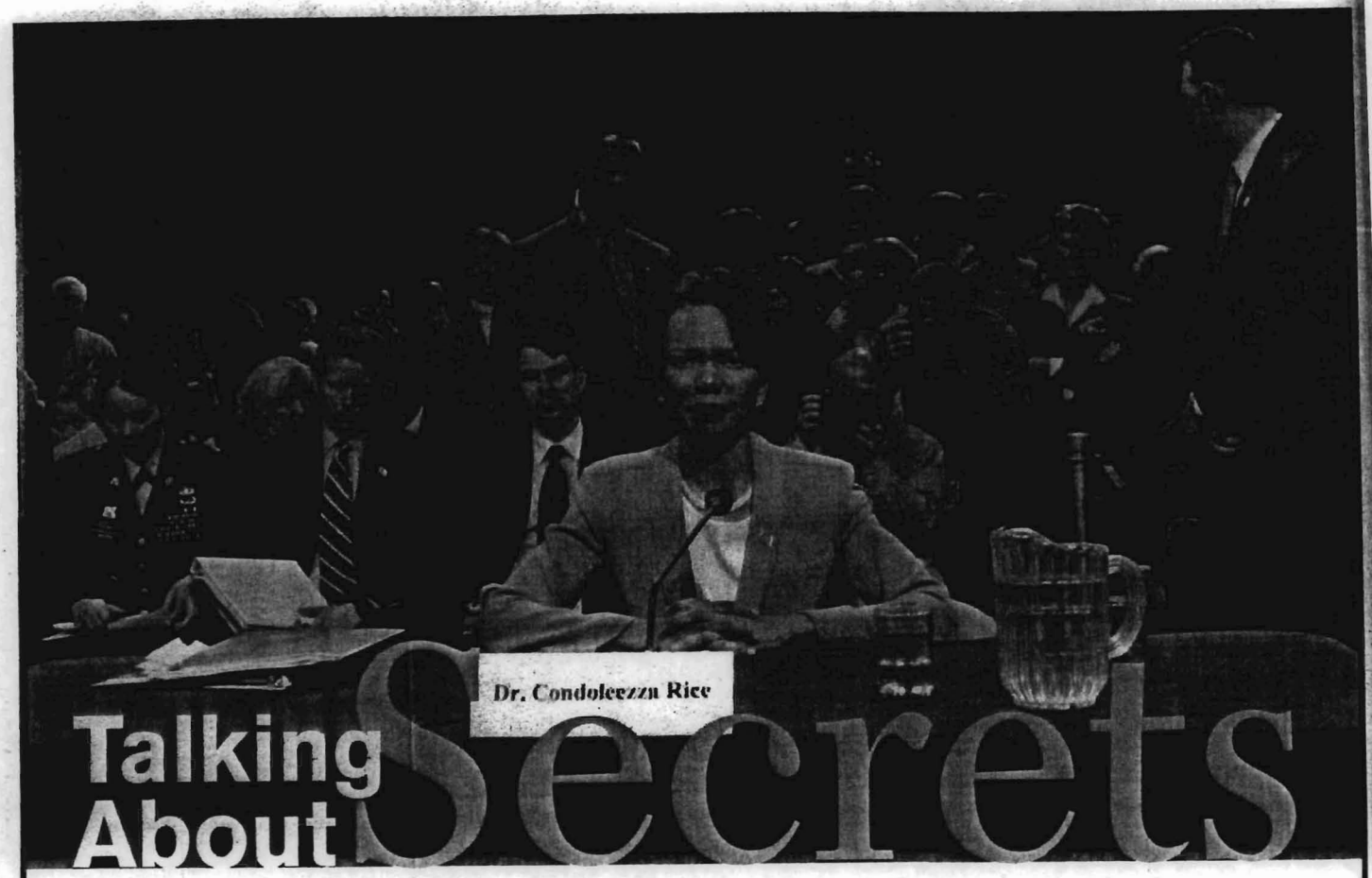

Talking About Secrets

BY LOUIS FISHER

The dispute over public testimony by Condoleezza Rice and the Aug. 6, 2001, President's Daily Briefing are the most recent examples of White House efforts to keep "national security" information from Congress, its commissions, and the public. Executive-legislative confrontations typically begin with broad White House claims that the release of such testimony or documents presents weighty constitutional matters and would gravely injure the national interest. Just as typically, political pressures can compel the executive branch to make the testimony and documents available.

