

THE POLITICS OF EXECUTIVE PRIVILEGE

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CONSTITUTIONAL PRINCIPLES

No constitutional language authorizes the President to withhold documents from Congress, nor does any provision empower Congress to demand and receive information from the executive branch. The Supreme Court has recognized the constitutional power of Congress to investigate,¹ and the President's power to withhold information,² but those powers would exist with or without judicial rulings. Over the past two centuries, both branches have insisted that their powers are necessarily implied in the effective functioning of government. No doubt they are. The difficult and unpredictable issue is how to resolve two implied powers when they collide.³ Court cases occasionally provide guidance, but most of the disputes are resolved through political accommodations.

A lengthy study by Herman Wolkinson in 1949, expressing the executive branch position, asserted that federal courts "have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion."⁴ That statement, incorrect when written, is even less true today as a result of litigation and political precedents established over the past half century. Similarly inaccurate is the claim that "in every instance where a President has backed the refusal of a head of a depart-

1. *McGrain v. Daugherty*, 273 U.S. 135, 175 (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.")

2. *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("To the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.")

3. For a careful analysis of the constitutional arguments for and against executive privilege, see Mark J. Rozell, *Executive Privilege* (2d ed. 2002).

4. Herman Wolkinson, "Demands of Congressional Committees for Executive Papers" (Part I), 10 *Fed'l Bar J.* 103, 103 (1949). At the time he wrote his article, Mr. Wolkinson served as an attorney with the U.S. Department of Justice.

ment to divulge confidential information to either of the Houses of Congress, or their committees, the papers and the information requested were not furnished.”⁵ Congress and its committees have enjoyed more success than that. Wolkinson asserted that Congress could not, “under the Constitution, compel heads of departments by law to give up papers and information, regardless of the public interest involved; and the President is the judge of that interest.”⁶ He seriously understated the coercive powers of Congress by claiming that the heads of departments “are entirely unaffected by existing laws which prescribe penalties for failure to testify and produce papers before the House of Representatives or the Senate, or their committees.”⁷ Congress may hold both executive officials and private citizens in contempt.

What informs the process of congressional access to executive branch information is the constitutional structure of separation of powers and the system of checks and balances. Neither political branch has incontestable authority to withhold information or force its disgorgement. When these executive-legislative clashes occur, they are seldom resolved judicially. Accommodations are usually entered into without the need for litigation. In 1982, President Ronald Reagan set forth the governing procedure for responding to congressional requests for information: “Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.”⁸

On those rare occasions where these executive-legislative disputes enter the courts, judges typically reject sweeping claims of privilege by elected officials while encouraging the two branches to find a satisfactory compromise.⁹ Courts rely on legal precedent, “and legal precedent is much too inflexible to apply in individual cases of executive-legislative disputes.”¹⁰ The outcome is more likely decided by the persistence of Congress and its determination to punish executive noncompliance. Congress can win most of the time—if it has the will—because its political tools are formidable.

5. *Id.* at 104.

6. *Id.* at 107.

7. *Id.*

8. Memorandum from President Reagan to the Heads of the Executive Departments and Agencies, “Procedures Governing Responses to Congressional Requests for Information, November 4, 1982, paragraph 1.

9. E.g., *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. American Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976).

10. Joel D. Bush, “Congressional-Executive Access Disputes: Legal Standards and Political Settlements,” 9 *J. Law & Pol.* 719, 745 (1993).

Political confrontations between Congress and the executive branch attract the media, which loves a good fight. Knock-down battles dominate the press and remain within our collective memory, but little attention is devoted to the week-to-week cooperative efforts that characterize much of executive-legislative operations. Government cannot function in a constant state of strife, agitation, and enmity. Lawmakers and agency officials necessarily devise compromises to break deadlocks and move public policy forward.¹¹

Although the congressional power to investigate is not expressly stated in the Constitution, the framers understood that legislatures must oversee the executive branch. Under British precedents, lawmakers developed procedures to hold administrators accountable. James Wilson, one of the framers and later a Justice on the Supreme Court, expected the House of Representatives to “form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.”¹² In an essay in 1774, he described members of the British House of Commons as “grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censures; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.”¹³

At the Philadelphia Convention, George Mason emphasized that members of Congress “are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices.”¹⁴ Charles Pinckney submitted a list of congressional prerogatives, including: “Each House shall be the Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same.”¹⁵ The Constitution, however, provided no express powers for Congress to investigate or to punish for contempt. What was left silent would be filled within a few years by implied powers and legislative precedents.

11. Stephen W. Stathis, “Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts,” 3 *J. Law & Pol.* 183 (1986).

12. 1 *The Works of James Wilson* 415 (1967 ed.).

13. 2 *Id.* 731 (essay “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament”).

14. 2 *The Records of the Federal Convention of 1787*, at 206 (Farrand ed. 1937 (hereafter “Farrand”). See also Mason’s comments as reported by Madison, *id.* at 199.

15. *Id.* at 341.

Early Skirmishes

The Constitution makes no specific reference to a presidential power to withhold documents from Congress, nor does it expressly recognize a congressional need for information to legislate. Yet it is routine to consider both powers implied in the operation of the executive and legislative branches. Long before the Supreme Court acknowledged that fact, the political branches had already reached a rough understanding and worked out accommodations. When these two implied powers collide, which should give way? No magic formula yields a ready and reliable answer, for too much depends on individual circumstances and political requirements.

