

THE POLITICS OF EXECUTIVE PRIVILEGE

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THE CONTEMPT POWER

When the executive branch refuses to release information or allow officials to testify, Congress may decide to invoke its contempt power. Although the legislative power of contempt is not expressly provided for in the Constitution and exists as an implied power, as early as 1821 the Supreme Court recognized that without this power the legislative branch would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.”¹ If either House votes for a contempt citation, the President of the Senate or the Speaker of the House shall certify the facts to the appropriate U.S. Attorney, “whose duty it shall be to bring the matter before the grand jury for its action.”² Individuals who refuse to testify or produce papers are subject to criminal contempt, leading to fines of not more than \$100,000 and imprisonment up to one year.³

This chapter begins by covering contempt actions, from 1975 to 1981, against six Cabinet officers who refused to surrender documents to Congress: Secretary of Commerce Rogers C. B. Morton, HEW Secretary F. David Mathews, Secretary of State Henry Kissinger, HEW Secretary Joseph A. Califano, Jr., Secretary of Energy Charles W. Duncan, Jr., and Secretary of Energy James B. Edwards. With contempt citations looming, the two branches reached a compromise settlement that gave Congress access to the documents. The remainder of the chapter focuses on more recent contempt actions, including Secretary of the Interior James Watt, Administrator of the Environmental Pro-

1. *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 228 (1821).

2. 2 U.S.C. §194 (2000).

3. *Id.*, §192. As a result of sentencing classification of offenses, the original \$1,000 maximum in §192 has been increased to \$100,000 as a Class A misdemeanor. See also Todd D. Peterson, “Prosecuting Executive Branch Officials for Contempt of Congress,” 66 N.Y.U. L. Rev. 563 (1991), and John C. Grabow, *Congressional Investigations: Law and Practice* 86–99 (1988).

tection Agency Anne Gorsuch, White House Counsel Jack Quinn, and Attorney General Janet Reno.

The contempt action against Gorsuch revealed a weakness in the statutory procedures that Congress relies on for contempt, especially when the interests of the Justice Department are directly at stake. Citing an executive official for contempt requires the executive branch—through a U.S. Attorney—to bring the action. In the Gorsuch case, which challenged executive privilege doctrines developed by the Justice Department, action was not taken by the executive branch until a federal judge nudged the two parties toward an accommodation.

Actions from 1975 to 1981

From 1975 to the start of the Reagan administration, Congress several times threatened to hold executive officials in contempt for refusing to cooperate with congressional committees. In the face of statutory and constitutional reasons offered by the administration for withholding information from Congress, in the end the committees persisted and gained access to the requested documents. To minimize some of these disputes in the future, Congress amended statutory language to clarify the right of legislative committees to agency information.

Rogers C. B. Morton

A 1975 tug of war between the branches, with Congress the eventual victor, concerned reports compiled by the Department of Commerce identifying the U.S. companies that had been asked to join a boycott—organized by Arab nations—of companies doing business with Israel. Secretary of Commerce Rogers Morton refused to release the documents to a House Interstate and Foreign Commerce subcommittee, citing the following language from Section 7(c) of the Export Administration Act of 1969: “No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.”⁴

4. Letter of July 24, 1975, from Secretary Morton to John E. Moss, chairman of the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Relations, reprinted, “Contempt Proceedings Against Secretary of Commerce, Rogers

In his letter of July 24, 1975, to the subcommittee, Morton said he understood the need to provide Congress “with adequate information on which to legislate,” but concluded that “disclosing the identity of reporting firms would accomplish little other than to expose such firms to possible economic retaliation by certain private groups merely because they *reported* a boycott request, whether or not they complied with that request.”⁵ Morton’s response implied that whatever he gave the subcommittee would be shared with the public.

On July 28, the subcommittee issued a subpoena. In a letter to the committee on August 22, Morton again reiterated his refusal to release the documents, explaining that his decision was not based “on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress.”⁶ In other words, based on discretionary authority granted him by Congress, he would deny information to a legislative committee. He said he was prepared to make copies of the documents available, “subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved.”⁷

At subcommittee hearings on September 22, Chairman John Moss told Secretary Morton that Section 7(c) did not “in any way refer to the Congress nor does the Chair believe that any acceptable interpretation of that section could reach the result that Congress by implication had surrendered its legislative and oversight authority under Article I and the Rules of the House of Representatives.”⁸

Morton told Moss that he had been advised by Attorney General Edward Levi not to make the documents available to the committee.⁹ In a letter dated September 4, 1975, Levi had advised Morton that the subpoena did not override the confidentiality requirement of Section 7(c), and that the committee was not entitled to receive the information “unless, in exercising the discretion granted by §7(c), you determine that withholding them would be ‘contrary to the national interest.’”¹⁰ Levi cited some earlier opinions by Attorneys

C. B. Morton,” hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 153 (1975).

5. *Id.* at 153–54 (emphasis in original).

