

THE POLITICS OF EXECUTIVE PRIVILEGE

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Fisher, Louis

The politics of executive privilege / by Louis Fisher

p. cm.

Includes bibliographical references and index.

ISBN 0-89089-416-7 (paperback)

ISBN 0-89089-541-4 (hardcover)

1. Executive privilege (Government information—United States. 2. Executive power—United States. 3. Legislative power—United States. 4. Separation of powers—United States. I. Title.

JK468.S4F57 2003
352.23'5'0973—dc22

2003060238

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Cover art by Scot C. McBroom for the Historic American Buildings Survey, National Parks Service. Library of Congress call number HABS, DC, WASH, 134-1.

Printed in the United States of America

NATIONAL SECURITY CLAIMS

Those who write about executive privilege sometimes imply that the mere claim by an administration of “national security” (or “foreign affairs” or “diplomacy”) is sufficient to establish presidential primacy. In one article, Saikrishna Prakash writes that “national security considerations strongly bolster the case for an executive privilege.... Properly wielded, an executive privilege could lead to... enhanced [presidential] supervision of foreign affairs...”¹ Writing for the Court in the Watergate Tapes Case, Chief Justice Burger rejected an “absolute, unqualified” presidential privilege of immunity from judicial process.² However, in clumsy dicta, he seemed to cede ground if the President claimed a “need to protect military, diplomatic, or sensitive national security secrets.”³ If the Court wants to acquiesce to such presidential arguments, it is free to do so. But Congress has no reason to follow in its steps. The Watergate Tapes Case concerned *judicial*, not *congressional*, access to executive branch information.⁴

In 1973, President Nixon was asked to compare the congressional investigation of Watergate with his earlier inquiry—as a member of Congress—in the Alger Hiss case. A reporter noted that the Hiss investigation involved “foreign affairs” and “possibly security matters,” whereas the pending questioning of John Dean concerned the Watergate break-in. Should lawmakers have reduced access to national security documents? Nixon argued that they needed *greater* access: “when a committee of Congress was investigating espionage against the Government of this country, that committee should have had com-

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

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

3. *Id.*

4. 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.

plete cooperation from at least the executive branch of the Government in the form that we asked.” The Watergate investigation, he said, “does not involve espionage against the United States.” Nixon insisted that Congress “would have a far greater right and would be on much stronger ground to ask the Government to cooperate in a matter involving espionage against the Government than in a matter like this involving politics.”⁵

Unlike the judiciary, Congress has express constitutional powers and duties in the fields of military affairs and national security. When Congress passed the Freedom of Information Act (FOIA), requiring executive agencies to make documents available to the public, it set forth nine exemptions, including matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”⁶ Another exemption: “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”⁷ Yet another exemption: “records or information compiled for law enforcement purposes...”⁸ Those are some of the grounds for denying *members of the public* information from executive agencies. They do not apply to Congress. FOIA specifically provides that those exemptions do not constitute “authority to withhold information from Congress.”⁹

Controlling National Security Information

A 1996 memorandum prepared by the Office of Legal Counsel argued that a congressional enactment “would be unconstitutional if it were interpreted ‘to divest the President of his control over national security information in the Executive Branch’ by vesting lower-ranking personnel in that Branch with a ‘right’ to furnish such information to a Member of Congress without receiving official authorization to do so.”¹⁰ OLC based this position on the following separation of powers rationale:

5. Public Papers of the Presidents, 1973, at 211–12.

6. 5 U.S.C. § 552(b)(1) (2000).

7. *Id.* at § 552(b)(5).

8. *Id.* at § 552(b)(7).

9. *Id.* at § 552(d).

10. Memorandum from Christopher H. Schroeder, Office of Legal Counsel, Department of Justice, to Michael J. O’Neil, General Counsel to the Central Intelligence Agency, November 26, 1996, at 3 (hereafter “OLC Memo”).

[T]he President’s roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command—and to erect an obstacle to the President’s exercise of all executive powers relating to the Nation’s security—by vesting lower-level employees in the Executive Branch with a supposed “right” to disclose national security information to Members of Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President.¹¹

As explained later in this chapter, OLC’s analysis led to the conclusion that two congressional statutes—one dating back to 1912, and pending language in a Senate bill—were unconstitutional. However, the department’s position relies on faulty generalizations and misconceptions about the President’s roles as Commander in Chief, head of the Executive Branch, and “sole organ” of the Nation in its external relations.

Commander in Chief

The Constitution empowers the President to be Commander in Chief, but that title must be understood in the context of military responsibilities that the Constitution grants to Congress. Article II reads: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”¹² For the militia, Congress—not the President—does the calling. The Constitution gives to Congress the power to provide “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”¹³

11. *Id.* at 4.

12. U.S. Const., art. II, §2.

13. *Id.*, art. I, §8, cl. 15.

An important purpose of the Commander in Chief Clause is to preserve civilian supremacy. Attorney General Edward Bates explained in 1861 that the President is made Commander in Chief “not because the President is supposed to be, or commonly is, in fact, a military man, a man skilled in the art of war and qualified to marshal a host in the field of battle. No, it is for quite a different reason.” A soldier knows that whatever military victories might occur, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”¹⁴

Article I empowers Congress to declare war, raise and support armies, and make rules for the land and naval forces. The debates at the Philadelphia Convention make clear that the Commander in Chief Clause did not grant the President unilateral, independent power other than the power to “repel sudden attacks.”¹⁵ Roger Sherman said the President should be able “to repel and not to commence war.”¹⁶ Taking the country from a state of peace to a state of war was a deliberative process that required congressional debate and approval. George Mason told his colleagues that he was for “clogging rather than facilitating war.”¹⁷ At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress.”¹⁸

The framers gave Congress the power to initiate war because they believed that Presidents, in the search for fame and personal glory, would have a bias that favored war.¹⁹ John Jay warned in Federalist No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”²⁰ James Madison made the same point. Writing in 1793, he called war “the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in

14. 10 Op. Att’y Gen. 74, 79 (1861) (emphasis in original).

15. 2 Farrand 318–19.

16. *Id.* at 318.

