

THE EXECUTIVE'S RIGHT OF PRIVACY: AN UNRESOLVED
CONSTITUTIONAL QUESTION

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A CONSTITUTIONAL question of the first importance, raised in more or less acute form in practically every administration from Washington's to Eisenhower's, is, singularly enough, still wide open. That question is the constitutional power of the executive to withhold information from the legislature. It seems to be no nearer settlement today than it was in 1792, when President Washington announced the right of the executive to exercise its discretion in communicating executive documents requested by a committee appointed by the House of Representatives "to inquire into the causes of the failure of the late expedition under Major General St. Clair."¹

A regular reader of the newspapers need reflect but briefly to realize the tremendous political importance of the problem. The files of the executive bulge with documents which Congressmen, from the best and worst motives, are eager to examine and which bureaucrats, also from the best and worst motives, are determined to keep to themselves. Many of these documents, if published, would certainly cause headlines and headaches all across the nation, and some might create a stir in foreign chancelleries—a prospect from which the average legislator, especially if he be up for re-election, shrinks about as much as Brer Rabbit shrank from the briar patch, but which may cause exquisite pain to the executive branch. An example: among the large number of dossiers maintained by the FBI and the various intelligence and security services in the Pentagon there are inevitably some whose subjects are persons of local or national prominence. Many such dossiers contain "derogatory" information² which, if portentously attributed by an unfriendly politician to "the

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1. See BINKLEY, *PRESIDENT AND CONGRESS* 40-41 (1947). On this occasion, the President found no papers which might not properly be inspected by Congress. But four years later the problem recurred when a committee of the House demanded copies of the instructions and other documents employed in connection with the negotiation of a treaty with Great Britain. This time Washington found that "a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request." 1 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 188 (1897).

2. The inclusion in a file of such information does not, of course, mean that it is true, or even that the agency thinks it is true. The investigators simply collect all available

files of the FBI," might produce a political explosion. Another example: the files of the State and Defense Departments are naturally full of records of conversations between the governments of the United States and other countries, the disclosure of which might benefit the political fortunes of the Congressmen who disclosed them in approximate proportion to its adverse effect on relations between the two countries. Hence, it is not surprising that legislative demands for information and executive refusals have been so common;³ what is at first blush surprising is that the conflict has never come to a real head.

As a matter of constitutional theory the problem might as well arise between the executive and the judiciary, or the legislative and the judiciary.⁴ The latter problem seems never to have arisen, probably because neither branch has any information, not available to the public, which is of much interest to the other. The former has often been raised—in situations in which the government is, or is said to be, in exclusive possession of relevant evidence—and has given rise to a considerable body of case law. Most such cases have been decided on grounds that throw at best a flickering and feeble light on the main question. Nevertheless, because these cases have been cited as authority,⁵ and because it is at least true that there are no better judicial precedents, they merit discussion.

One class of such cases deals with the situation in which a subordinate federal official, directed by a court to disclose official information or produce official records, pleads a departmental regulation forbidding compliance with

material on the subject. Very few politicians (or even ordinary successful people) go through life without a single discreditable incident and still fewer without making an enemy.

3. The executive's right to withhold information has been asserted by such Presidents, in other respects so diverse, as Washington, Jefferson, Jackson, Tyler, Buchanan, Grant, Cleveland, Roosevelt I, Coolidge, Hoover, Roosevelt II, Truman and Eisenhower. These precedents are recapitulated in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 *FED. B.J.* 103, 223, 319 (1949).

4. Similarly, an interesting subject for speculation is the possible reaction of a congressional committee to an executive demand for information in the committee's files. In practice, the traffic has been all the other way, although once or twice the executive has politely indicated that it would appreciate information as to the facts on which congressional allegations—*e.g.*, some of Senator McCarthy's figures on Communists in government—were based.

5. See, *e.g.*, 40 *OPS. ATT'Y GEN.* 45, 49 (1941). In a memorandum to the President, released by the White House on May 17, 1954, Attorney General Brownell made the remarkable and inexact assertion that "Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold [from Congress] the information and papers in the public interest. . . ." *N.Y. Times*, May 18, 1954, p. 24, col. 2. He cited no cases. The statement, like most of the memorandum, was lifted almost word for word from a law review article which had appeared some years previously, but the author of that article cited no cases either. See Wolkinson, *supra* note 3. Since there appears to be no case in which a court has passed on an executive refusal of a congressional demand for information, the writer must have had in mind cases in which the courts themselves have sought to obtain information from the executive—in which case the statement is still incorrect.

