Y. TIMES, May 18, 2002, at C1.

402. *White House Asks Subpoena Not Be Issued*, WASH. POST, May 22, 2002, at A19.

403. Mike Allen, *Panel Demands Enron Papers*, WASH. POST, May 23, 2002, at A1.

closed.[404] The subpoenas flushed out a number of documents and e-mails related to White House communications with Enron.[405] In some cases, the White House refused to make copies of Enron-related documents but allowed Lieberman's staff to come to the Eisenhower Executive Office Building, which is next to the White House, and look at some of them.[406]

6. *White House Defense Strategies*. The Waxman-Dingell request can be described as a "gotcha" legislative tactic: an effort by lawmakers to put the administration immediately on the defensive and possibly unearth some damaging information useful in political campaigns. No doubt a relatively small legislative investment in time and energy can put a White House in a tail-spin as it begins the laborious search for documents. An alternative is to concoct strained legal arguments that deny the lawmakers the documents, but at risk of appearing to engage in a cover-up. In the end, regardless of the merits of the legal doctrines, the documents are likely to become public anyway.

In the face of what appears to be a win-win legislative strategy, is the administration without a remedy? A resourceful administration has a number of ways to discourage or blunt a legislative inquiry. In the case of the energy task force, the administration came to power with noticeable attention to the business background of President George W. Bush and the industry ties of Vice President Cheney, Secretary of Defense Don Rumsfeld, and other top officials. It would have been prudent for the administration to go out of its way by meeting with a plethora of environmental, consumer, and labor union groups. When the time came for a legislative investigation of the energy task force, the administration could have released a lengthy list of the groups it met with, without embarrassment. If an administration fails to protect itself in advance, it will take a political hit, and deservedly so.

At that point, an administration has to decide whether it is better to release the damaging information early and absorb the blows—

404. *Id*.

405. Mike Allen, *White House Gathers Enron Data*, WASH. POST, May 25, 2002, at A4.

406. Mike Allen, *White House Gives Lieberman Limited Access to Enron Data*, WASH. POST, June 4, 2002, at A2; *see also Senate Panel Gets Some Enron Data*, WASH. POST, June 5, 2002, at A4 (explaining that only after Lieberman's deadline had passed did the White House reluctantly provide Enron-related information).

probably doing short-term damage—or drag out the investigation with the risk that the outside world will learn the truth anyway, because other lawsuits will probably bring the documents to light. Administrations are supposed to have an instinct for minimizing political damage. They live in a political world and have to expect opponents to score political points when they have an opportunity to do so, just as the administration will score when it sees an opening.

X. TESTIMONY BY WHITE HOUSE OFFICIALS

Vice President Cheney's argument that he enjoys a level of immunity from legislative inquiries, especially when he acts in an official manner developing national policy, raises a related question about White House aides. Tom Ridge, the director of the Office of Homeland Security, announced on March 4, 2002, that he would refuse to testify before congressional committees, claiming that he is an adviser to President Bush and not a Cabinet officer.[407] When White House officials are asked to testify before congressional committees, administrations frequently advise Congress that under "long-established" precedents the immediate staff of a president do not appear before committees.[408] In fact—given the right political conditions—they do appear, and they appear in great numbers. A previous Part on the appointment power explained how presidential aide Peter Flanigan testified in 1972 as part of the Kleindienst nomination to be Attorney General.[409] This Part discusses many other examples.

A. Watergate Precedents

On March 2, 1973, President Nixon objected to the appearance of White House Counsel John Dean at congressional hearings. President Nixon said that "no President could ever agree to allow the Counsel to the President to go down and testify before a committee."[410] He later elaborated on the reasons for refusing to allow White House aides to testify:

> Under the doctrine of separation of powers, the manner in which the

407. *See infra* Part X.C.

408. *See supra* note 70 and accompanying text.

409. *See supra* Part IV.B.

410. Richard Nixon, News Conference (Mar. 2, 1973), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1973, at 151, 160 (1975) [hereinafter NIXON PAPERS].

> President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.[411]

In a statement on March 15, President Nixon offered other reasons for denying Congress the right to question Dean at legislative hearings: "Mr. Dean is Counsel to the White House. He is also one who was counsel to a number of people on the White House Staff. He has, in effect, what I would call a double privilege, the lawyer-client relationship, as well as the Presidential privilege."[412] He repeated his position that members of the White House staff "[would] not appear before a committee of Congress in any formal session."[413]

Political pressures made it impossible for President Nixon to adhere to these legal doctrines. On April 17, he agreed to allow White House aides to testify before the Senate Select Committee on Presidential Campaign Activities, provided they followed four ground rules: White House aides would appear, in the first instance, in executive session, if appropriate; executive privilege would be expressly reserved and could be asserted during the course of the hearing to any question; the proceedings could be televised; and all members of the White House staff would appear "voluntarily" and testify under oath to "answer fully all proper questions."[414] Reference to the voluntary appearance enabled President Nixon to retain some semblance of his theory about separation of powers, but basically the White House capitulated while insisting that it did not have to.