17. *Id.* at 319.

18. 2 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 528 (Elliot ed. 1896).

19. William Michael Treanor, “Fame, the Founding, and the Power to Declare War,” 82 *Corn. L. Rev.* 695 (1997).

20. The Federalist 101 (Benjamin Fletcher Wright ed. 1961).

war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.”²¹

All three branches understood that the President’s unilateral power in matters of war is limited to defensive actions. Implied in the power of Congress to declare war was the President’s power “to repel sudden attacks.”²² For example, when the Supreme Court upheld Lincoln’s blockade on the rebellious states, Justice Robert Grier emphasized that the President as Commander in Chief “has no power to initiate or declare a war against either a foreign nation or a domestic State.”²³ The executive branch took exactly the same position. During oral argument, Richard Henry Dana, Jr., who was representing the President, acknowledged that Lincoln’s actions had nothing to with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”²⁴

The historical record is replete with examples of Congress relying on the regular legislative process, including access to national security information held by the executive branch, to control presidential actions in military affairs.²⁵ There is no evidence from these sources that the Commander in Chief Clause was intended to deny members of Congress information needed to supervise the executive branch and learn of agency wrongdoing.

Head of the Executive Branch

The framers placed the President at the head of the executive branch to provide for unity, responsibility, and accountability. No doubt that is an important principle for assuring that the President, under Article II, Section 3, is positioned to “take Care that the Laws be faithfully executed.” The delegates at the constitutional convention rejected the idea of a plural executive, preferring to anchor that responsibility in a single individual. Said John Rutledge: “A single man would feel the greatest responsibility and administer the public affairs best.”²⁶

But placing the President at the head of the executive branch did not remove from Congress the power to direct certain executive activities and to gain access to information needed for the performance of its legislative duties. At the Convention, Roger Sherman considered the executive “nothing more than

21. 6 The Writings of James Madison 174 (Hunt ed. 1906).

22. 2 Farrand 318–19.

23. The Prize Cases, 67 U.S. 635, 668 (1863).

24. *Id.* at 660 (emphasis in original).

25. Louis Fisher, *Presidential War Power* (1995).

26. 1 Farrand 65.

an institution for carrying the will of the Legislature into effect.”²⁷ It was never the purpose to make the President personally responsible for executing all the laws. Rather, he was to take care that the laws be faithfully executed, including laws that excluded him from some operations in the executive branch.

For example, from an early date Congress vested in certain subordinate executive officials the duty to carry out specified “ministerial” functions without interference from the President. On many occasions an Attorney General has advised Presidents that they have no legal right to interfere with administrative decisions made by the auditors and comptrollers in the Treasury Department, pension officers, and other officials.²⁸ The President is responsible for seeing that administrative officers faithfully perform their duties, “but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties.”²⁹ In several decisions the Supreme Court has recognized that Congress can impose certain duties on executive officials that are beyond the control and direction of the President.³⁰

Those principles were underscored by a confrontation during the Reagan administration. In 1984, Congress passed the Competition in Contracting Act (CICA) to give the Comptroller General certain authorities over agency contracting. President Reagan signed the bill but instructed Attorney General Edwin Meese to inform all executive branch agencies how to comply with the statute “in a manner consistent with the Constitution.”³¹ A memorandum from the Justice Department concluded that the contested provision for the Comptroller General was unconstitutional and should not be enforced by the agencies.³² In effect, the administration had exercised an item veto by decid-

27. *Id.*

28. 1 Op. Att’y Gen. 624 (1823); 1 Op. Att’y Gen. 636 (1824); 1 Op. Att’y Gen. 678 (1824); 1 Op. Att’y Gen. 705 (1825); 1 Op. Att’y Gen. 706 (1825); 2 Op. Att’y Gen. 480 (1831); 2 Op. Att’y Gen. 507 (1832); 2 Op. Att’y Gen. 544 (1832); 4 Op. Att’y Gen. 515 (1846); 5 Op. Att’y Gen. 287 (1851); 11 Op. Att’y Gen. 14 (1864); 13 Op. Att’y Gen. 28 (1869).

29. 19 Op. Att’y Gen. 685, 686–87 (1890).

30. *E.g.*, *Kendall v. United States*, 37 U.S. 522, 610 (1838); *United States v. Schurz*, 102 U.S. 378 (1880); *Butterworth v. Hoe*, 112 U.S. 50 (1884); *United States v. Price*, 116 U.S. 43 (1885); *United States v. Louisville*, 169 U.S. 249 (1898).

31. *Public Papers of the Presidents*, 1984, II, at 1053.

32. Office of Legal Counsel, Department of Justice, Memorandum for the Attorney General, “Implementation of the Bid Protest Provisions of the Competition in Contracting Act,” October 17, 1984, at 15.

ing what parts of a statute to carry out. This was part of a larger strategy devised by enthusiasts who believed in the theory of a “unitary executive,” with all parts of the executive branch directly accountable and subordinate to the President.³³

This theory was repeatedly struck down in the courts. In upholding the provisions of CICA, a district judge stated that the position of the Reagan administration “flatly violates the express instruction of the Constitution that the President shall ‘take care that the Laws be faithfully executed.’”³⁴ Once a bill is enacted into law, the President executes all of it, not just the parts he favors. The district court’s ruling was upheld on appeal by the Third Circuit.³⁵ The Ninth Circuit, in upholding the Comptroller General provision, said that once Reagan put his signature to CICA it became “part of the law of the land and the President must ‘take care that [it] be faithfully executed.’”³⁶ In his role as head of the executive branch, the President has no authority to “employ a so-called ‘line item veto’ and excise or sever provisions of a bill with which he disagrees.”³⁷ A later attempt by the Justice Department to challenge the constitutionality of CICA was also turned aside in the courts.³⁸

Agencies have a direct responsibility to Congress, the body that creates them. In 1854, Attorney General Caleb Cushing advised departmental heads that they had a threefold relation: to the President, to execute his will in cases in which the President possessed a constitutional or legal discretion; to the law, which directs them to perform certain acts; and to Congress, “in the conditions contemplated by the Constitution.” Agencies are created by law and “most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government.”³⁹

33. For an excellent analysis of the deficiencies of this theory, see Morton Rosenberg, “Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive,” 57 *G.W. L. Rev.* 627 (1989).