such a subpoena without the previous consent of the head of the department.⁶ An act of Congress has long authorized the head of each executive department⁷ to "prescribe regulations, not inconsistent with law, for the government of his Department . . . and the custody, use and preservation of the records, papers and property appertaining to it."⁸ It is certainly true that the courts have consistently treated this statute as validly authorizing the department head to centralize in himself discretion to grant or withhold information requested by a court; but it is equally true that they have sedulously refrained from passing on "the ultimate reach of the authority of the [department head] to refuse to produce at a court's order the government papers in his possession. . . ."⁹ Moreover, these decisions plainly furnish no guidance as to the inherent right of the executive to withhold information from Congress, for they are based on an act of Congress; what Congress hath given, Congress can take away. For example: R.S. 161 could scarcely be invoked to justify a refusal to furnish information to the House and Senate Committees on Government Operations, for since 1928 an act of Congress has provided that any department of the executive shall give them "any information requested of it relating to any matter within the jurisdiction of said Committee."¹⁰ In practice,

6. A number of such cases arose because, before the Eighteenth Amendment, federal law taxed makers and sellers of spirits whose activities might be quite illegal under state law. On several occasions state courts, in the course of efforts to prosecute moonshiners and proprietors of blind tigers, attempted to compel the testimony of the federal gaugers, or the production of Treasury records as to the operations of these criminal taxpayers. The Treasury, which was naturally reluctant to penalize full disclosure to itself, forbade its excisemen to reveal information garnered in the course of their official duties. The validity of its regulation was generally, but not always, upheld until the problem was laid to rest by the decision of the Supreme Court in *Boske v. Comingore*, 177 U.S. 459 (1900). *E.g.*, *Stegall v. Thurman*, 175 Fed. 813 (N.D. Ga. 1910); *In re Lamberton*, 124 Fed. 446 (W.D. Ark. 1903). *Contra*, *In re Hirsch*, 74 Fed. 928 (D. Conn. 1896).

7. The courts seem to make little distinction between the traditional departments and the various agencies created by executive order or statute. *Cf.* *Appeal of SEC*, 226 F.2 501 (6th Cir. 1955); *Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993, 999 (D.C. Cir. 1951).

8. REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952).

9. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467 (1951), and, in particular the concurring opinion of Mr. Justice Frankfurter at 470, 472. See also *Ex parte Sackett*, 74 F.2d 922, 924 (9th Cir. 1935) and cases cited note 6 *supra*. Yet a dictum of Learned Hand, exemplifying the sporadic fallibility of that illustrious judge, cites *Boske v. Comingore* and the other cases referred to in note 6 *supra* for the proposition that it is "lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons. . . ." See *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944).

10. 45 STAT. 996 (1928), 5 U.S.C. § 105a (1952). The statute actually names the Committees on Expenditures in the Executive Department, the predecessors of the present Committees on Government Operations. Despite its apparently unambiguous language, its legislative history can be used to ground a plausible argument that the "information" referred to was intended to include only noncontroversial types which the executive had previously furnished to Congress voluntarily. See *Wolkinson*, *supra* note 3, at 322-23.

of course, when the executive is dealing with Congress rather than the courts, it does not cite R.S. 161 or any other act of Congress. In such circumstances, the Attorney General invariably asserts a constitutional right, under the principle of separation of powers, to grant or withhold in the executive's unfettered discretion.¹¹

Another class of cases deals with the "privilege" of the executive to withhold from the courts certain not very clearly defined categories of information. Although there have been too few of these cases to permit the accumulation of a body of case law clearly drawing the line between privileged and unprivileged matter,¹² secrets which can readily be classified as "military" or "state" do not present much difficulty. Thus, in one of the oldest of such decisions,¹³ the administrator of the estate of a deceased spy brought suit to recover salary due for services in that capacity under a secret contract between the deceased and President Lincoln. The Supreme Court affirmed the dismissal of the petition:

"Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife. . . . Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."¹⁴

The latest opinion of the Supreme Court upholding the privilege, *United States v. Reynolds*,¹⁵ involved matters equally easy to recognize as military secrets—official reports dealing with the causes of the crash of an Air Force plane loaded with experimental electronic equipment. But in the few instances that have arisen the courts have been at least reluctant to place within the privilege information which the government desired to keep to itself for reasons other than military or diplomatic. Thus, courts have shown reluctance to treat as privileged the statements of witnesses taken by the FBI in the course of a

11. See, *e.g.*, in addition to the Memorandum of Attorney General Brownell, *supra* note 5, the opinion of Attorney General Jackson at 40 OPS. ATT'Y GEN. 45 (1941), declining to furnish certain FBI reports to the House Committee on Naval Affairs.

12. A number of these cases are collected and discussed in Note, 41 CORNELL L.Q. 737 (1956).

13. *Totten v. United States*, 92 U.S. 105 (1875).

