

# THE POLITICS OF EXECUTIVE PRIVILEGE

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## CONCLUSIONS

Congress needs information to perform its constitutional duties. The Supreme Court remarked in 1927: “A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to those who do possess it.”<sup>1</sup> To enforce these constitutional duties, Congress possesses the inherent power to issue subpoenas and to punish for contempt.

Many of the documents and expert testimony needed by lawmakers are located within executive agencies that are created, authorized, and funded by Congress. In both a legal, constitutional, and practical sense, agencies are “creatures” of Congress and must serve both the executive and legislative branches.<sup>2</sup> As greater portions of executive power flow to the President’s office, Congress has a heightened need to obtain White House documents and compel White House aides to testify. Part of legislative access depends on executive employees—the rank-and-file—who alert Congress to problems within their agencies. On the basis of two centuries of experience, Congress knows how important it is hear from employees about agency operations that an administration would just as well keep secret.

Whether lawmakers actually receive the requested information depends on their willingness, skills, and ability to devote the energy and time it takes to overcome bureaucratic 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. This does not mean that lawmakers set aside their party obligations, particularly when the President is from their party. Those obli-

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1. *McGrain v. Daugherty*, 272 U.S. 135, 175 (1927).

2. Louis Fisher, *The Politics of Shared Power* 106–45 (4th ed. 1998).

gations, however, often require a member of Congress to draw a line on what the administration may and may not do, for otherwise the President and the party will both suffer.

The White House and agencies have become more skilled in resisting legislative inquiries, whether they come from a Congress controlled by the President's party or the opposition party. In either case, Presidents will attempt to frustrate committee investigations that threaten to embarrass the administration or divert the White House from its chosen mission. Faced with an unwanted legislative investigation, Presidents typically promise to "cooperate fully" while at the same time perfecting efforts "to blunt, to parry, and to outlast the accusations against them."<sup>3</sup> Similarly, agencies dig in while flooding committees with marginal or extraneous material, announcing that they have handed over "420,000 documents" when not one is useful to the legislative inquiry.

Congress has the theoretical edge because of the abundant tools at its disposal. To convert theory to practical results requires from lawmakers an intense motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor their constitutional purpose. Antonin Scalia, while serving as head of the OLC, put the matter well during hearings in 1975. 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. . . . [W]hen it comes to an impasse the Congress has means at its disposal to have its will prevail."<sup>4</sup>

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 the courts would be constructive or helpful. The risk is great that the Supreme Court, in trying to settle one issue, will reach upwards and announce standards and doctrines that are too broad and awkwardly drawn. The unfortunate dicta by Chief Justice Burger in the Watergate Tapes Case, suggesting that the courts might cede ground to Presidents who claim a "need to protect military, diplomatic, or sensitive national security secrets," is one example of this trait. That issue was not before the Court, was never argued or briefed, and should not have been addressed.

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3. Tiefer, "The Specially Investigated President," at 146.

4. "Executive Privilege—Secrecy in Government," hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 87 (1975).

Some journalists and academics think that if the President announces that information falls within the magic categories of military, diplomatic, or national security, the other two branches (and the press) should back away respectfully. Courts sometimes retreat in the face of such presidential claims, but judicial deference comes at the cost of individual liberties and a weakened system of checks and balances. Neither Congress nor the press should follow the model of judicial acquiescence. Lawmakers, assigned specific constitutional duties over the military and national security, have no reason to defer to presidential claims or exclusive or overriding power.

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. Attempts to announce precise 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, both legal and political, and are not likely to be governed solely by past practices and understandings. Alexander Bickel recognized that large societies will explode if they cannot devise 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.”<sup>5</sup>

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5. Alexander M. Bickel, “Foreword: The Passive Virtues,” 75 Harv. L. Rev. 40, 49 (1961).