On July 7, President Nixon further relaxed the guidelines. He directed that the right of executive privilege concerning possible criminal conduct "no longer be invoked for present or former members of the White House staff."[415] He also agreed to permit "the unrestricted

411. Richard Nixon, Statement about Executive Privilege (Mar. 12, 1973), *in* NIXON PAPERS, *supra* note 410, at 184, 185.

412. Richard Nixon, News Conference (Mar. 15, 1973), *in* NIXON PAPERS, *supra* note 410, at 202, 203.

413. *Id*. at 211.

414. Richard Nixon, Remarks Announcing Procedures and Developments in Connection with the Watergate Investigations (Apr. 17, 1973), *in* NIXON PAPERS, *supra* note 410, at 298, 299.

415. Letter from Richard Nixon, President of the United States, to Sam J. Ervin, Jr., Chairman, Select Committee on Presidential Campaign Activities (July 7, 1973), *in* NIXON PAPERS, *supra* note 410, at 636–37.

testimony of present and former White House staff members" before the committee.[416] Beginning on May 17 and continuing until September 23, 1975, a number of White House aides testified before the committee, including John Dean, Jeb Magruder, Alexander Butterfield, Herbert Kalmbach, John Ehrlichman, H.R. Haldeman, Patrick Buchanan, Leonard Garment, and General Alexander Haig, Jr.[417]

B. Other Accommodations

On October 31, 1975, Henry Kissinger appeared before the House Select Committee on Intelligence, at a time when he served in a dual capacity as secretary of state and national security adviser. In 1980, White House Counsel Lloyd Cutler and National Security Adviser Zbigniew Brzezinski appeared at hearings conducted by a subcommittee of the Senate Judiciary Committee to investigate whether Billy Carter, the president's brother, had acted criminally in his relationship with Libya. President Jimmy Carter instructed all members of the White House staff to cooperate fully with the subcommittee and to "respond fully to such inquiries from the subcommittee and to testify if the subcommittee determines that oral testimony is necessary."[418] He was not about to fall on his sword for his brother's misjudgments.

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

Congressional hearings in 1994 focused on whether White House aides had inappropriately learned details of a Resolution Trust Corporation investigation of the failed Madison Guaranty Savings and Loan, with President Clinton and Hillary Rodham Clinton named as

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416. *Id*. at 637.

417. The complete list appears in Louis Fisher, *White House Aides Testifying Before Congress*, 27 PRESIDENTIAL STUD. Q. 139, 141–42 (1997).

418. Jimmy Carter, Billy Carter's Activities with the Libyan Government: White House Statement on the Senate Judiciary Committee Inquiry (July 24, 1980), *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, 1980–81, AT 1420 (1982).

potential beneficiaries of alleged wrongdoing at Madison.[419] In 1995 and 1996, as part of the investigation of the dismissal of seven employees from the White House Travel Office in 1993, former assistant to the president John Podesta and former director of the White House Office of Administration David Watkins testified before the House Committee on Government Reform and Oversight.[420]

Senate hearings into the Whitewater Development Corporation in 1995 and 1996 brought these White House officials before a special Senate committee: Assistant to the President Mark Gearan, former Special Assistant to the President Sylvia Mathews, Deputy Assistant to the President Patsy Thomasson, former Assistant to the President for Management and Administration David Watkins, White House Deputy Press Secretary Evelyn Lieberman, Counsel to the President Thomas McLarty, Assistant to the President Jack Quinn, Assistant to the President Bruce Lindsey, Special Counsel to the President Jane Sherburne, Special Assistant to the President Carolyn Huber, Deputy Chief of White House Staff Harold Ickes, and many others.[421]

Even when the White House decides that presidential aides will not testify, other mechanisms can be used to satisfy congressional needs. In 1981, Martin Anderson, President Reagan's assistant for policy development, refused to appear before a House Appropriations subcommittee responsible for funding his budget request for the Office of Policy Development. The subcommittee retaliated by deleting all of the $2,959,000 requested for the office. In doing so, it pointed out that the previous heads of the office (Stuart Eizenstat in the Carter years, James Cannon in the Ford years, and Kenneth Cole in the Nixon years) had appeared before the subcommittee. As a compromise, Anderson met informally and off-the-record with the subcommittee to respond to their questions. After the Senate restored almost all of the funds, Congress appropriated $2,500,000 for the office.[422]