14. *Id.* at 107. But the facts of the *Totten* case do not seem to afford a very good illustration of the principle, for it is hard to see how the disclosure of the existence of the contract could have harmed the national interest, long after the completion of the contract and the extinction of the Confederacy. Of course, if the contract had concerned a power with which the United States had been trying to maintain friendly, or at least diplomatic, relations, the reasoning of the Court would have been more cogent.

15. 345 U.S. 1 (1953).

routine, nonconfidential investigation,¹⁶ or the record of the proceedings of a Naval Board of Inquiry in a similarly commonplace matter.¹⁷

The majority in the *Reynolds* case, while explicitly disclaiming any intent to pass one way or the other on the inherent constitutional power of the executive to withhold information in its sole discretion, nevertheless stated, just as explicitly, that it is the court, not the executive, which must determine whether the circumstances are appropriate for the claim of privilege: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."¹⁸ The knotty problem of how the judge is to make this determination without forcing at least a disclosure to himself was dismissed with no more illuminating answer than a reference to the similar difficulties raised by claims of privilege under the Fifth Amendment.

The apparent contradiction between the Court's statement that the judge must determine the nature of the secret and perhaps overrule a claim of privilege, and its disclaimer of intent to pass on the proposition that the head of an executive department has absolute power to withhold from judicial view documents in his custody, can perhaps be resolved. Presumably the Court thought that, even if the documents were found not to be privileged, there would be no question of actually compelling production of the documents. Instead, the issue to which the doubtful materials referred would be resolved against the government. In the *Reynolds* case, however, the ground of decision was that since the Tort Claims Act incorporates the Federal Rules of Civil Procedure, and since those rules penalize only refusal to produce unprivileged documents, the imposition of even such a penalty for failure to produce privileged documents would subject the sovereign to liability on terms to which it had not consented. Deciding the issue to which the suppressed information related against the government would not, of course, have been exactly the same thing as jailing the Secretary of the Air Force for contempt, and perhaps the Court refused to equate prejudice to the government in its conduct of litigation with physical

16. *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948), *vacated on other grounds sub nom. Allmont v. United States*, 174 F.2d 931 (3d Cir. 1949). The government made the somewhat malapropos argument that, since the FBI agents happened to be members of the bar, their reports were covered by the attorney-client privilege. The case presented no question of keeping secret the identity of informers. The privilege of withholding such information has been recognized in cases too numerous to cite. *E.g.*, *Scher v. United States*, 305 U.S. 251 (1938); *United States v. Sun Oil Co.*, 10 F.R.D. 448 (E.D. Pa. 1950).

17. See *Bank Line v. United States*, 76 F. Supp. 801, 804 (S.D.N.Y. 1948); *cf. Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265, 269 (E.D.N.Y. 1943).

The British courts, while according privilege to military and diplomatic secrets, have observed by way of dictum that it could not be claimed merely because disclosure "might involve the Government . . . in parliamentary discussion or in public criticism . . ." *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, 642.

18. 345 U.S. at 9-10. The British Court of Appeals took a similar view in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, 642.

compulsion to produce the document.¹⁹ But a distinction—if the Court intended one—between the threat of contempt proceedings and other forms of pressure is of somewhat dubious validity. It is certain that there have been, and possible that there may be, cabinet officers whose incarceration would be much less inimical to the public welfare than mulcting the public fisc of thumping damages for negligence; it is hard to say that the former is compulsion while the latter is not.

The Court did indeed, in the course of its dissertation upon the scope of the privilege and the consequences of its invocation, distinguish criminal prosecution holdings that the government must play a sort of Truth or Consequences—*i.e.*, it must choose between acquittal of the accused and the production of any relevant material in its possession, even though the government might be clearly entitled to withhold that material from judicial inspection.²⁰ But it did so simply on the ground that “such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.”²¹ In other words, the bedrock on which the decision rests is the concept of sovereign immunity. It contains no implication that there is any other distinction between the application of pressure by threatening the loss of a civil suit and the application of pressure by threatening the loss of a criminal action. Assuming that the government is as interested in enforcing the criminal law as it is in preventing unjustified charges on the Treasury, one seems about as effective a method of compelling the production of information as the other, and both seem to differ in degree rather than kind from coercion by the threat of contempt proceedings—although the latter would no doubt have a more abrasive effect on relations between the executive and the judiciary.²²

19. See *O'Neill v. United States*, 79 F. Supp. 827, 830 (E.D. Pa. 1948), *vacated on other grounds sub nom. Alltmont v. United States*, 174 F.2d 931 (3d Cir. 1949). There seems to be no case which presents the question of whether a court would attempt to compel actual production of information in the possession of the executive. In all those discussed in this Article, the government was a party, so that—assuming that it had in fact no privilege to withhold the information—the ends of justice could adequately be served by assuming against it the issue on which the requested evidence was alleged to bear.