34. *Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F.Supp. 750, 755 (D. N.J. 1985). See also *Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F.Supp. 962 (D. N.J. 1985).

35. *Ameron v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986)

36. *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988).

37. *Id.*

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

39. 6 *Op. Att’y Gen.* 326, 344 (1854).

“Sole Organ” in Foreign Affairs

During debate in the House of Representatives in 1800, John Marshall said that the President “is the sole organ of the nation in its external relations and its sole representative with foreign nations.”⁴⁰ That remark was later incorporated in Justice Sutherland’s opinion in *United States v. Curtiss-Wright Corp.* (1936), to suggest that the President is the exclusive policymaker in foreign affairs.⁴¹ However, Justice Sutherland wrenched Marshall’s statement from context to imply a position that Marshall never held. At no time, either in 1800 or later, did Marshall ever suggest that the President could act unilaterally to make foreign policy in the face of statutory limitations.

The debate in 1800 focused on the decision of President John Adams to turn over to England someone who had been charged with murder. Because the case was already pending in an American court, some members of Congress thought that Adams should be impeached for encroaching upon the judiciary and violating the doctrine of separated powers.⁴² It was at that point that Marshall intervened to say that there was no basis for impeachment. Adams, by carrying out an extradition treaty entered into between England and the United States, was not attempting to make national policy single-handedly. Instead, he was carrying out a policy made jointly by the President and the Senate (for treaties).⁴³ Only after the policy had been formulated through the collective effort of the executive and legislative branches (by treaty or by statute) did the President emerge as the “sole organ” in *implementing* national policy. The President merely *announced* policy; he did not alone *make* it. Consistent with that principle, Marshall later decided a case as Chief Justice of the Supreme Court and ruled that in a conflict between a presidential proclamation and a congressional statute governing the seizure of foreign vessels during wartime, the statute prevails.⁴⁴

Sutherland’s use of “sole organ” in *Curtiss-Wright* prompted Justice Robert Jackson in 1952 to say that the most that can be drawn from Sutherland’s decision is the intimation that the President “might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.”⁴⁵ Jackson also noted that “much of the [Sutherland] opinion is *dic-*

40. Annals of Cong., 6th Cong. 613 (1800).

41. 299 U.S. 304, 319–20 (1936).

42. Annals of Cong., 6th Cong. 552 (1800) (statement of Rep. Harper).

43. *Id.* at 597, 613–14.

44. *Little v. Barreme*, 6 U.S. (2 Cr.) 169, 179 (1804).

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

tum.”⁴⁶ In 1981, the D.C. Circuit cautioned against placing undue reliance on “certain dicta” in Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.”⁴⁷

Role of the Courts

In the period immediately after World War II, federal courts typically deferred to presidential responsibilities in military and diplomatic affairs. In 1948, the Supreme Court said it would be “intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.”⁴⁸ The deference here was not wholly to the President. Such decisions, said the Court, “are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.”⁴⁹

A few years later, in the midst of the Korean War, the Court again avoided a clash with the executive branch over national security documents. A district court had ordered the government to produce documents to permit the court to determine whether they contained privileged matter. The Supreme Court reversed, ruling that the judiciary “should not jeopardize the security which the [government’s] privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”⁵⁰

Those attitudes have long since been superseded by statutory grants of power to the courts, discussed later, that invite judges to exercise independent judgment on matters of national security. Nevertheless, some courts continue to defer to the President. In 1980, the Fourth Circuit remarked that the “executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely in-

46. *Id.* (emphasis in original).

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

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

49. *Id.*

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

experienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance.”⁵¹ The Fourth Circuit freely expressed its uneasiness in this area: “the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized.”⁵² Although the lawsuit presented a potential conflict between the President and the judiciary—and not a clash between the President and Congress—the court called the executive branch “constitutionally designated as the pre-eminent authority in foreign affairs.”⁵³ However obsequious federal judges decide to behave, Congress—given its explicit constitutional duties—does not have to assume the same posture.

The Pentagon Papers

In the Pentagon Papers Case in 1971, the Supreme Court decided that two newspapers were constitutionally entitled to publish a Defense Department secret study that was critical of U.S. policy in the Vietnam War. Justice Stewart wrote a concurrence that spoke approvingly of independent presidential power: “If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.”⁵⁴

At first glance this sentence may seem logical: If one clause is valid, the other follows. But there is no necessary linkage between the two statements. The President’s largely unshared power to *conduct* foreign affairs does not imply a largely unshared power to determine the *policy* for internal security, nor does it imply a largely unshared power to provide oversight of the policy. The conduct of foreign policy usually means the implementation of national security policy arrived at jointly by Congress and the President. Conduct may be executive but the policy and the oversight is executive-legislative. That is true to an even greater extent in the “maintenance of our national defense,” as Justice Stewart expressed it. Congress shares that responsibility with the Pres-

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

52. *Id.* at 913–14.

53. *Id.* at 914.

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

ident. In the field of foreign affairs, the Constitution does not give “a large degree of unshared power” either to Congress or to the President.

Justice Stewart offered other broad views about presidential power: “it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.”⁵⁵ No one doubts that the President has important duties and prerogatives in protecting confidential information. The more difficult question is the degree to which Congress can share in those duties and prerogatives by enacting restrictive legislation and conducting oversight. On that issue, Stewart’s concurrence provides no answer.

Justice Stewart did acknowledge that the President lacks a monopoly: “This is not to say that Congress and the courts have no role to play.”⁵⁶ And yet he appeared to assign to Congress a narrow, subordinate role: “Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets.”⁵⁷ In any event, a concurrence by a Justice has no authoritative value in settling or defining constitutional issues.