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419. A number of senior White House staff testified at the hearings: White House Counsel Lloyd Cutler; Lisa Caputo, Press Secretary to Hillary Clinton; Associate Counsel to the president Neil Eggleston; Assistant to the President Bruce Lindsey; former White House Chief of Staff Thomas McLarty; former White House Counsel Bernard Nussbaum; Assistant to the President John Podesta; Senior Policy Adviser to the President George Stephanopoulos; and Margaret Williams, Chief of Staff to Hillary Clinton. Other White House attendees are cited in Fisher, *supra* note 417, at 145–46.

420. *Id.* at 146–47.

421. *Id.* at 148–49.

422. *Id.* at 139–40.

C. Tom Ridge

After the September 11 terrorist attacks, President Bush issued an executive order to establish the Office of Homeland Security, to be located within the Executive Office of the president.[423] Because of its location within the president's office and its creation by executive order instead of by statute, the White House could argue that the head of the Office of Homeland Security would have protection against testifying before congressional committees. President Bush appointed Tom Ridge to head the office.

In a letter of March 4, 2002, Democratic Senator Robert Byrd of West Virginia and Republican Senator Ted Stevens of Alaska, the chairman and ranking member of the Appropriations Committee, invited Ridge to testify before their committee on April 9, 10, and 11.[424] The White House announced that Ridge would not appear because he was an "adviser" to President Bush, not a Cabinet officer.[425] A letter of March 13 from White House liaison Nicholas Calio advised the two Senators that "members of the President's staff do not ordinarily testify before congressional committees."[426]

Not receiving a response from Ridge, Senators Byrd and Stevens wrote to President Bush, pointing out that the budget he submitted to Congress proposed $38 billion for over eighty federal departments and agencies for homeland defense. It was their position that Ridge "is the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs."[427] They further argued that the duties and responsibilities that President Bush had assigned to Ridge are "much broader in scope than the staff role of advising the President," and that unless Ridge testified, they would have "no recourse but to invite witnesses from more than

423. Establishing the Office of Homeland Security and the Homeland Security Council, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

424. Letter from Ted Stevens, Ranking Member, Senate Committee on Appropriations, and Robert C. Byrd, Chairman, Senate Committee on Appropriations, to Tom Ridge, Assistant to the President for Homeland Security 1 (Mar. 4, 2002) (on file with the *Duke Law Journal*).

425. Allison Mitchell, *Letter to Ridge Is Latest Jab in Fight over Balance of Powers*, N.Y. TIMES, Mar. 5, 2002, at A8.

426. *See* Letter from Ted Stevens, Ranking Member, Senate Committee on Appropriations, and Robert C. Byrd, Chairman, Senate Committee on Appropriations, to George W. Bush, President of the United States 1 (Mar. 15, 2002) (on file with the *Duke Law Journal*) (describing the March 13 letter that senators Stevens and Byrd received from Calio).

427. *Id*.

eighty Federal departments and agencies that participate in homeland defense programs."[428] Byrd and Stevens renewed their request for Ridge to testify before the Appropriations Committee and asked to meet with President Bush to explain their intentions."[429]

The meeting with President Bush did not take place, but the letter from Byrd and Stevens prompted a letter from Ridge to Byrd, offering a compromise designed to "avoid the setting of a precedent that could undermine the Constitutional separation of powers and the long-standing traditions and practices of both Congress and the Executive Branch."[430] Ridge proposed that he provide a public briefing in April to Senators and members of Congress. Joining him would be executive officials with operational authority over the homeland security programs. Lawmakers would have the opportunity to ask questions of Ridge and the other executive officials, with the proceedings open to both the public and the press.[431] How that proposal protects the constitutional separation of powers and "long-standing traditions and practices" is difficult to fathom. Probably no credible explanation could be offered by the administration. Under pressure from both parties, the White House devised an accommodation that it hoped would settle the dispute.

While Senators Byrd and Stevens considered this proposal, Ridge offered to "informally" brief two House committees.[432] He followed through by meeting informally with a subcommittee of House Appropriations and the House Government Reform Committee.[433] Ridge also met with a group of Senators to discuss border security is-

428. *Id*.

429. *Id.* at 2.

430. Letter from Tom Ridge, Assistant to the President, Office of Homeland Security, to Robert C. Byrd, Senate Committee on Appropriations 1 (Mar. 25, 2002) (on file with the *Duke Law Journal*).