20. *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *cf. Edwards v. United States*, 312 U.S. 473, 480 (1941). The *Andolschek* case, a prosecution against employees of the Bureau of Internal Revenue for seeking bribes, did not in fact involve a claim of privilege based on the nature of the particular documents requested (which were official reports by the defendants themselves on the allegedly criminous transactions) but simply another instance in which regulations issued by the Secretary of the Treasury under Rev. STAT. § 161 (1875), 5 U.S.C. § 22 (1952) forbade disclosure without his authority.

21. 345 U.S. at 12.

22. The concurring opinion of Mr. Justice Frankfurter in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) “assumes,” no doubt correctly, that the Attorney General could be reached by judicial process if that were necessary to compel him to disclose information which he is not privileged to withhold. *Id.* at 472-73. *Cf. Land v. Dollar*, 190 F.2d 623 (D.C. Cir. 1951), *motion for stay denied*, 341 U.S. 912 (1951).

Peering darkly through the glass of these judicial precedents, not always very clear nor wholly consistent with one another, one can deduce the following propositions:

(1) Where the government is the defendant in a civil suit, it may be compelled to choose between losing the suit and producing an unprivileged document.

(2) Where the government prosecutes a criminal action, it may be compelled to choose between losing the action and producing any relevant document, even one which is privileged. This may be true where the government is the plaintiff in a civil action.²³

(3) The courts have had no occasion and no inclination to attempt other methods of compelling the government to produce evidence.

Obviously, none of this is of direct help in determining whether the executive branch has an inherent constitutional right to withhold information from the courts, let alone the Congress. Nor is this paucity of authoritative judicial precedent alleviated by the comparative plethora of *ipse dixit*s on both sides of the question. Attorneys General have, not surprisingly, invariably supported the constitutional right of the executive to withhold information from the Congress.²⁴ Congress, as noted above, has by statute declared its right to require information.²⁵ And a recent study by a committee of Congress came to the equally predictable conclusion that Congress has constitutional authority to require the heads of executive agencies to release information upon terms and conditions prescribed by Congress.²⁶ The same committee, indeed, assembled a panel of learned professors and eminent counsel, all of whom espoused similar views—although they did so on grounds of polity and expediency, for, unlike the Attorneys General, they frankly recognized the absence of authoritative judicial precedent.²⁷

23. See *Bank Line v. United States*, 76 F. Supp. 801, 803 (S.D.N.Y. 1948).

24. *E.g.*, the Memorandum of Attorney General Brownell, *supra* note 5; 40 OPS. ATT'Y GEN. 45 (1941); 25 OPS. ATT'Y GEN. 326 (1905).

25. 45 STAT. 996 (1928), 5 U.S.C. § 105a (1952). See note 10 *supra*. On the other hand, section 3(c) of the Administrative Procedure Act, providing that matters of official record shall be made available to proper persons "except information held confidential for good cause found," seems to recognize a right to withhold information. 60 STAT. 238 (1946), 5 U.S.C. § 1002(c) (1952). The trouble is, of course, that the act omits to say who is to find the good cause.

26. See Study by the Staff of the House Committee on Government Operations, *The Right of Congress to Obtain Information from the Executive and from Other Agencies of the Federal Government*, 26 (Committee Print, May 3, 1956); Memorandum on *Proceedings Involving Contempt of Congress and its Committees*, 80th Cong., 2d Sess. 15 (printed for the use of the Committee on the Judiciary, January 6, 1948); Note, 43 GEO. L.J. 634, 647-48 (1955).

27. See *Hearings Before the Subcommittee on Availability of Information from Federal Departments and Agencies of the House Committee on Government Operations*, 84th Cong., 2d Sess., pt. 3 (1956).

The chances are not particularly good that the courts will soon be called upon to decide squarely whether the executive can properly resist a congressional demand for information. The question is essentially whether such resistance amounts to a punishable contempt of Congress; and there seem to be in the last analysis but two ways by which that question can be brought squarely before the courts. In the first place, such a contempt might be dealt with by prosecution under the statute which denounces as a misdemeanor refusal to appear or produce papers when required by either house of Congress,²⁸ and the corollary provision which makes it the duty of the appropriate United States attorney to present to a grand jury instances of such refusal certified to him by the House or Senate.²⁹ Although the President and the heads of executive departments have repeatedly, and sometimes brusquely, rejected such congressional demands, Congress seems never to have reported such a case to the United States Attorney, nor has the Attorney General ever on his own motion caused one of them to be prosecuted under this statute. It seems, somehow, improbable that he ever will—even if the administration should change immediately after the refusal. Executive *esprit de corps* appears to be stronger than loyalty to party shibboleths: the present administration, for example, has shown itself at least as intransigent as its predecessors in this respect, to both Republican and Democratic Congresses.³⁰ Even if Congress should certify such a case to a United States Attorney, it seems intrinsically likely that the Attorney General would take the position that Congress could not constitutionally command its prosecution.