Two other points about the Stewart concurrence deserve comment. First, his overall analysis depends almost entirely on a single case, *Curtiss-Wright*,⁵⁸ which is itself deeply flawed. Second, after stating that presidential power in national defense and international relations is “largely unchecked by the Legislative and Judicial branches,”⁵⁹ and that there is “the absence of the governmental checks and balances present in other areas of our national life,”⁶⁰ he concluded that the Pentagon documents should be published in the newspapers. Because of what he believed to be inadequate governmental checks on presidential power, Justice Stewart declared that “the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”⁶¹ It was for that reason that he supported “an informed and free press” to enlighten the people.⁶²

55. *Id.* at 729–30.

56. *Id.* at 730.

57. *Id.*

58. *Id.* at 727 n.2, 728–29 n.3 (citing *United States v. Curtiss-Wright*).

59. *Id.* at 727.

60. *Id.* at 728.

61. *Id.*

62. *Id.*

Recent Statutory Changes

Judicial attitudes have become somewhat more emboldened in recent decades, in part because of congressional legislation. In 1973, the Supreme Court decided that it had no authority to examine *in camera* certain documents regarding a planned underground nuclear test to sift out “nonsecret components” for their release.⁶³ In response, Congress passed legislation to clearly authorize courts to examine executive records in judges’ chambers as part of a determination of the nine categories of exemptions in the Freedom of Information Act.⁶⁴ The Foreign Intelligence Surveillance Act of 1978 requires a court order to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information. A special court, the Foreign Intelligence Surveillance Court (FISC), is appointed by the Chief Justice to review applications submitted by government attorneys.⁶⁵ In 1980, Congress passed the Classified Information Procedures Act (CIPA) to establish procedures in court to allow a judge to screen classified information to determine whether it could be used during the trial.⁶⁶

These statutes bring the courts a long way in terms of attitude, procedures, and capability in passing judgment on national security matters. Even if courts were to continue to defer to the President, the same attitude should not be taken by Congress. Unlike the courts, Congress has explicit duties under the Constitution to declare war, provide for the common defense, raise and support armies, and provide and maintain a navy. Legislative expertise exists in the Armed Services Committees, the defense appropriations subcommittees, the Budget Committees, the intelligence committees, and other legislative panels.

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

63. *EPA v. Mink*, 410 U.S. 73, 81 (1973).

64. 88 Stat. 1562, §4(B) (1974); see H. Rept. No. 1380, 93d Cong., 2d Sess. 8–9, 11–12 (1974).

65. 92 Stat. 1783 (1978).

66. 94 Stat. 2025 (1980).

Department of the Navy v. Egan (1988)

The OLC memo in 1996 relied in part on *Department of the Navy v. Egan* to maximize presidential power.⁶⁷ However, *Egan* is fundamentally and solely a case of statutory construction.⁶⁸ It has nothing to do with the President's constitutional authority. The dispute involved the Navy's denial of a security clearance to Thomas Egan, who worked on the Trident submarine. He was subsequently removed. Egan sought review by the Merit Systems Protection Board (MSPB), but the Supreme Court upheld the Navy's action by ruling that the denial of a security clearance is a sensitive discretionary judgment call *committed by law* to the executive agency with the necessary expertise for protecting classified information.⁶⁹ The conflict in this case was within the executive branch (Navy versus the MSPB), not between Congress and the executive branch.

The focus on statutory questions was evident throughout the case. As the Justice Department noted in its brief submitted to the Supreme Court: "The issue in this case is one of statutory construction and 'at bottom... turns on congressional intent.'"⁷⁰ The parties were directed to address this question: "Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance."⁷¹

The statutory questions centered on 5 U.S.C. §§ 7512, 7513, 7532, and 7701. The Justice Department's brief analyzed the relevant statutes and their legislative history and could find no basis for determining that Congress intended the MSPB to review the merits of security clearance determinations.⁷² The entire oral argument before the Court on December 2, 1987, was devoted to the meaning of statutes and what Congress intended by them. At no time did the Justice Department suggest that classified information could be withheld from Congress.

The Court's deference to the Navy did not cast a shadow over the right of Congress to sensitive information. The Court decided merely the "narrow

67. OLC Memo, at 6–7.

68. 484 U.S. 518 (1988).

69. *Id.* at 529–30.

70. U.S. Department of Justice, "Brief for the Petitioner," *Department of the Navy v. Egan*, October Term, 1987, at 22 (citing *Clarke v. Securities Industry Ass'n*, No. 85-971, January 14, 1987).

71. *Id.* at (I) (emphasis added).

72. U.S. Department of Justice, "Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit," *Department of the Navy v. Thomas E. Egan*, October Term, 1986, at 4–5, 13, 15–16, 18.

question” of whether the MSPB had *statutory* authority to review the substance of a decision to deny a security clearance.⁷³ Although the Court referred to independent constitutional powers of the President, including those as Commander in Chief and head of the executive branch,⁷⁴ and noted the President’s responsibility with regard to foreign policy,⁷⁵ the case was decided purely on statutory grounds. In stating that courts “traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” the Court added this key qualification: “*unless Congress specifically has provided otherwise.*”⁷⁶ The Court appears to have borrowed this thought, and language, from the Justice Department’s brief: “Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.”⁷⁷ Nothing in the legislative history of the Civil Service Reform Act of 1978 convinced the Court that the MSPB could review, on the merits, an agency’s security-clearance determination.⁷⁸

During oral argument before the Supreme Court, the Justice Department and Egan’s attorney, William J. Nold, debated the statutory issues. After the department completed its presentation, Nold told the Justices “I think that we start out with the same premise. We start out with the premise that this is a case that involves statutory interpretation.” Yet Nold remarked on the department’s effort to shoehorn in some constitutional qualities: “What they seem to do in my view is to start building a cloud around the statute. They start building this cloud and they call it national security, and as their argument progresses... the cloud gets darker and darker and darker, so that by the time we get to the end, we can’t see the statute anymore. What we see is this cloud called national security.”⁷⁹

In citing the President’s role as Commander in Chief, the Court stated that the President’s authority to protect classified information “flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”⁸⁰ If Congress had never enacted legisla-

73. 484 U.S. at 520.

74. *Id.* at 527.

75. *Id.* at 529.

76. *Id.* at 530 (emphasis added).

77. U.S. Department of Justice, “Brief for the Petitioner,” Department of the Navy v. Egan, October term, 1987, at 21.

78. 484 U.S. at 531 n.6.