Robert Morris Inquiry

During the First Congress, the House debated a request from Robert Morris to investigate his conduct as Superintendent of Finance during the period of the Continental Congress.¹⁶ The matter was referred to a select committee consisting of James Madison, Theodore Sedgwick, and Roger Sherman.¹⁷ The House learned a day later that the Senate had passed a resolution authorizing President George Washington to appoint three commissioners to inquire into the receipts and expenditures of public moneys during Morris's administration and to report the results to Congress.¹⁸ Thus, while the House was determined to conduct its own inquiry, the Senate initially entrusted the matter to the President.

The select committee of Madison, Sedgwick, and Sherman issued a report, recommending that a committee of five be appointed to examine Morris's performance in office. John Laurance and William Smith were added to the three already in place.¹⁹ Elbridge Gerry objected that the House was pretending it still had the power of the Continental Congress, when it possessed both legislative and executive powers. He insisted that the President was "the only competent authority to take cognizance of the conduct of officers in the Executive Department; if we pursue the proposed plan of appointing committees, we destroy the responsibility of Executive officers, and divest the House

16. 1 Annals of Cong. 1168 (February 8, 1790).

17. *Id.* at 1204 (February 10, 1790).

18. *Id.* at 1233 (February 11, 1790).

19. 2 Annals of Cong. 1514 (March 19, 1790) (spelled "Lawrence" in the Annals).

of a great and essential privilege, that of impeaching our Executive offices for maladministration.”²⁰ Gerry favored the Senate’s approach of appointing three commissioners to do the job.²¹ Theodorick Bland regarded the appointment of commissioners as “an unnecessary expense.”²² Madison supported the five-man committee, arguing that the House “should possess itself of the fullest information in order to doing [sic] justice to the country and to public officers.”²³ Gerry persisted in his belief that “the several branches of Government should be kept separate.”²⁴ The committee was appointed and issued a report on February 16, 1791.²⁵

The committee investigation did not represent a full-fledged collision between Congress and the Washington administration. The controversy centered on a holdover dispute from the previous Continental Congress. Still, Congress ended up debating an important issue: Which branch of government—legislative or executive—was the proper party for investigating executive matters? The House decided, as Madison noted, that Congress needed information to “do justice” to the country and to public officers.

Steuben’s Annuity

A 1790 request from Treasury Secretary Alexander Hamilton to Congress, seeking financial compensation for Baron von Steuben, triggered an early executive-legislative clash over access to documents. Initially, the administration withheld some materials from Congress. In the end, after a confrontation, lawmakers received sufficient documents to pass the bill for Steuben. The controversy involved both principle and personalities, a mix that continues to this day.

On January 27, 1790, Steuben detailed for Hamilton his military assistance to America during the Revolutionary War. Trained in the Prussian army, Steuben accepted a commission in the American Continental army in 1777. Among his duties: training, disciplining, and reorganizing the troops under General George Washington, preparing regulations for military discipline, and commanding one of the three divisions at Yorktown.²⁶ Steuben told Hamilton

20. *Id.* at 1515.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1515–16.

25. *Id.* at 2017 (February 16, 1791).

26. For some of the history on Steuben’s effort to seek financial compensation from Congress, see 7 *Documentary History of the First Federal Congress of the United States of*

that to “decline all compensation for the Sacrifices I had made” would appear to be the conduct of “a Lunatic or a Traitor.” Either he fit the first category, for coming “from another part of the globe to serve a Nation unknown to him,” or the second, “as it might appear that his making such generous proposals to introduce himself into your army was with the most dangerous views, for which he probably received compensation from the enemy.”²⁷

On April 6, 1790, the House received from Hamilton a memorial requesting financial assistance for Steuben.²⁸ The memorial consisted mainly of statements by those who knew Steuben and could vouch for his contributions to the country. Hamilton believed that legislation offering compensation would be “most consistent with the dignity and equity of the United States.”²⁹ He recommended three types of compensation: a lump sum of \$7,396.74, an annuity for life, and “a moderate grant of land.”³⁰

Upon receipt of Hamilton’s memorial, the House appointed a committee to report a bill.³¹ The House bill proposed an annuity for life of \$2,706, plus “_____ thousand acres of land in the Western Territory of the United States.”³² After omitting the grant of land, the House settled on a fixed sum of \$7,000 and an annuity of \$2,000 for life.³³ The Senate, notified that the House had passed the bill for Steuben, assigned the matter to a committee consisting of William Maclay, Caleb Strong, Ralph Izard, Oliver Ellsworth, and Samuel Johnston.³⁴

Maclay called on the Commissioner of Army Accounts, who “furnished me with all [the information] in his power.”³⁵ Discovering that the Continental Congress had previously given Steuben \$7,000, Maclay met with Joseph Nourse, Register of the Treasury Department, and asked for the receipts. Nourse assured Maclay that his request would be complied with. Told by Maclay that he needed the documents that day, Nourse gave assurances that the deadline would be honored.³⁶ A little over an hour later Nourse gave

America 201–06 (1997). For documents related to his petition to Congress, see *id.* at 206–46.

27. 6 *The Papers of Alexander Hamilton* 221 (Syrett ed. 1962).

28. 2 *Annals of Cong.* 1572 (April 6, 1790).

29. 6 *The Papers of Alexander Hamilton* 326.

30. *Id.* at 326–27.

31. 2 *Annals of Cong.* 1584 (April 19, 1790).

32. *Id.* at 1606.

33. *Id.* at 1609–10.

34. 1 *Annals of Cong.* 972.

35. Kenneth R. Bowling and Helen Veit, eds., *The Diary of William Maclay* 265 (1988).

36. *Id.* at 266.