Secondly, Congress undoubtedly has power to punish contempts without invoking the aid of the executive and the judiciary, by the simple and forthright process of causing the Sergeant at Arms to seize the offender and clap him into the common jail of the District of Columbia or the guardroom of the Capitol Police;³¹ and the prisoner can then, of course, try out the propriety of

28. REV. STAT. § 102 (1875), as amended, 2 U.S.C. § 192 (1952). Prosecutions under the statute have, of course, multiplied prodigiously since Congressmen discovered the delights of investigations. Although the act goes back to 1857, the Annotation reveals but two prosecutions under it in its first seventy years. 2 U.S.C.A. § 192 (Supp. 1955).

29. REV. STAT. § 104 (1875), as amended, 2 U.S.C. § 194 (1952).

30. Quite aside from the great McCarthy imbroglio which produced Mr. Brownell's celebrated memorandum (see note 5 *supra*), see, *e.g.*, N.Y. Times, June 30, 1955, p. 1, cols. 6-7; March 27, 1956, p. 20, col. 3. Within a year of its accession to power, the present administration was interposing between Senator McCarthy and the security files of individual employees the same Truman directives which had been the target of so many Republican oratorical salvos.

31. *Jurney v. McCracken*, 294 U.S. 125 (1935); *McGrain v. Daugherty*, 273 U.S. 135 (1927); see Memorandum on *Proceedings Involving Contempt of Congress and its Committees*, *supra* note 26. The District of Columbia jail is no pleasure resort, especially in summer, and the Capitol guardroom is probably not much more agreeable. Normally, of course, even in the case of private persons, Congress has preferred the more convenient and conventional method of referring alleged contempts to the Department of Justice for prosecution in the courts. See, *e.g.*, *United States v. Kleinman*, 107 F. Supp. 407, 408 (D.D.C. 1952).

the action by seeking a writ of habeas corpus. Such an episode—assuming that the information sought by Congress bore some reasonable relation to its constitutional functions³² or, in the case of a committee of Congress, to the scope of the committee's jurisdiction³³—would furnish the courts an admirable occasion to decide the precise question of the constitutional authority of the executive to withhold the desired data. But it is not likely to arise. Congress has never in the past been willing to push matters to the point of dispatching the Sergeant at Arms to cleave a path through the Secret Service cordon and seize the person of the President, or even one of his subordinates.³⁴ Not even Theodore Roosevelt, at his most pugnacious, could succeed in provoking the Senate into such extreme measures.³⁵ It is more than likely that Congress never will resort to them.

It is, however, conceivable that the Supreme Court may yet be called upon to face the closely related and logically indistinguishable question of the executive's power to reject a judicial subpoena. If, in litigation to which the government is not a party, a court becomes convinced that a document in the possession of the government is relevant, and if it somehow manages to satisfy itself that that information is unprivileged, and if the determination to withhold is made by a department head so that there is not presented the situation of a subordinate taking shelter behind a departmental directive,³⁶ the courts may yet have to decide the ultimate reach of the executive's discretion to grant or withhold information.³⁷ But there are plainly too many ifs to make the hypothetical a probability, especially when one considers the acrobatic agility which the courts have so far displayed in dodging the question.

The upshot of this judicial abstention is, of course, that the executive enjoys by pragmatic sanction, if not constitutional law, discretion to decide what in-

32. Cf. *Kilbourne v. Thompson*, 103 U.S. 168, 190 (1880). Modern commentators would give Congress more leeway in the exercise of the investigative power than is suggested by some of the language in the *Kilbourne* case. See, e.g., FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 332-34 (1939). But the Supreme Court's most recent word on the subject leaves no doubt that there are constitutional limits—however imprecise—on Congress' power to inform itself. See *United States v. Rumely*, 345 U.S. 41, 46 (1953).

33. Cf. *United States v. Lamont*, 236 F.2d 312 (2d Cir. 1956).

34. The Daugherty of *McGrain v. Daugherty*, 273 U.S. 135 (1927), was not the Attorney General of fragrant memory, but his brother, Mally S., whose involvement in Harry M.'s transgressions had been solely in a private capacity.

35. See BUTT, *THE LETTERS OF ARCHIE BUTT* 305-06 (1924).

36. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and text at note 9 *supra*.