431. *Id*.

432. Ridge made offers to meet informally with two House committees and additionally hold thirty-five individual meetings with members of Congress. Elizabeth Becker, *Ridge to Brief 2 House Panels, but Rift with Senate Remains*, N.Y. TIMES, Apr. 4, 2002, at A19; *Byrd Presses Ridge to Speak to Committee*, WASH. POST, Apr. 5, 2002, at A2.

433. Elizabeth Becker, *Ridge Briefs House Panel, but Discord Is Not Resolved*, N.Y. TIMES, Apr. 11, 2002, at A23; Bill Miller, *From Bush Officials, a Hill Overture and a Snub*, WASH. POST, Apr. 11, 2002, at A27.

sues.[434] Ridge explained that he was willing to meet with lawmakers in "briefings" but not "hearings."[435]

These artificial distinctions created by the White House—allowing Ridge to meet informally and take questions but not appear formally to take questions, or to participate in briefings but not hearings—added fuel to congressional efforts to create a Department of Homeland Security and have the agency headed by someone who must be confirmed by the Senate and subject to being called to testify. Statutory action would override President Bush's executive order and neutralize White House arguments about Ridge functioning as a presidential adviser. Congress could have compromised by creating both a statutory department and a small Office of Homeland Security located in the White House. However, the statute establishing a Department of Homeland Security makes no mention of a White House office.[436] The Office of Homeland Security remains within the White House, as a presidential creation.

CONCLUSION

Congress depends on information from the executive branch to perform its constitutional duties. Much of the information that Congress seeks is located within executive agencies that are created, authorized, and funded by Congress. In both a legal and constitutional sense, agencies are "creatures" of Congress and must learn to serve both the executive and legislative branches.[437] As greater portions of executive power move to the president's office, Congress has a similar need to gain access to White House documents and compel White House aides to testify.

Whether lawmakers obtain that information depends on their willingness and ability to expend the energy and time it takes to overcome bureaucratic hurdles. To do that well, members of Congress have to think of themselves as belonging to an *institution* rather than a variety of interests. The White House and agencies have become more skilled in resisting legislative inquiries, particularly when they

434. Bill Miller, *Ridge to Brief Senators About Border Security*, WASH. POST, May 2, 2002, at A2.

435. Bill Miller, *On Homeland Security Front, a Rocky Day on the Hill*, WASH. POST, May 3, 2002, at A25.

436. 116 Stat. 2135 (2002).

437. LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 106–45 (4th ed. 1998).

come from a Congress controlled by the opposition party. Although presidents routinely announce that they will "cooperate fully" with a congressional investigation, they have also learned "to blunt, to parry, and to outlast the accusations against them."[438] Similarly, agencies dig in while flooding committees with marginal or extraneous material. Congress has the theoretical edge because of the more than adequate tools at its disposal. What it needs primarily is motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor its constitutional purpose.

Untidy as they are, political battles between Congress and the executive branch are generally effective in resolving executive privilege disputes. Courts play a minor role, which is good for the judiciary and good for the country. There is no reason to think that greater involvement by courts would be constructive or helpful. The risk is great that the Supreme Court, in trying to settle one issue, will fashion standards and doctrines that may prove to be too broad and awkwardly drawn. For example, in the Watergate tapes case, Chief Justice Warren Burger resorted to clumsy dicta and ceded ground to presidents who claim a "need to protect military, diplomatic, or sensitive national security secrets."[439] That issue was not before the Court, was never argued or briefed, and should not have been addressed.

Nevertheless, journalists and even academics seem to think that if the president announces that information falls within the categories of military, diplomatic, or "sensitive national security secrets," the other two branches should back off. If the courts want to do that, they may retreat in the face of such presidential claims. Congress should not. The Watergate tapes case concerned access to information by the judiciary, not Congress.[440] Lawmakers, with specific constitutional duties over issues involving the military and national security, have no reason to defer to such presidential arguments.[441]

Political understandings and settlements have kept executive-legislative conflicts over information to a manageable level. Legal and constitutional principles serve as guides, but no more than that. Precision in this area cannot be expected or even desired. Alexander Bickel recognized that large societies will explode if they cannot de-

438. Tiefer, *supra* note 118, at 146.

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

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

441. Fisher, *supra* note 39, at 602–27.

vise accommodations and middle positions to overcome conflict. His advice four decades ago remains sound today: "No good society can be unprincipled; and no viable society can be principle-ridden."[442]

442. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 49 (1961).