Maclay some information, indicating that the warrants were deposited at the U.S. Bank. Maclay subsequently learned that “some books papers or property of that kind was lodged at the Bank by Mr. Hamilton, Who had the Keys and Care of them.”³⁷

Maclay told Hamilton what he wanted and was refused “in pretty stiff terms.” Hamilton saw no grounds for opening “any Gentlemen’s Papers.” Maclay insisted that the papers “belonged to the public & to no private Gentleman,” and that Hamilton was in no position “to refuse information to a Committee of Congress.” When Hamilton offered to deliver the papers if the committee voted for them, Maclay replied that “any Member of Congress, had a right to any Papers in any Office Whatever. That as Chairman of the Committee I had promised to procure What Papers were necessary.”³⁸ The leverage here lay with Congress. If Hamilton chose to stonewall, Maclay and his committee members could withdraw support for the Steuben bill.

Following this exchange, Maclay said he expected to hear from Hamilton in half an hour. After that time had come and gone, Maclay went to the Treasury. The warrant “was delivered to me with all the pomp of official ceremony.”³⁹ Maclay was still waiting for a document that Hamilton had promised to provide. After Maclay was “admitted into the Sanctum Sanctorum,” he told “his Holiness that he had been good enough to promise me a note which was not come to my hands.”⁴⁰ Hamilton admitted that the papers were on the premises, but in a desk that was locked and “bound round with tape.”⁴¹ Maclay wrote in his diary: “A School Boy should be Whipped for such pitiful Evasions.”⁴²

Maclay continued collecting “documents & papers” to support the bill for Steuben. Whether he obtained the papers in the bound desk is not known from available records. Maclay was incensed at Hamilton’s request, saying he had never seen “so Villainous an Attempt to rob the public, as the System which has been brought forward by the Secretary of the Treasury.”⁴³ Maclay and the other committee members examined the papers regarding the bill for Steuben.⁴⁴ They deleted the lump sum of \$7,000 and reduced the annuity to

37. Id.

38. Id.

39. Id. at 267.

40. Id.

41. Id.

42. Id.

43. Id. at 270.

44. Id.

\$1,000.⁴⁵ After the Senate accepted and rejected some amendments, Congress settled on a private bill that granted Steuben an annuity of \$2,500 for life.⁴⁶

St. Clair Investigation

Two years later, on March 27, 1792, the House appointed a committee to inquire into the heavy military losses suffered by the troops of Maj. Gen. Arthur St. Clair to Indian tribes. Out of 1,400 U.S. troops, 657 were killed and another 271 wounded.⁴⁷ The House empowered the committee “to call for such persons, papers, and records, as may be necessary to assist their inquiries.”⁴⁸ William Giles, who regarded the inquiry as “indispensable” and “strictly proper,” called the House “the proper source, as the immediate guardians of the public interest.”⁴⁹ Similar to the Morris inquiry, some members of the House thought the investigation should be conducted by President Washington. A motion to that effect was rejected 21 to 35, after which the House supported the inquiry 44 to 10.⁵⁰

According to the account of Thomas Jefferson, President Washington convened his Cabinet to consider the extent to which the House could call for papers and persons. The Cabinet agreed

first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.⁵¹

The Cabinet concluded that “there was not a paper which might not be properly produced.”⁵² President Washington instructed Secretary of War

45. *Id.* at 274; 1 *Annals of Cong.* 978 (May 25, 1790).

46. 6 *Stat.* 2 (1790); 1 *Annals of Cong.* 978–80; *The Diary of William Maclay*, at 276–78.

47. George C. Chalou, “St. Clair’s Defeat, 1792,” in *Congress Investigates, 1792–1974*, at 7 (Arthur M. Schlesinger, Jr. & Roger Bruns, eds. 1975).

48. 3 *Annals of Cong.* 493 (March 27, 1792).

49. *Id.* at 490.

50. *Id.* at 493.

51. 1 *The Writings of Thomas Jefferson* 304 (Bergh ed. 1903).

52. *Id.* at 305.

Henry Knox to “lay before the House of Representatives such papers from your Department, as are requested by the enclosed Resolution.”⁵³ Washington also thought it appropriate for St. Clair, who had expressed an interest in retiring, to make himself fully available to the House: “I should hope an opportunity would thereby be afforded you, of explaining your conduct, in a manner satisfactory to the public and yourself.”⁵⁴ The House committee examined papers furnished by the executive branch, listened to explanations from department heads and other witnesses, and received a written statement from General St. Clair.⁵⁵ The general principle of executive privilege had been established because the President could refuse papers “the disclosure of which would injure the public.” The language here is significant. The injury had to be to the *public*, not to the President or his associates. Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal improper or illegal activities.

Investigating Hamilton

Early in 1793, Rep. William Giles introduced a series of resolutions charging that Secretary Hamilton had violated an appropriations law, deviated from the instructions given to him by President Washington, failed to give Congress official information “in due time,” failed to give official information to commissioners regarding the purchase of the public debt, and had been guilty of “an indecorum to this House, in undertaking to judge of its motives in calling for information which was demandable of him, from the constitution of his office; and in failing to give all the necessary information within his knowledge.”⁵⁶ The House agreed to delete the charge regarding a violation of an appropriations law, but took votes on the other resolutions.

In debating these resolutions, part of the discussion concerned the degree of discretionary authority that must be available to top executive officials.⁵⁷ Also of concern was the procedure available to Hamilton, who was forced to submit lengthy reports without the opportunity to come before the House to explain his conduct. Rep. William Smith explained:

53. 32 The Writings of George Washington 15 (John C. Fitzpatrick ed. 1939).

54. *Id.* at 16.