37. It has been held in a suit between two airlines that a court may compel a Civil Aeronautics Board inspector to testify to facts observed by him in his official capacity, either by deposition or in person. The CAB disclaimed, however, any objection to such testimony; and the court agreed with the Board's contention that "it is error to compel an agent of the Board to produce any of the Board's reports, orders, or private files or to testify as to the contents of such private papers." *Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993, 1000 (D.C. Cir. 1951).

formation shall be released to Congress. Notwithstanding the battery of authorities assembled by the House Committee on Government Operations,³⁸ the continuation of this state of affairs does not seem inimical to good government. In fact, it is the view of the writer that, whereas the present situation is quite tolerable, unlimited congressional access to executive information (whether "secrets of state" or merely "official information"³⁹) would almost certainly be intolerable. A number of practical considerations support these propositions:

(1) There is little reason to believe that, in practice, the lack of an absolute power to compel the executive to produce information appreciably handicaps Congress in the exercise of its legislative function. It is obvious that in a large majority of cases it is greatly to the advantage of the executive to cooperate with Congress, and in a large majority of cases it does so. Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation.

(2) Congress may not be a safe repository for sensitive information: there can be no guarantee that information coming into the hands of Congress or the whole membership of one of its major committees will long remain secret.⁴⁰ Most Congressmen are, of course, quite as trustworthy as most executive officials, but there can be no "security program" for legislators. There is no assurance, if our democracy is to be maintained, that so large a body of men will not include a percentage, to be expected on statistical grounds, of subversives, alcoholics, psychopaths and other security risks, and no assurance that the seniority system will not place such a security risk in the chairmanship of an important committee. Even legislators of high respectability have been known, in the heat of partisan passion, to place the national interest a very poor second to considerations of faction.⁴¹ If these premises are granted, it follows that, as a practical matter, Congress ought not to be given an absolute right of access to military and diplomatic secrets. If such a right existed, it

38. See note 27 *supra*.

39. One of the experts assembled by the House Committee on Government Operations proposed that Congress be given unlimited access to information other than "state" (*i.e.*, military or diplomatic) secrets, and that an independent "Government Information Commission" be created to pass on executive claims that matter requested by Congress falls within the category of "state secrets." See *Hearings, supra* note 27, at 462-65.

40. See, *e.g.*, 94 CONG. REC. 5724 (1948). It has been held that the judiciary cannot restrain Congress from publishing any information in its possession, because to do so would go counter to the doctrine of separation of powers. *Hearst v. Black*, 87 F.2d 68, 71-72 (D.C. Cir. 1936); *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731-32 (D.D.C. 1956). These cases involved the confidential information of private citizens, but the rationale seems applicable to information obtained from the executive.

41. For example, in 1941 Senator Burton K. Wheeler, an extreme isolationist, revealed the Navy's occupation of Iceland while the operation was still in progress and the ships involved vulnerable to attack by submarines. See 2 MORISON & COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 669 (3d ed. 1942).

severely taxes one's faith in legislative moderation to foresee Congress practicing self-denial to the point of refusing to peek at information on the mere say-so of a bureaucrat, or even of an independent "Government Information Commission,"⁴² that such information is a military or diplomatic secret.

(3) There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter.⁴³ In the first place, the line is by no means easy to draw, even when the best of faith is used: there is not much information in the files of the State and Defense Departments—of a sort likely to attract congressional interest—which could not with some plausibility be given a security classification, if the executive wished to withhold it on that ground. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions.⁴⁴ Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him should be answerable only to him—*i.e.*, they should be able to present unpalatable facts and make unpopular arguments without fear of being dragooned by the first Congressman who needs a headline.⁴⁵ This principle is applicable to many government decisions; it finds what is probably its most compelling illustration in the operation of the employee security system. The power to discharge an alleged security risk resides in the head of a department; his is the decision and his the responsibility to Congress. If the department head is conscientious, as is often the case, he personally studies such

42. See note 39 *supra*.

43. See *Hearings*, *supra* note 27, at 462-63.

44. The Deputy Attorney General recently stated that the policy of the Department of Justice "does not permit disclosure of staff memoranda or recommendations." See 58 PUB. UTIL. FORT. 319, 320 (1956).

45. "Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions concerning such advice be disclosed, you will instruct employes of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. . . ."

Letter from the President to the Secretary of Defense, May 17, 1954. N.Y. Times, May 18, 1954, p. 24, col. 1. The weight of this consideration seems to have become apparent only in comparatively recent years. So astute a commentator as Wigmore, for example, completely overlooks it. See WIGMORE, EVIDENCE § 2378a (3d ed. 1940).

cases before deciding. But obviously he cannot start from scratch with an undigested mass of papers; he must have advice. In the Army, as elsewhere, such cases are reviewed by screening boards, which make recommendations to the Secretary. A *casus belli* in the Army-McCarthy Armageddon was the Army's repulse of the Senator's attempt to subpoena individual members of these boards and cross-examine them to find out who had voted to clear employees whom the Senator termed subversive.⁴⁶ It is obvious that if the Senator had managed to stage this Roman holiday the usefulness of the security review system would have virtually ended, for it would have taken a man of quite exceptional hardihood and integrity to exercise his judgment unaffected by the Senator's hot breath on the nape of his neck. It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guarantee that he will not long tolerate incompetent or disloyal advisors; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee, of Congress.