It is true that White House officials generally have been insulated from congressional inquiry because of a long-standing comity that exists between Congress and the presidency. But as the White House continues to expand its operations to determine policy that used to reside in the executive departments, where legislative oversight is strong, Congress has less reason to grant the White House its customary independence. And while debate over when Congress should assert its power usually proceeds in terms of constitutional doctrine, it is the messy political realities of the moment that usually decide the issue.

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Even taking all of this into account, the administration's turnarounds with Dr. Rice and the presidential briefings are quite extraordinary. On March 25, 2004, White House Counsel Alberto Gonzales wrote to the Sept. 11 commission explaining why Rice could not testify in public. He acknowledged that some national security advisers had testified earlier before Congress, but he noted that the appearances were either in closed sessions or involved a matter connected with potentially improper or illegal conduct. He could find no example of a "sitting National Security Advisor appearing publicly before a legislative body outside the context of potential improper or illegal conduct."

RICE'S JOURNEY

"More important than the legal precedents," Gonzales observed, "are the principles underlying the Constitutional separation of powers at stake here." In order for President George W. Bush and his successors to receive "the best and most candid possible advice from their White House staff on counterterrorism and other national security issues, it is important that their advisers not be compelled to testify publicly before congressional bodies such as the Commission."

But "separation of powers" was far too broad a concept to settle the dispute. The Framers expected—and built into the Constitution—a range of overlappings and interactions between the branches. As for the president's need to receive candid advice, Cabinet heads appear frequently before congressional committees and commissions and can always respond to a question by saying that the matter involved a confidential discussion with the president. Rice could have said the same, either in a private meeting with the commission, in a public setting, or in an appearance on national TV.

In meeting with reporters on March 25, White House spokesman Scott McClellan insisted that Dr. Rice could not appear in public before the commission because "it's a matter of principle. It's a matter of separation of powers." When Rice appeared on "60 Minutes" on March 28, she told Ed Bradley that "I'm not going to say anything in private that I wouldn't say in public. I'm legally bound to tell the truth, I'm morally bound to tell the truth." Her statement seemed to remove any principled objection to public testimony.

Five days after the White House's refusal, the administration folded. On March 30, Gonzales wrote to the commission to say that President Bush had agreed to allow Rice to testify before the commission in public and under oath. A few conditions were attached. This accommodation reflected not lofty principles of separation of powers but, as Gonzales put it, "a matter of comity."

Rice's public testimony on April 8 sparked renewed interest in the Aug. 6, 2001, presidential briefing. Initially, the administration refused to release the document to the commission. Over a period of time, it gave access to four commissioners. At the hearing, Rice discussed the presidential briefing, recalled its title, and dismissed its importance: "It did not warn of attacks inside the United States. It was historical information based on old reporting." Under pressure from the commission and the public, the administration agreed on April 10 to release the presidential briefing, redacting only the names of foreign intelligence services that supplied some of the information.

These settlements mirror resolutions of previous disputes. After the Watergate break-in and the start of congressional investigations, President Richard Nixon issued a statement on March 2, 1973, objecting to the appearance of White House Counsel John Dean at legislative hearings. Nixon said that "no President could ever agree to allow the Counsel to the President to go down and testify before a committee."

Citing the doctrine of separation of powers, President Nixon claimed that the manner in which the president exercises his constitutional powers was not subject to questioning by another branch of government. He claimed that if the president was 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." Within a matter of weeks, however, Nixon agreed to let Dean and other White House aides testify.