55. 3 Annals of Cong. 1106–13 and Appendix (1052–59, 1310–17).

56. *Id.* at 900 (February 28, 1793).

57. *Id.* at 901–02.

The Secretary of the Treasury was...not even permitted to come to the bar to vindicate himself. Through the imperfect medium of written reports he was compelled, when called upon for information, to answer, as it were by anticipation, charges which were not specific, without knowing precisely against what part of his administration subsequent specific charges would be brought to bear.

If in his reports he was concise, he was censured for suppressing information; if he entered into a vindication of the motives which influenced his conduct, he was then criminated for stuffing his reports with metaphysical reasonings. A gentleman from Pennsylvania [Mr. FINDLEY] had said that the Secretary's reports were so voluminous that he was quite bewildered by them, and that instead of their throwing any light on the subject, he was more in the dark than ever...⁵⁸

Whatever dispute there might have been over Hamilton's record in office, there was little question about the right of the House to whatever documents it needed to complete the investigation. For example, on the issue of Hamilton deviating from presidential instructions, Smith said those instructions "have been laid before the House."⁵⁹ Exactly what the House received is uncertain. Smith claimed that the instructions were not from Washington to Hamilton but from Hamilton to his agents.⁶⁰ Rep. William Findley disagreed:

The PRESIDENT did give commission and instructions, and those are fully communicated to us. If he conceived we had no right to demand them, he would have told us so; if he had kept any part of them back, he would have informed us, and assigned his reasons for doing so. I presume that the PRESIDENT has acted the part of a candid, honest man; the gentleman [Smith] presumes the reverse. The suggestion that this House, which has the exclusive right of originating the appropriation of money, has no right to be informed of the application of it, is so novel and extraordinary, so inconsistent with every idea of propriety and good Government, that it requires no reply.⁶¹

James Madison discussed an instruction that Washington had given Hamilton.⁶² In an investigation of this nature, involving the application of public

58. Id. at 912.

59. Id. at 913.

60. Id. at 916.

61. Id. at 919.

62. Id. at 940.

funds, it would have been of great risk for the administration to do anything other than comply fully with the legislative request. Any resistance could be interpreted as a cover-up, fueling suspicions, heightening passions, and hardening positions. In such situations, non-cooperation may escalate a dispute to a motion for contempt of Congress and even impeachment.

The resolutions were rejected by large margins, the votes ranging from 40–12 to 33–8. Having watched the resolutions defeated one by one, Smith said it “had been already clearly shown, by documents in the possession of the House, that the necessary information had been communicated.”⁶³ The final resolution, charging that Hamilton had been guilty of an indecorum to the House “in undertaking to judge of its motives in calling for information, which was demandable of him, from the constitution of his office, and in failing to give all the necessary information within his knowledge,” lost on a vote of 34 to 7.⁶⁴

Diplomatic Correspondence with France

In 1794, the Senate adopted a resolution requesting President Washington to submit certain diplomatic correspondence concerning U.S. policy with France.⁶⁵ At a Cabinet meeting he received advice from Secretary of War Knox that “no part of the correspondence should be sent to the Senate.” Secretary Hamilton agreed with Knox, adding that “the principle is safe, by excepting such parts as the President may choose to withhold.” Attorney General Edmund Randolph, about to become Secretary of State, said that “all the correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the President thinks improper, should not be sent.”⁶⁶ William Bradford, replacing Randolph as Attorney General, was of the opinion that “it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.”⁶⁷

Washington, carving out some room, notified the Senate that he had directed copies and translations to be made “except in those particulars which, in my judgment, for public considerations, ought not to be communicated.”⁶⁸

63. *Id.* at 960.

64. *Id.* at 960–63. For background on the House investigation of Hamilton, see 2 Broadus Mitchell, *Alexander Hamilton* 245–86 (1962).

65. 4 *Annals of Cong.* 38 (January 24, 1794).

66. 4 *The Works of Alexander Hamilton* 505–06 (John C. Hamilton ed.)

67. *Id.* at 494–95.

68. 4 *Annals of Cong.* 56 (February 26, 1794).

Apparently the Senate accepted this arrangement, but had Senators wanted to press the matter they might have forced the release of more material. As noted by Abraham Sofaer, “nothing would have prevented a majority from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge.”⁶⁹

The Contempt Power

The first use of the investigative power to protect the dignity of the House occurred in 1795. William Smith, a Representative from South Carolina, announced that a Robert Randall had confided in him a plan to seek a grant of some 20 million acres from Congress, to be divided into 40 shares. More than half that amount would be reserved to lawmakers who assisted him. Rep. William Murphy had also been sounded out by Randall. One of Randall’s associates, Charles Whitney, got in touch with Rep. Daniel Buck to see if he was interested. The House passed a resolution directing the Sergeant at Arms, upon the order of the Speaker, to arrest Randall and Whitney.⁷⁰

On January 6, 1796, the House concluded that Randall had been guilty of contempt and a breach of House privileges by attempting to corrupt the integrity of its members. Randall was brought to the bar of the House, reprimanded by the Speaker, and recommitted to custody. At that time, the House had a jail within its building. Because Whitney had attempted to bribe Buck when he was a member-elect, the House discharged Whitney from custody without charging him with contempt. A week later it voted to release Randall.⁷¹

Four years later, the Senate opened an investigation into material published by William Duane, editor of the *Aurora* newspaper.⁷² On March 18, 1800, the Federalist Senate voted 20 to 8 along party lines for this language: “the said publication contains assertions, and pretended information, respecting the Senate, and the Committee of the Senate, and their proceedings, which are false, defamatory, scandalous, and malicious; tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States.”⁷³ By a

69. Abraham D. Sofaer, “Executive Privilege: An Historical Note,” 75 *Colum. L. Rev.* 1318, 1321 (1975).

70. *Annals of Cong.*, 4th Cong., 1st Sess. 155–70 (1795).