79. Transcript of Oral Argument, December 2, 1987, at 19.

80. 484 U.S. at 527.

tion regarding classified information, certainly the President could act in the absence of congressional authority. But if Congress acts by statute, it can narrow the President's range of action and the courts then look to congressional policy.

It is helpful to place *Egan* in the context of Justice Jackson's three categories laid out in the Steel Seizure Case of 1952: (1) when the President acts pursuant to congressional authority his authority is at its maximum, because it includes everything that he possesses under the Constitution plus what Congress has delegated to him; (2) when he acts in the absence of congressional authority he operates in a "zone of twilight" in which he and Congress share concurrent authority; (3) when he acts against the expressed or implied will of Congress, his power is at "its lowest ebb."⁸¹ *Egan* belongs in the middle category. The President's range is broad until Congress enters the zone of twilight and exerts its own authority.

The *Garfinkel* Case

The OLC memo also misinterprets the litigation that led to the Supreme Court's decision in *American Foreign Service Assn. v. Garfinkel* (1989).⁸² At various points the memo cites *Garfinkel* for the proposition that Congress cannot "divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so."⁸³ Yet the progression of this case from district court to the Supreme Court and back to the district court illustrates how a lower court may exaggerate the national security powers of the President at the expense of congressional prerogatives. The district court's expansive view of executive power was quickly vacated by the Supreme Court.

In 1983, President Reagan directed that all federal employees with access to classified information sign "nondisclosure agreements" or risk the loss of their security clearance.⁸⁴ Congress, concerned about the vagueness of some terms and the loss of access to information, passed legislation to prohibit the use of appropriated funds to implement the nondisclosure policy.⁸⁵ In 1988, District Court Judge Oliver Gasch held that Congress lacked constitutional authority

81. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952).

82. 490 U.S. 153 (1989).

83. OLC Memo, at 3.

84. National Security Decision Directive 84; see Louis Fisher, "Congressional-Executive Struggles Over Information Secrecy Pledges," 42 *Adm. L. Rev.* 89, 90 (1990).

85. 101 Stat. 1329-432, § 630 (1987); 102 Stat. 1756, § 619 (1988).

to interfere, by statute, with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information.⁸⁶ Among other authorities, Judge Gasch relied on *Egan* and *Curtiss-Wright*.⁸⁷ From *Egan* he extracts a sentence (“The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief”) without acknowledging that *Egan* was decided on statutory, not constitutional, grounds.⁸⁸ From *Curtiss-Wright* he concludes that the “sensitive and complicated role cast for the President as this nation’s emissary in foreign relations requires that congressional intrusion upon the President’s oversight of national security information be more severely limited than might be required in matters of purely domestic concern.”⁸⁹

In fact, the issue in *Curtiss-Wright* was whether Congress could delegate *its* powers to the President in the field of foreign relations. The previous year the Court had struck down the National Industrial Recovery Act because it had delegated an excessive amount of legislative power to the President in the field of domestic policy.⁹⁰ The question before the Court in *Curtiss-Wright* was limited: Could Congress use more general standards when delegating its authority in foreign affairs? The Court held that more general standards were permissible because of the changing circumstances that prevail in international affairs. The issue before the Court was the extent to which Congress could delegate its power (embargo authority), not the existence of independent and autonomous powers for the President.

Having mischaracterized both Supreme Court decisions, Judge Gasch concluded that Congress had passed legislation that “impermissibly restricts the President’s power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations.”⁹¹

On October 31, 1988, the Supreme Court noted probable jurisdiction in the *Garfinkel* case.⁹² Both the House and the Senate submitted briefs protesting Judge Gasch’s analysis of the President’s power over foreign affairs. During oral argument, after Edwin Kneidler of the Justice Department spoke re-

86. *National Federation of Federal Employees v. United States*, 688 F.Supp. 671 (D.D.C. 1988).

87. *Id.* at 676, 684–85.

88. *Id.* at 685.

89. *Id.*

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

91. 688 F.Supp. at 685.

92. 488 U.S. 923 (1988).

peatedly about the President's constitutional role to control classified information, one of the Justices remarked: "But, Mr. Kneeder, I just can't—I can't avoid interrupting you with this thought. The Constitution also gives Congress the power to provide for a navy and for the armed forces, and so forth, and often classified information is highly relevant to their task."⁹³ The attorney for the association challenging Reagan's nondisclosure policy objected that Gasch's decision, "by declaring that the Executive Branch has such sweeping power, has impeded the kind of accommodation that should take place in this kind of controversy," and hoped that the Court "wipes that decision off the books."⁹⁴

On April 18, 1989, the Court issued a per curiam order that vacated Judge Gasch's order and remanded the case for further consideration.⁹⁵ In doing so, the Court cautioned Judge Gasch to tread with greater caution in expounding on constitutional matters: "Having thus skirted the statutory question whether the Executive Branch's implementation of [Nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees' argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security."⁹⁶ The Court emphasized that the district court "should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings."⁹⁷ On remand, Judge Gasch held that the plaintiffs (American Foreign Service Association and Members of Congress) failed to state a cause of action for courts to decide.⁹⁸ By dismissing the plaintiff's complaint on this ground, Judge Gasch did not address any of the constitutional issues.⁹⁹

Settling Executive-Legislative Collisions

In the 1970s and 1980s, Congress and the executive branch clashed repeatedly over access to "national security" and "foreign affairs" documents. On

93. Transcript of Oral Argument, March 20, 1989, at 57–58.

94. *Id.* at 60.

95. *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153 (1989).

96. *Id.* at 158.

97. *Id.* at 161.

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

99. *Id.* at 16.

each occasion the Justice Department insisted that the documents could not be shared with a congressional committee. In the end, the administration had to drop its pretensions to having an exclusive role in determining what to release to Congress. Federal courts applied the necessary pressure in the first dispute. In two other confrontations, the power of Congress to hold an executive official in contempt was sufficient leverage to pry loose the documents.