Similarly, during the Iran-Contra scandal, presidential aides worried about the vulnerability of President Ronald Reagan to impeachment. Getting facts out quickly would prevent the opposition from charging a cover-up. Because Reagan made documents and executive officials available to Congress and waived executive privilege, members of Congress never took seriously the thought of impeaching him. Reagan permitted his two former national security advisers, Robert McFarland and John Poindexter, to testify before Congress, allowed his Cabinet officials (including Secretary of State George Shultz and Secretary of Defense Caspar Weinberger) to discuss with Congress their conversations with the President, and made available to Congress thousands of sensitive, classified documents.

ENTER THE COURTS

The judiciary has tried to referee some of the executive-privilege disputes. Writing for the Supreme Court in the Watergate tapes case, Chief Justice Warren Burger rejected an "absolute, unqualified" presidential privilege of immunity from judicial process. However, in unfortunate dicta, he seemed to cede ground if the president claimed a "need to protect military, diplomatic, or sensitive national security secrets."

The language was overbroad because the executive branch often uses the label "national security" to avoid embarrassing revelations. Although Solicitor General Erwin Griswold prepared a brief in 1971 that told the Supreme Court that publication of the "Pentagon Papers" would pose a "grave and immediate danger to the security of the United States, and advised the Court during oral argument that making the documents public "would be of extraordinary seriousness to the security of the United States," he later admitted in 1989 that he had never seen "any trace of a threat to the national security from the publication" of the Pentagon Papers. The principal concern of executive officials who classify documents, he said, "is not with national security, but rather with governmental embarrassment of one sort or another."

Even when the White House yells privilege, the Constitution yields to politics.

Within the judiciary, Burger's cautious attitude toward judicial power has long since been superseded by statutory grants of power to the courts that invite judges to exercise independent judgment on matters of national security. Courts now examine executive records (including sensitive documents) in judges' chambers to decide on the exemptions in the Freedom of Information Act. The Foreign Intelligence Surveillance Act of 1978 required a court order to engage in electronic surveillance within the United States for the purpose of obtaining foreign intelligence information. The Classified Information Procedures Act of 1980 allows a judge to screen classified information to determine whether it can be used at trial. For instance, in the Zacarias Moussaoui trial, Judge Leonie Brinkema has had regular access to highly classified documents.

Even so, if the Court wants to acquiesce to presidential arguments about national security, it is free to do so. But Congress has no reason to follow in its steps. Unlike the judiciary, Congress has express constitutional powers and duties in the fields of military affairs and national security.

The text and intent of the Constitution, combined with legislative and judicial precedents over the past two centuries, provide compelling support for congressional access to national security information within the executive branch. Without that information, Congress is unable to fulfill its legislative duties and the political system inevitably moves away from the republican model fashioned by the Framers and toward an executive-centered regime that they feared.

Whether lawmakers actually receive national security information depends on their willingness, skills, and ability to devote the energy and time it takes to overcome bureaucratic and White House hurdles. To do that job well, lawmakers have to think of themselves as belonging to an institution rather than to a composite of local interests. They must regard themselves as playing an essential role in defending and maintaining a republic, bringing vigor and integrity to a system of checks and balances. Performed in that manner, legislative oversight protects not only Congress as a coequal branch but also the political system of popular control.

BEYOND THE LAW

Battles over national security information are settled only in part on the basis of legal and constitutional principles. The executive branch cannot expect to win every time it says "national security," "deliberative process," or "active litigation files." Those are typically opening, not closing, arguments. Legal and constitutional arguments, finely honed as they might be, are often overridden by the political and practical considerations of the moment.

Attempts to announce precise constitutional boundaries between the two branches, indicating when Congress can and cannot have information, are not realistic or even desirable. Disputes over information invariably come with unique qualities, characteristics, and histories.

Antonin Scalia, while serving as head of the Office of Legal Counsel in the 1970s, put the matter well during Senate hearings. As he said, when congressional and presidential interests collide, the answer is likely to lie in "the hurly-burly, the give-and-take of the political process between the legislative and the executive."

More on LegalTimes.com

Read more about the national security adviser and the 9/11 commission.

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