71. *Id.* at 171–245, *passim*. For further details on Congress’s power to punish for contempt, see 2 *Hinds’ Precedents* §§ 1597–1640.

72. *Annals of Cong.*, 6th Cong., 1st–2d Sess. 63 (February 26, 1800).

73. *Id.* at 111–12.

vote of 17 to 11 it regarded the content of the newspaper “a high breach of the privileges of this House.”⁷⁴ Duane was ordered to appear at the bar of the Senate on March 24 to defend his conduct.⁷⁵ After hearing the charges and appearing before the Senate, he asked for the assistance of counsel, which the Senate granted.⁷⁶ He then refused to return, explaining that he was “bound by the most sacred duties to decline any further voluntary attendance upon that body, and leave them to pursue such measures in this case as, in their *wisdom*, they may deem meet.”⁷⁷

It was for that action, and not the published material, that the Senate voted 16–12 to hold him in contempt.⁷⁸ A warrant was issued for his arrest, but Duane managed to stay a step ahead of the Sergeant at Arms.⁷⁹ On May 14, the Senate adopted a resolution (13 to 4) requesting the President to prosecute Duane in the courts. The Senate asked that a proper law officer prosecute Duane “for certain false, defamatory, scandalous, and malicious publications... tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite against them the hatred of the good people of the United States.”⁸⁰ Duane was indicted by a federal grand jury, but after several postponements was never convicted. The grand jury’s failure to find “any legal basis for the Senate’s complaint clearly branded the original action by the Federalist majority as a usurpation of authority.”⁸¹

During the debate, Senator Charles Pinckney questioned the authority of Congress to punish members of the press simply because “they thought they had a right to attack, by argument, proceedings which appeared to them unconstitutional.”⁸² It seemed plain to Pinckney that “for all libels or attacks on either branch of the Legislature, in writing or in print, the mode must be prosecution...”⁸³ In these indictments for libel “the *Jury* shall have a right to determine the law, and the fact, under the direction of the court, as in other

74. *Id.* at 112.

75. *Id.* at 113.

76. *Id.* at 117–18.

77. *Id.* at 122 (emphasis in original).

78. *Id.* at 123.

79. James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Law and American Civil Liberties* 297–98 (1956).

80. *Annals of Cong.*, 6th Cong., 1st–2d Sess. at 184.

81. Smith, *Freedom’s Fetters*, at 306; see also Ernest J. Eberling, *Congressional Investigations* 42–53 (1928).

82. *Annals of Cong.*, 6th Cong., 1st–2d Sess. at 73.

83. *Id.* at 75.

84. *Id.* at 76 (emphasis in original).

cases.”⁸⁴ Other Senators recognized the option of transferring this type of dispute “to the judicial courts, and that the Attorney General should be directed to prosecute.”⁸⁵

Thomas Jefferson, Presiding Officer of the Senate in 1800, summarized the legislative action on Duane. He noted that Congress had a right to protect itself so that it did not “sit at the mercy of every intruder who may enter our doors or gallery, and, by noise and tumult, render proceeding in business impracticable.”⁸⁶ He suggested in his parliamentary manual that it might be wise for Congress, given the uncertain state of the law of contempt of Congress, to “declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.”⁸⁷

The first committee witness punished for contempt of the House was Nathaniel Rounsavell, a newspaper editor, charged in 1812 with releasing sensitive information to the press. He admitted to a select committee that he had leaked secret House debates on a proposed embargo, and that part of the source was overhearing a conversation between members of the House. Nevertheless, he refused to identify the lawmakers or say where the conversation took place. The House put him in the custody of the Sergeant at Arms and brought him before the bar to be questioned. Once against he declined to name the lawmakers.

On the following day, still in custody, Rounsavell drafted a letter in which he disclaimed any intention of showing disrespect to the House. He said that overhearing the conversation was inadvertent and explained that he had declined to give the select committee the information it requested because he thought it might incriminate lawmakers who had committed, in his view, no crime. Only because of previous knowledge, which he obtained from other sources, was he aware that the conversation involved an embargo. At this point in the proceedings, John Smilie of Pennsylvania identified himself as the member who Rounsavell had overheard. Smilie regarded the information that appeared in the newspaper “of no importance.” If the House wanted a victim, he offered himself as a substitute for Rounsavell.

The House now wanted to discharge Rounsavell without compromising its rights and dignity. The Speaker put to him the question: “Are you willing to answer such questions as shall be propounded by you by order of the House?”

85. *Id.* at 91 (Senator Joseph Anderson).

86. Jefferson’s Manual, §297; H. Doc. No. 106-320, at 134.

87. *Id.* at §299, at 136–37.