The other side of the case was eloquently stated by Professor Bernard Schwartz, testifying before the Subcommittee on Government Information of the House Committee on Government Operations. He said:

"[T]he overriding danger is not congressional abuse but the vesting of unfettered discretion in the executive to surround with secrecy all its activities.

"....
"Those who are concerned with the possibility of legislative abuse ignore the overriding peril of the present century, that of the superstate with its omnipotent administration, unrestrained by any checks on its all pervasive regulatory activities, so vividly pictured by George Orwell in his novel 1984. The great danger today is 1984, not Senator McCarthy. If the elected representatives of the people assert their right to lay bare all that goes on within the executive, that danger may be avoided. An executive whose abuses and inadequacies are exposed to the public eye can hardly become a menace to constitutional government."⁴⁷

The plain and short answer to this is that neither can there be a menace to constitutional government by an executive which has to go to Congress for every cent it spends, which has no power by itself to raise and maintain armed forces and which cannot jail its citizens except under a law passed by Congress and after proceedings presided over by an independent judiciary. These are the factors that make the essential difference between an American President and Big Brother—not whether Senator McCarthy is or is not allowed to prospect in the security files of charwomen, junior clerk-typists and building

46. The Army based its refusal on directives of President Truman which, not having been revoked by the new administration, were still in force, notably his directive of March 13, 1948. 13 FED. REG. 1359 (1948).

47. *Hearings, supra* note 27, at 465.

guards. Moreover, on the pragmatic basis of the experience of the last decade or so, the proposition that Congress is the paladin of civil liberties and the executive their foe seems at least debatable.

In practice, of course, as has already been suggested, the executive has not "unfettered discretion . . . to surround with secrecy all its activities."⁴⁸ All but a minute percentage of congressional requests for information are honored promptly and even with a show of cheerfulness, for the very good reason that the executive needs from Congress cooperation which it will not get without reciprocating.

A brief consideration of the generally satisfactory *modus vivendi* which has evolved may help to dispel the picture of the executive branch in the character of Domitian. There is, of course, no statute that sets standards for the release of information to Congress, and only sporadically, as in the case of security files, are there formal executive regulations. Usually, the head of a department has an aide—often his general counsel—who is responsible for what is bureaucratically known as "legislative liaison." The aide controls the flow of information to Congress, referring only the hottest questions to his boss. Of course the abilities and views of these virtuosi vary widely, and most of them play by ear, but, according to the writer's observation, the most experienced of them agree on certain fundamental policies. These policies may be briefly summarized, as follows:

(1) *No fishing expeditions are allowed.* The initiators of a congressional investigation (who, in practice, are often members of committee staffs rather than the Congressmen themselves) must define with reasonable precision the general area which they intend to investigate and the character of the documents they wish to see.

(2) *No "raw" files are to be released.* The files requested will be screened by the legislative liaison officer or one of his assistants, who will remove any documents which, in his judgment (or, as in the case of individual security files, because of directives of higher authority) should not go outside the executive branch. There can be no blinking the fact that this affords an opportunity for serious abuse. It is entirely justifiable and sometimes necessary to remove, for example, genuine military or diplomatic secrets, or documents identifying confidential informants, or confidential data respecting costs or production techniques furnished by private business.⁴⁹ It is arguably justifiable, for the reasons outlined above, to remove recommendations on policy made by subordinate officials, or documents (besides the above-mentioned individual security data) containing allegations which, although unsubstantiated,

48. *Ibid.*

49. Compare the recent action of the Department of Justice in refusing to give the House Committee on the Judiciary access to the files relating to settlement of the anti-trust suit against American Telephone and Telegraph Company. The Deputy Attorney General said that such action "would violate the confidential nature of settlement negotiations" and "discourage defendants, present and future, from entering into such negotiations." See 58 PUB. UTIL. FOR. 319, 320 (1956).

might work irreparable injury to private reputations. But it is most certainly unjustifiable to remove part of a file simply because it betrays administrative stupidity or inertia. The temptation to indulge in just such an abuse is, of course, considerable. The only answers to this objection are *first*, that the risk of abuse and consequent prejudice to efficient government which it raises is on the whole less than the risk inherent in giving Congress free access to executive files; and *second*, that in practice, competent department heads sooner or later learn the truth of the homely maxim about honesty as a policy in their dealings with Congress. It pays better to admit errors and correct them than to deny their existence; Congress, when it embarks on an investigation of an executive abuse, usually has other sources of information—*e.g.*, disgruntled contractors or bidders—than the files of the executive, and these other sources, if untempered by complete disclosure, are likely to make matters look much worse than they really are.