The AT&T Cases

The first dispute began in 1976 when Congressman John Moss and his subcommittee requested from the American Telephone and Telegraph Co. (AT&T) information on “national security” wiretaps by the administration. The company was willing to release the information, but the Justice Department intervened to prevent compliance with the subcommittee subpoena, arguing that compliance might lead to public disclosure of vital information injurious to national security. President Ford wrote directly to Congressman Moss: “I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security.”¹⁰⁰

A district judge decided that if a final determination had to be made about the need for secrecy and the risk of disclosure, “it should be made by the constituent branch of government to which the primary role in these areas is entrusted. In the areas of national security and foreign policy, that role is given to the Executive.”¹⁰¹ This judicial deference to presidential power was soon overturned by the D.C. Circuit. Writing for the appellate court, Judge Harold Leventhal rejected the claim of the Justice Department that the President “retains ultimate authority to decide what risks to national security are acceptable.”¹⁰² The cases cited by the administration “do not establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers.”¹⁰³

Leventhal urged executive and legislative officials to settle their differences out of court, pointing out that a “compromise worked out between the branches is most likely to meet their essential needs and the country’s consti-

100. Timothy S. Robinson, “Judge Halts Hill Probe of Wiretaps,” *Washington Post*, July 23, 1976, at A12.

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

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

103. *Id.*

tutional balance.”¹⁰⁴ Continued disagreement between the Justice Department and the subcommittee forced the appellate court to intervene again to give additional guidance. Leventhal dismissed the idea that the dispute was a “political question” beyond the court’s jurisdiction. When a dispute consists of a clash of authority between the two branches, “judicial abstention does not lead to orderly resolution of the dispute,” for neither branch had “final authority in the area of concern.” In a dispute of this nature, judicial intervention helps promote the “smooth functioning of government.”¹⁰⁵

Advising the parties to resolve their differences by seeking middle-ground positions, Leventhal noted that the framers, in adopting a Constitution with general and overlapping provisions, anticipated that “a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”¹⁰⁶ Each branch “should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.”¹⁰⁷ The case was finally dismissed on December 21, 1978, after the Justice Department and the subcommittee settled their differences.¹⁰⁸

Proceedings against Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Henry Kissinger, Secretary of State, commanding him to provide documents relating to covert actions.¹⁰⁹ After he failed to comply with the subpoena, the committee voted 10 to 2 to cite Kissinger for contempt of Congress.¹¹⁰ Acting on the advice of the Justice Department, President Ford invoked executive privilege to keep the material from the committee, arguing that the documents included “recommendations from previous Secretaries of State to then Presidents,” jeopardizing the internal decisionmaking process.¹¹¹ A few days later, in a letter to the committee, Ford cautioned that the dispute

104. *Id.* at 394.

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

106. *Id.* at 127.

107. *Id.*

108. House Select Committee on Congressional Operations, “Court Proceedings and Actions of Vital Interest to the Congress, Current to December 31, 1978,” 95th Cong., 2d Sess. 50 (1978).

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

110. *Id.* at 2.

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

“involves grave matters affecting our conduct of foreign policy and raises questions which go to the ability of our Republic to govern itself effectively.”¹¹² Under the pressure of the contempt citation, committee members listened to an NSC aide read verbatim from the documents concerning the covert actions. Thereafter the committee chairman announced that the White House was in “substantial compliance” with the subpoena and the planned contempt action was “moot.”¹¹³ This confrontation is discussed in detail in Chapter 6.

The James Watt Episode

The third dispute concerned a decision by Interior Secretary James Watt to withhold 31 documents from a House subcommittee in 1981. The confrontation quickly escalated to a committee subpoena for the documents and a recommendation by the Committee on Energy and Commerce that Watt be cited for contempt. Attorney General Smith advised President Reagan to invoke executive privilege on the ground that all of the documents at issue “are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations.”¹¹⁴ *Foreign policy? Were the Attorney General and his legal assistants in the Justice Department unaware that Congress had a clearly legitimate and constitutionally-based reason for the information? The dispute with Watt concerned the impact of Canadian investment and energy policies on American commerce, an issue clearly within the enumerated constitutional power of Congress to “regulate Commerce with foreign Nations” and its authority to oversee the particular statute that established the nation’s policy on foreign investments. The eventual outcome of this dispute demonstrated that the documents were not, as Smith argued, privileged. They could have been, and eventually were, shared with the subcommittee. The details of this dispute are included in Chapter 6.*

Charges about Congressional “Leaks”

Members of the executive branch often argue that sensitive, national security information should not be shared with Congress because lawmakers are

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

113. Pat Towell, “Contempt Action Against Kissinger Dropped,” *CQ Weekly Report*, December 13, 1975, at 2711.

114. 43 *Op. Att’y Gen.* 327, 328 (1981).

likely to leak the documents or intelligence to the public. During the Iran-Contra hearings in 1987, Col. Oliver North admitted that he participated in the preparation of statements to Congress that were “erroneous, misleading, evasive, and wrong,” but defended his conduct because “we have had incredible leaks from discussions with closed committees of Congress.” Such leaks, he said, placed “American lives at stake.”¹¹⁵

During the hearings, Senator Daniel Inouye (D-Hawaii) reacted sharply to North’s claim that two U.S. Senators, after being briefed by President Reagan two hours before an air attack against Libya, had leaked the information to the press. The premature disclosure, said North, resulted in intense anti-aircraft fire that caused the death of two American pilots.¹¹⁶ Yet officials from the Reagan administration had been the ones to tip off the media about the imminent attack. A week before the bombing, “CBS Evening News” reported: “Top U.S. officials acknowledge that detailed military contingency plans for retaliation already exists. Said one source, ‘They involve five targets in Libya.’”¹¹⁷ Other media outlets, including the *Wall Street Journal*, the *New York Times*, the *Washington Post*, the Associated Press, and ABC News had been given a heads-up by administration officials.¹¹⁸ So public was the planned military action “that scores of American reporters had arrived in advance in the Libyan capital of Tripoli to witness the attack.”¹¹⁹

North himself had been party to leaks of national security information. In his testimony before the Iran-Contra committee, he spoke about the leak of details in the capture of terrorists charged with having hijacked the cruise ship *Achille Lauro*. He claimed that “a number” of members of Congress had divulged details of the U.S. interception of an Egyptian airliner carrying the suspected terrorists. The disclosure, he said, “very seriously compromised our intelligence activities.”¹²⁰ Information on the planned interception had indeed been leaked to *Newsweek*. The media is generally loath to identify sources, but the circumstances in this case convinced the magazine to provide the name:

115. “Iran-Contra Investigation” (100-7, Part 1), joint hearings before the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Committee to Investigate Covert Arms Transactions with Iran, 100th Cong., 1st Sess. 180 (1987).