Rounsavell said he was prepared to do that. The House then moved that Rounsavell, having purged himself of contempt, be released. The motion carried without opposition.⁸⁸

Judicial Guidelines

The British Parliament treated the contempt power and legislative privileges as wholly within the power of the legislative branch, without any interference from the judiciary. A different practice developed in the United States. The Supreme Court has held that the congressional authority to punish citizens for contempt because of a breach of legislative privileges “can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices.”⁸⁹

The Court first placed limits on congressional investigations in *Anderson v. Dunn* (1821). Rep. Lewis Williams informed the House that a Col. John Anderson had offered him \$500 if he would reciprocate with certain favors. The House ordered the Sergeant at Arms to take Anderson into custody. After interrogation by the Speaker, the House voted Anderson in contempt and in violation of the privileges of the House. The Speaker reprimanded him and released him from custody.⁹⁰ The Supreme Court upheld the House action as a valid exercise in self-preservation. Without the power to punish for contempt, the House would be left “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it.”⁹¹ However, the Court ruled that the power to punish for contempt was not unlimited. The House had to exercise the least possible power adequate to fulfill legislative needs (in this case, the power of imprisonment), and the duration of punishment could not exceed the life of the legislative body. Thus, imprisonment had to cease when the House adjourned at the end of a Congress.⁹²

88. Annals of Cong., 12th Cong., 1st Sess. 1255–74. Additional cases where the House punished witnesses for contempt are discussed in 3 Hinds’ Precedents §§ 1666–1701.

89. *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1881). See also *Marshall v. Gordon*, 243 U.S. 521, 533–41 (1917) and *Watkins v. United States*, 354 U.S. 178, 192 (1957).

90. Annals of Cong., 15th Cong., 1st Sess. 580–83, 592–609, 777–90 (1818).

91. *Anderson v. Dunn*, 6 Wheat. 204, 228 (1821).

92. The Senate, a continuing body, is not limited by the expiration of a Congress; *McGrain v. Daugherty*, 273 U.S. 135, 181–82 (1927).

As a result of this decision, it would be possible for someone to violate the dignity of the House in the closing days of a Congress and be punished only for the remaining period. To handle such situations, Congress passed legislation in 1857 to enforce the attendance of witnesses on the summons of either House. If an individual fails to appear or refuses to answer pertinent questions, that person can be indicted for misdemeanor in the courts.⁹³

Initially, the Court defined the legislative power to investigate somewhat narrowly. In 1881, it spoke of Congress investigating only with “valid legislation” in mind.⁹⁴ That particular case concerned the power of Congress to investigate the affairs of private citizens engaged in a real-estate pool. If the individuals committed a crime or offence, the Court said the judiciary would be the proper branch to act. The Court worried about “a fruitless investigation into the personal affairs of individuals.”⁹⁵

Later judicial rulings came to recognize a much greater sweep to congressional authority. In 1927, the Court faced a situation where Congress looked not into the activities of people in the private sector but rather the conduct of the executive branch, particularly the administration of the Justice Department. The Court first stated that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary of the legislative function.”⁹⁶ Congress could not legislate “wisely or effectively in the absence of information.”⁹⁷ Unlike the decision in 1881, the Court in 1927 did not confine congressional investigations to “valid legislation.” Congress had a right to seek information “for legislative purposes.”⁹⁸ The Court recognized that the Senate resolution that launched the investigation of the Justice Department

does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or mistreated, and particularly whether the Attorney General and his assistants were per-

93. 11 Stat. 155 (1857), amended by 12 Stat. 333 (1862). The 1857 law, as amended, was upheld by the Supreme Court; *In re Chapman*, 166 U.S. 661 (1897). As amended in 1936 (49 Stat. 2041) and 1938 (52 Stat. 942), this law is codified at 2 U.S.C. §§ 192–94 (2000).

94. *Kilbourn v. Thompson*, 103 U.S. 168, 195 (1881).

95. *Id.*

96. *McGrain v. Daugherty*, 273 U.S. at 174.

97. *Id.* at 175.

98. *Id.* at 177.

forming or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited.⁹⁹

It was enough, said the Court, that the subject of investigation “was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit.”¹⁰⁰ That is, a *potential* for legislation was sufficient. A congressional investigation could have legislation as a possible, but not a necessary, outcome. Investigation as pure oversight into the operations of the executive branch was adequate justification.

To accomplish the purpose of legislation or oversight, each House is entitled to compel witnesses to provide testimony pertinent to the legislative inquiry.¹⁰¹ Even the “potential” theory too narrowly circumscribes legislative investigations. Courts recognize that committee investigations may take researchers up “blind alleys” and into nonproductive enterprises: “To be a valid legislative inquiry there need be no predictable end result.”¹⁰²

Presidential Challenges

As implied in President Washington’s response to the St. Clair investigation, administrations were prepared to withhold information from Congress if disclosure “would injure the public: consequently were to exercise a discretion.” In the nineteenth century, one of the most effective presidential challenges to a legislative demand for documents came from Grover Cleveland. Under great pressure, he refused to buckle to principles he considered fundamental to the effective discharge of executive duties. His steadfastness led to repeal of the Tenure of Office Act, which had given the Senate a major role in the suspension and removal of executive branch employees.

In 1886, the Senate voted to condemn Attorney General Augustus Garland for refusing, “under whatever influence” (meaning Cleveland), to send copies of papers called for in a Senate resolution. For 24 years, from Abraham Lincoln through Chester Arthur, Republicans held control of the White House. Cleveland’s election in 1884 interrupted this period of Republican dominance,

99. *Id.*

100. *Id.*

101. *Id.* at 180.