(3) *Congressional recipients of classified information must themselves be subjected to a security check.* Committees of Congressmen and their aides are, of course, constantly given access to military and diplomatic secrets. The Department of Defense applies to members of committee staffs the same criteria which it applies to its own employees and grants them appropriate clearances, the committee chairman being always formally reminded of the statutes and regulations applicable to any such information transmitted. Congressmen themselves are a more delicate problem. The executive is naturally reluctant to say outright that a member of a coordinate branch of government is not regarded as a proper person to be trusted with his country's secrets—although it has done so on occasion.⁵⁰ Seniority may bring a security risk to the chair of an important committee or subcommittee. Fortunately, this has never happened; if and when it does, great finesse will be required to solve the resulting problems of committee access to executive information.

(4) *The executive should have a chance to comment on any resulting committee report before it is published.* The more responsible committee chairmen usually agree to some such arrangement, the utility of which is obvious. Bona fide mistakes can be eliminated in this way, and both sides of a disputed question brought out. A committee is, of course, under no obligation to submit its drafts to such a preview or, if it does so, to accept any of the executive's comments and suggestions. Some chairmen are unwilling to permit their reports to be inspected before they are made public—perhaps because they feel it wasteful to dull a sparkling, sensational allegation by exposing it to lackluster facts.

These principles are, of course, primarily designed for dealing with responsible committees, who are trying to fulfill a legislative function beyond the mere capture of headlines. Rules for dealing with the guerillas, the Congressional Comanches, are naturally far harder to formulate. Still, there are one or two basic, simple principles which, based on the experience of the present writer,

50. Representative Robert L. Condon of California was barred from a test of nuclear weapons in May, 1953. See N.Y. Times, July 6, 1953, p. 12, col. 1.

the executive ought as a general thing to employ in dealing with the irresponsibles. For example, the brunt of denying a demand for information, which cannot be acceded to, should be borne at the highest level—by the department head and even, if the matter is important enough, by the President.⁵¹ It is unfair and unwise to expect a subordinate official to weather the congressional blast alone. Thus, if it can be predicted—as it frequently can be—that Senator So-and-So is going to demand from an official witness information which should not be disclosed, the witness should carry up to the Hill in his pocket a letter from the department head, describing in some detail the prohibited categories of information and instructing him to refer demands for such data—courteously—to the signer of the letter. If trouble is anticipated, the witness ought, moreover, to be accompanied by counsel. It takes a lawyer, and a fairly astute and cool-headed one at that, to deal with such maneuvers as vociferous insistence that a witness, barred from saying what he has done or will do in his official capacity in an actual case, give his “personal opinion” as to what ought to be done in a hypothetical case closely resembling the actual one. Another sound principle is to produce promptly, and publicize as widely as possible, all the germane facts (such as the context from which misleading excerpts have been torn) which *can* be released, together with an explanation of the reasons—which had better be good—for withholding the others. The *ruses de guerre* of the legislative *franc-tireurs* are, naturally, extremely varied, and certainly the author of this paper would not and could not attempt to catalogue them all; but it seems to be true, if banal, that the impact of most of them is minimized by maximum candor and disclosure on the part of the executive branch.

CONCLUSION

A situation so ambiguous and muddled cannot fail to distress the tidy-minded constitutionalist. And yet there is every prospect that it will continue for some time to come. For reasons given it is not likely soon to be cleared up by judicial decision. An act of Congress, even if it avoided or surmounted a presidential veto, would simply beg the question.⁵² An amendment to the Constitution would at least meet the problem squarely; in view of the recent vogue of amendments designed to limit the powers of the executive, it is perhaps a matter of some surprise that none such has been seriously proposed. Perhaps this is so because, on the whole, a good case can be made out for the proposition that the present imprecise situation is, in fact, reasonably satisfactory. Neither the executive nor the Congress is very sure of its rights, and both usually evince a tactful disposition not to push the assertion of their rights to abusive extremes. Of such is the system of checks and balances.

51. *E.g.*, the Truman directive cited in note 46 *supra*, and the Eisenhower directive cited in note 45 *supra*.

52. In 1948 the House passed a Joint Resolution in substance purporting to require the executive to furnish to all House and Senate committees any information the committees might deem necessary. H.R.J. Res. 342, 80th Cong., 2d Sess. (1948); see 94 CONG. REC. 5821 (1948). The Resolution died in the Senate.