116. *Id.* (100-7, Part II), at 132–33.

117. *Id.* at 198.

118. *Id.* at 198–99.

119. David B. Ottaway, “Inouye Refutes North’s Charge on Leaks,” *Washington Post*, July 15, 1987, at A6.

120. “Iran-Contra Investigation” (100-7, Part II), at 132.

“the colonel did not mention that details of the interception, first published in a Newsweek cover story, were leaked by none other than North himself.”¹²¹

There should be little doubt that congressional leaks, compared to executive leaks, are infrequent and small in number, and that a congressional leak of sensitive data will result in the removal of the legislator from the committee. The executive branch leaks more because there are more people with access to more classified documents. Presidents have long expressed frustration about the deluge of leaks from their administrations. Based on this history, John F. Kennedy spoke frankly and accurately that “the Ship of State is the only ship that leaks at the top.”¹²² When President Nixon was furious about leaks, leading to the creation of a “plumbers” unit and the Watergate affair, the leaks he worried about came not from Congress but from his own administration.

A recent example of the executive custom of leaking sensitive material comes from the George W. Bush administration. After 9/11, President Bush expressed anger about leaks to the news media. In response, he issued a memo stating that only eight members of Congress could receive classified or sensitive law enforcement information.¹²³ A member of his own party, Senator Chuck Hagel of Nebraska, remarked: “To put out a public document telling the world he doesn’t trust the Congress and we leak everything, I’m not sure that helps develop unanimity and comradeship.”¹²⁴ The presidential memo was so ill-advised and impractical, with regard to the access to classified information needed by lawmakers and congressional committees, that Bush retreated within a few days.¹²⁵

Compare this contretemps to the publication in 2002 of *Bush at War* by Bob Woodward. Officially, the administration spoke harshly against leaks to the news media. And yet Woodward was permitted to interview the top executive officials, including Bush, who formulated the war against Afghanistan.

121. “Two Leaks, But by Whom?,” *Newsweek*, July 27, 1987, at 16; “Newsweek Says North Was Source of Leak,” *Washington Post*, July 20, 1987, at A4.

122. Elie Abel, *Leaking: Who Does It? Who Benefits? At What Cost?* 17 (1987). For the record of Congress and the executive branch in protecting classified information, see the July 29, 1988 study by Frederick M. Kaiser, Congressional Research Service, reprinted at “Congress and the Administration’s Secrecy Pledges,” hearing before a subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. 50–66 (1988).

123. Presidential Memorandum, “Disclosures to the Congress,” October 5, 2001.

124. Dana Milbank and Peter Slevin, “Bush Edict on Briefings Irks Hill,” *Washington Post*, October 10, 2001, at A1.

125. Todd S. Purdum, “Bush Lifts Some Restrictions On Classified Information,” *New York Times*, October 11, 2001, at B11; Chuck McCutcheon, “Congress Maintains its Right To Remain in the Loop,” *CQ Weekly Report*, October 13, 2001, at 2395–96.

More seriously, the administration allowed him access to top secret, secret, and classified documents. He had neither of the two qualifications required for such access: clearance, and a “need to know.” No one in the administration reviewed or censored the manuscript prior to publication. Woodward decided for himself what information to release to the public.¹²⁶

Congressional Access to Executive Branch Employees

In 1997, the Intelligence Committees considered legislative language to expand executive employee access to Congress. A Senate report explained that current executive branch policies on classified information “could interfere with [the Senate Intelligence Committee’s] ability to learn of wrongdoing within the elements over which it has oversight responsibility.”¹²⁷ In creating the Intelligence Committees in the 1970s, Congress relied heavily on those panels to guard the interests of Congress as an institution. To a great degree, Congress delegated to the committees the responsibility for monitoring and controlling the intelligence community.

The 1996 OLC memo analyzed the constitutionality of two congressional enactments concerning the rights of federal employees to provide information to Congress: 5 U.S.C. §7211 (Lloyd-LaFollette Act) and Section 625 of the Treasury, Postal Service Appropriations Act for fiscal 1997 (P.L. No. 104-208).¹²⁸ Both statutory provisions gave executive employees a right to furnish information to either House of Congress or to a committee or member thereof.

The Lloyd-LaFollette Act

The OLC memo swept broadly to challenge the constitutionality of the Lloyd-LaFollette Act, originally enacted in 1912. The statute responded to presidential efforts to block the flow of information from executive employees to Congress. For example, President Theodore Roosevelt in 1902 issued a “gag order” prohibiting employees of the executive department from seeking to influence legislation “individually or through associations” except through

126. Bob Woodward, *Bush at War* xii–xiii, 75ff, 101, 117, 119, 184, 197, 228, 246, 268, 269, 282–83, 319 (2002).

127. S. Rept. No. 105–24, 105th Cong., 1st Sess. 26 (1997).

128. OLC Memo, at 2.

the heads of the departments. Failure to abide by this presidential order could result in dismissal from government service.¹²⁹ In 1909, President William Howard Taft issued another gag order, forbidding any bureau chief or any subordinate in government to apply to either House of Congress, to any committee of Congress, or to any member of Congress, for legislation, appropriations, or congressional action of any kind, “except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.”¹³⁰

Through language added to an appropriations bill in 1912, Congress nullified the gag orders issued by Roosevelt and Taft. The debate on this provision underscores the concern of Congress that the gag orders would put congressional committees in the position of hearing “only one side of a case”: the views of Cabinet officials rather than the rank-and-file members of a department. Members refused to place the welfare of citizens “in the hands and at the mercy of the whims of any single individual, whether he is a Cabinet officer or anyone else.”¹³¹ Lawmakers wanted agency employees to express complaints about the conduct of their supervisors.¹³² The stated purpose of the legislation was to ensure that government employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.¹³³

During House debate, members viewed the gag orders as an effort to prevent Congress “from learning the actual conditions that surrounded the employees of the service.”¹³⁴ If agency employees could speak only through the heads of the departments, “there is no possible way of obtaining information excepting through the Cabinet officers, and if these officers desire to withhold information and suppress the truth or to conceal their official acts it is within their power to do so.”¹³⁵ One legislator remarked: “The vast army of Government employees have signed no agreement upon entering the service of the Government to give up the boasted liberty of the American citizens.”¹³⁶ Even more explicit was this statement during debate in the Senate:

129. 48 Cong. Rec. 4513 (1912).