102. *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 509 (1975).

and he took office in the shadow of the Pendleton Act of 1883, which promised the nation a new breed of nonpartisan civil servant. Cleveland discussed civil service reform in his inaugural address of March 4, 1885, stating that the people had a right to be protected from the “incompetency of public employees who hold their places solely as the reward of partisan service.” He decried this “corrupting influence” and insisted that an able citizen who sought public service had the right to expect that “merit and competency shall be recognized instead of party subserviency or the surrender of honest political belief.”¹⁰³ In his first annual message to Congress, on December 8, 1885, he ventured the hope that “we shall never again be remitted to the system which distributes public positions purely as rewards for partisan service.”¹⁰⁴

Cleveland took care to sprinkle in a few qualifiers, such as “solely” and “purely.” It was never his intention to exclude partisan considerations, particularly after inheriting a federal bureaucracy estimated to be “at least” 95 percent Republican.¹⁰⁵ Any official who attended county, district, state, or national conventions of the Republican party, or who had been an active partisan in elections, became a candidate for suspension, no matter how “capable, faithful, and efficient in the discharge of his official duties.”¹⁰⁶

Cleveland’s plans for replacing Republicans with Democrats depended upon the advice and consent of the Senate, which remained under Republican control. The Tenure of Office Act of 1867 had given the Senate a role in the suspension and removal of executive officials. The statute required the President to report to the Senate the “evidence and reasons” for suspending an official. If the Senate refused to concur in the suspension, the officer should “forthright resume the functions of the office.”¹⁰⁷ After Ulysses S. Grant replaced Andrew Johnson in the White House, Congress revised the statute to give the President greater discretion over suspensions while retaining the Senate’s role in the removal process.¹⁰⁸

The revised legislation provided that during any recess of the Senate the President could, “in his discretion,” suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the federal courts, until the end of the next session of the Senate. The President was further au-

103. 10 A Compilation of the Messages and Papers of the Presidents 4887 (James D. Richardson ed.) (hereafter “Richardson”).

104. *Id.* at 4948.

105. S. Rept. No. 135 (Part 2), 49th Cong., 1st Sess. 1 (1886).

106. *Id.* at 22.

107. 14 Stat. 430 (1867).

108. 16 Stat. 6, §2 (1869).

thorized to designate a suitable person, “subject to be removed in his discretion by the designation of another,” to perform the duties of the suspended officer. Within 30 days after the commencement of each session of the Senate, the President would nominate persons to fill all vacancies that existed at the last meeting of the Senate as well as those for places occupied by the suspended officers. If the Senate refused to consent to the appointment of a replacement for a suspended officer, the President was required to nominate another person as soon as practicable.

In his first ten months in office, Cleveland sent to the Senate a list of 643 suspensions,¹⁰⁹ but the Senate refused to act on his nominations to replace the suspended officers. On July 17, 1885, after Cleveland had suspended George M. Duskin from the office of U.S. Attorney for the southern district of Alabama, he designated John D. Burnett to perform the duties of that office, and on December 14, when the Senate returned, he submitted Burnett’s nomination.

On December 16, George F. Edmunds of the Senate Judiciary Committee asked Attorney General Garland for all papers and information concerning the conduct and administration of Duskin, as well as the character and conduct of Burnett. On January 25, 1886, after numerous delays convinced the committee that it could not rely on this informal process for obtaining the information, the committee persuaded the Senate to adopt a resolution directing Garland to transmit to the Senate copies of all documents and papers filed in the Justice Department since January 1, 1885, relating to the management and conduct of the office of U.S. Attorney for the southern district of Alabama.¹¹⁰

Garland responded that the papers regarding Burnett’s fitness for office had already been delivered to the committee, but that it “is not considered that the public interest will be promoted” by transmitting the documents on Duskin to the committee.¹¹¹ The committee insisted that under the Constitution either House of Congress must have “at all times the right to know all that officially exists or takes place in any of the Departments of Government.”¹¹² The committee recognized some limits to the investigative power. The House of Representatives could not demand papers relating to treaties still under con-

109. S. Rept. No. 135 (Part 1), 49th Cong., 1st Sess. 12–13 (1886). See also Grover Cleveland, *The Independence of the Executive* 43–45 (1913).

110. 25 *Journal of the Executive Proceedings of the Senate* 294 (1901).

111. S. Rept. No. 135 (Part 1), 49th Cong., 1st Sess. 3 (1886).

112. *Id.* at 4.

113. *Id.* at 4–5.

sideration by the President and the Senate, and papers might be refused in cases where Congress had granted the President a discretionary authority.¹¹³ But just as Congress could claim an implied power to investigate, so could Cleveland claim the implied power to remove executive officials or to withhold documents concerning their removal.

The report from the Senate Judiciary Committee, indirectly criticizing the President, provoked Cleveland to make his views known, and he did so in a communication to the Senate on March 1, 1886. He justified his refusal to give the Senate the papers it wanted on two grounds: statutory interpretation and constitutional authority. Under the revised Tenure of Office Act, the Senate did not appear to have any role in suspensions. It could not explore the reasons for a suspension or put the suspended person back in office. Under the 1869 statute the President did not have to disclose his reasons for suspending an officer, for he acted “in his discretion.”

The Senate Judiciary Committee claimed that the Senate was not interested in the “reasons or motives” behind the suspensions, and yet those were precisely what the committee sought. Regarding Duskin’s suspension, the committee said “it is plain that the conduct and management of the incumbent is a matter absolutely essential to be known to the Senate in order that it may determine whether it can rightly advise his removal. . . .”¹¹⁴ Cleveland said that the Senate’s request for papers and documents assumed the right “to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office.”¹¹⁵

Turning to constitutional grounds, Cleveland denied that he had withheld any official or public papers. He regarded the papers and documents addressed to him, or intended for his use, “purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine.” Although the papers were kept in the files of the Justice Department, they were deposited there “for my convenience, remaining still completely under my control.” Cleveland believed that it would be entirely proper to take them into his own custody, “and if I saw fit to destroy them no one could complain.”¹¹⁶

He claimed that the President was at liberty to suspend public officers in the absence of any papers or documents. He noted that many suspensions

114. S. Rept. No. 135 (Part 1), 49th Cong., 1st Sess. 9 (1886).

115. 10 Richardson 4966.

116. *Id.* at 4963.

from office were more the result of oral representations made to him by citizens of known good repute, including members of Congress, than of letters and documents presented for his examination.¹¹⁷ In the event the Senate refused to confirm one of his nominees, he would not assume the right to ask the reasons for the Senate's action, and he did not want the Senate inquiring into his reasons for suspensions or removals.¹¹⁸ It was Cleveland's position that the power to remove or suspend public officials was vested in the President alone. The Constitution expressly provided that the executive power be vested in the President, and that he shall take care that the laws be faithfully executed.¹¹⁹ His message suggested that the Tenure of Office Act, however interpreted, intruded upon the constitutional powers of the President.¹²⁰

Because of Democratic control of the House of Representatives, the Senate was unable to act legislatively against Cleveland. Instead, the Judiciary Committee reported four Senate resolutions to the floor for consideration. The first resolution was a motion to adopt and agree to the committee report. The second expressed the Senate's "condemnation of the refusal of the Attorney-General, under whatever influence," to send copies of papers called for by the Senate resolution of January 25. The third resolution, which represented the ultimate sanction, stated that it was the duty of the Senate, under the circumstances then prevailing, to refuse to give advice and consent to proposed removals of officers. The fourth resolution suggested that Cleveland had violated a public law that gave preference to persons seeking civil office who had been honorably discharged from the military service by reason of disability incurred in the line of duty.¹²¹ According to information available to Democrats on the committee, Duskin had never been a Union soldier. He was either a member of the Confederate army or a Confederate sympathizer in his native state of North Carolina.¹²²

During floor debate, Senator Edmunds denied that Presidents had exclusive control over "unofficial and private" papers. Any papers located within a department, he said, must of necessity be public papers available to Congress.¹²³ A Democrat on the committee, James Lawrence Pugh, charged that the whole proceeding was in vain because Duskin's term of office had expired

117. *Id.* at 4964.

118. *Id.* at 4967.

119. *Id.* at 4964.

120. *Id.* at 4965–66.

121. S. Doc. No. 135 (Part 1), 49th Cong., 1st Sess. 12 (1886).

122. S. Doc. No. 135 (Part 2), 49th Cong., 1st Sess. 22 (1886).

123. 17 Cong. Rec. 2214 (1886).

on December 20, 1885. What possible purpose could the Senate have in asking for papers? If Senators decided that the suspension was improper or unwise, they could not restore Duskin to an office that had expired. Pugh said that “the Senate is thrown into a moot-court in discussing a purely abstract question.”¹²⁴

By considering a resolution to condemn the Attorney General, the Senate marched into territory reserved by the Constitution to the House of Representatives. Did the Senate intend to usurp the power of impeachment by pronouncing a judgment of conviction before the official had been tried?¹²⁵

After a debate occupying almost 200 pages of the *Congressional Record* (printed with much smaller type than at present), the Senate voted on the four resolutions. Had they been adopted, they would have had no legal effect. Senate resolutions merely express the sentiment of a majority of that body. The first resolution, adopting the committee report, passed by a strictly partisan vote of 32 to 26. The second, expressing condemnation of the Attorney General, passed along partisan lines, 32 to 25. The third, concerning the duty of the Senate to refuse its advice and consent to Cleveland’s proposed removal of officers, passed 30 to 29. Two Republicans (John H. Mitchell of Oregon and Charles H. Van Wyck of Nebraska) and a Readjuster (Harrison H. Riddleberger of Virginia) voted with the Democrats.¹²⁶ The final resolution, about giving preference to disabled veterans, could have been for mother or apple pie. It passed 56 to one.¹²⁷

Even after its amendment in 1869, there had been strong doubts about the constitutionality and propriety of the Tenure of Office Act. The suspicion was strongly held that Congress, intoxicated by its assertions of authority during the Andrew Johnson administration, had arrogated unto itself a power that belonged to the President. The House of Representatives had voted almost unanimously in 1869 to repeal the act, but the Senate succeeded in preserving some role for itself in removals.

On December 14, 1885, before the Senate had made headlines with its resolutions against the Attorney General and the President, Senator George Hoar (R-Mass.) introduced a bill for the total and complete repeal of the Tenure of Office Act. The bill passed the Senate on December 17, 1886, by a vote of 30 to 22. Four Republicans—Jonathan Chase of Rhode Island, George Hoar,

124. *Id.* at 2247.

125. *Id.* at 2617.

126. *Id.* at 2810–14.

127. *Id.* at 2814.

128. 13 Cong. Rec. 248 (1886).

John J. Ingalls of Kansas, and John H. Mitchell of Oregon—joined with the Democrats to form the majority.¹²⁸ The bill found easy acceptance in the House of Representatives and was enacted into law on March 3, 1887. Cleveland had not only prevailed in his confrontation with the Senate over documents, but had helped lay the foundation for the repeal of a troubled, and troubling, statute.¹²⁹

Subsequent chapters explore the use of particular congressional powers to force the release of documents or testimony by executive officials: the appropriations power, impeachment, Senate advice and consent on appointments, congressional subpoenas, the contempt power, and House resolutions of inquiry. Other chapters deal with a particular statute (the “Seven Member Rule”), access by the General Accounting Office, testimony by White House officials, and claims by administrations that documents related to national security may be kept from Congress.

129. 24 Stat. 500 (1887). For more details on the conflict between Cleveland the Senate over documents, see Louis Fisher, “Grover Cleveland Against the Senate,” 7 *Capitol Studies* 11 (1979).