130. *Id.*

131. *Id.* at 4657 (statement of Rep. Reilly).

132. *Id.*

133. *Id.* at 5201 (statement of Rep. Prouty).

134. *Id.* at 5235 (statement of Rep. Buchanan).

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

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

Mr. President, it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States.¹³⁷

The language used to nullify the gag orders was added as Section 6 to the Postal Service Appropriations Act of 1912.¹³⁸ Section 6, known as the Lloyd-LaFollette Act, provides a number of procedural safeguards to protect agency officials from arbitrary dismissals. The final sentence of Section 6 reads: “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.” Section 6 was later carried forward and supplemented by the Civil Service Reform Act of 1978 and codified as permanent law.¹³⁹ The conference report on this statute elaborates on the need for executive employees to disclose information to Congress:

The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.¹⁴⁰

As codified in 1978, any interference with the right of executive branch employees in communicating with Congress becomes an enforceable right along with other prohibited personnel practices. The U.S. Code now provides that various qualifications to the provision on prohibited personnel practices “shall

137. *Id.* at 10674 (statement of Senator Reed).

138. 37 Stat. 555, §6 (1912).

139. 5 U.S.C. §7211 (2000).

140. S. Rept. No. 95-1272, 95th Cong., 2d Sess. 132 (1978).

not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”¹⁴¹

Whistleblower Protection Act of 1989

Congress supplemented these federal employee protections by enacting legislation in 1989, finding that federal employees who make disclosures described in 5 U.S.C. §2302(b)(8) “serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures,” and that “protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.”¹⁴² Employees may disclose information which they reasonably believe evidences a violation of any law, rule, or regulation, or constitutes gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Such disclosures are permitted unless “specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”¹⁴³ In signing the bill, President Bush said that “a true whistleblower is a public servant of the highest order... [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment.”¹⁴⁴

Congressional Action in 1998

In order to examine the objections raised by OLC, the Senate Select Committee on Intelligence held two days of hearings in 1998. Professor Peter Raven-Hansen and I appeared the first day to rebut OLC’s position that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information.¹⁴⁵ On the second day of hearings I testified alongside an attorney from OLC.¹⁴⁶ Based on those hearings and its own independent staff analysis, the committee reported leg-

141. 5 U.S.C. §2302(b) [sentence following ¶ 12] (2000).

142. 103 Stat. 16, §2(a) (1989).

143. *Id.* at 21, §1213(a)(1).

144. Public Papers of the Presidents, 1989, I, at 391.

145. “Disclosure of Classified Information to Congress,” hearings before the Senate Select Committee on Intelligence, 105th Cong., 2d Sess. 5–37 (1998).

146. *Id.* at 39–61 (Randolph D. Moss, Office of Legal Counsel).

islation despite claims by the Justice Department that the bill was an unconstitutional invasion of presidential prerogatives. The committee acted unanimously, voting 19 to zero to report the measure.¹⁴⁷ The bipartisan support for legislative prerogatives was solid. The Senate report said that the administration's "intransigence on this issue compelled the Committee to act."¹⁴⁸ The bill passed the Senate by a vote of 93 to one.¹⁴⁹

The House Permanent Select Committee on Intelligence, taking a different approach in drafting the legislation, also rejected the administration's claim that the President exercised exclusive control over national security information. I testified before the House committee as well.¹⁵⁰ Like the Senate, the House committee dismissed the assertion that the President, as Commander in Chief, "has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity."¹⁵¹ The two committees reported and enacted legislation with this language: "national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President." The statute further provides that Congress, "as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community."¹⁵²

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 under Article I of the Constitution, and the political system necessarily moves away from the republican model fashioned by the framers toward

147. S. Rept. No. 105-165, 105th Cong., 2d Sess. 2 (1998).

148. *Id.* at 5.

149. 144 Cong. Rec. S1561-65 (daily ed. March 9, 1998).

150. "Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act," hearings before the House Permanent Select Committee on Intelligence, 106th Cong., 1st Sess. 32-53 (1998).

151. H. Rept. No. 105-747, Part 1, 105th Cong., 2d Sess. 15 (1998).

152. 112 Stat. 2413, § 701(b) (1998). See H. Rept. No. 105-780, 105th Cong., 2d Sess. 19 (1998), and Thomas Newcomb, "In From the Cold: The Intelligence Community Whistleblower Protection Act," 53 *Adm. L. Rev.* 1235 (2001).

an executive-centered regime they feared. Part of legislative access depends on agency employees—the rank-and-file—who are willing to share information about operations within their agencies. The legislative branch has a legitimate interest in obtaining information about agency corruption and mismanagement that an administration may want to conceal.

Members of Congress are aware that the executive branch often uses the label “national security” to avoid embarrassing revelations. Although Solicitor General Erwin N. 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,”¹⁵³ and advised the Court during oral argument that the broaching of one of the documents “would be of extraordinary seriousness to the security of the United States,”¹⁵⁴ 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.¹⁵⁵ 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.”¹⁵⁶

153. 71 Landmark Briefs 127 (1975) (New York Times Co. v. United States).

154. *Id.* at 221.

155. Erwin N. Griswold, “Secrets Not Worth Keeping,” *Washington Post*, February 15, 1989, at A25.

156. *Id.*