6. *Id.* at 158.

7. *Id.*

8. *Id.* at 4.

9. *Id.* at 6.

10. “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” at 173. Levi’s opinion is also reprinted at 43 *Op. Att’y Gen.* 29 (1975).

General that “proceeded under the general assumption—which I share—that statutory restrictions upon executive branch disclosure of information are presumptively binding even with respect to requests or demands of congressional committees.”¹¹ An argument of that nature will almost always lead to trouble for an executive official.

On November 11, the subcommittee voted 10 to 5 to find Morton in contempt for failure to comply with the subpoena of July 28.¹² The prospect of contempt proceedings provided sufficient incentive for Morton to release the material to the subcommittee.¹³ To avoid this problem in the future, Congress passed legislation in 1977 to specify that Section 7(c) does not authorize the withholding of information from Congress, and that any information obtained under the Export Administration Act “shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act which is submitted on a confidential basis unless the full committee determines that the withholding thereof is contrary to the national interest.”¹⁴

David Mathews

On the same day that the House Subcommittee on Oversight and Investigation decided to cite Morton for contempt, it met to consider a separate contempt citation against F. David Mathews, Secretary of the Department of Health, Education, and Welfare (HEW).¹⁵ The subcommittee, concerned that some hospitals were receiving Medicare payments automatically without meeting federal standards for the Medicare program, wanted letters Mathews had received from the Joint Commission on Accreditation of Hospitals (JCAH).¹⁶

Turning first to his agency general counsel for legal advice, Mathews was told not to release the documents to the subcommittee. In a letter of October

11. “Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton,” at 173–74.

12. *Id.* at 137.

13. 1975 CQ Almanac, at 343–44. See also 121 Cong. Rec. 3872–76, 36038–39, 40230, 40768–69 (1975).

14. 91 Stat. 241, §113 (1977), amending 83 Stat. 845, §7(c) (1969). Contempt actions against Morton, Duncan, Watt, and Gorsuch are also explored by Peter M. Shane, “Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information,” 44 *Adm. L. Rev.* 197, 202–12 (1992).

15. “Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.,” 95th Cong., 2d Sess. 55 (Comm. Print No. 95-76, 1978).

16. “Mathews Subpoena,” CQ Weekly Report, November 22, 1975, at 2527.

17, 1975, the general counsel limited his analysis to statutory construction. He interpreted a confidentiality section in the Social Security Act as “on its face an absolute pledge of confidentiality” because it contained no exceptions, either for Congress or the judiciary.¹⁷ On the same day that Mathews received this legal guidance, he wrote to the subcommittee that he had been advised that “it would be a violation of the law for me to furnish you these JCAH documents given in confidence.”¹⁸

The subcommittee subpoenaed the material, setting a deadline of 10 A.M. on November 12. On the day of the deadline, Attorney General Levi advised Mathews to produce the documents to the subcommittee. Levi read the statutory language “on a confidential basis” as placing in the HEW Secretary a discretionary authority to assure that the information is “not to be made public but may be conveyed to the Congress on proper request.”¹⁹ Levi’s analysis of the statutory provision “on its face” differed fundamentally from Mathew’s general counsel. Levi said this about the reliance on the confidentiality provision:

It seems to me unlikely that reliance included some belief that the information could be kept out of the hands of the Congress, since it was apparent upon the face of the statute, that Congress knew the existence of these documents and the identity of their sole possessor. It was obvious that the Congress could as easily subpoena the information from JCAH itself as from HEW. Or, to place the matter in its present context: It is apparent that if we now find, by reason of the statute, the Committee on Interstate and Foreign Commerce cannot obtain the information from HEW, they can immediately subpoena it from JCAH itself. There hardly seems any purpose to be served by such a circuitous procedure, and I think it would be unreasonable to assume that in enacting the vague and weak confidentiality provision of this statute, and referring specifically to JCAH, the Congress intended it.²⁰

Mathews, by making the information available to the subcommittee, removed the threat of a House vote on the contempt citation.²¹

17. *Id.* at 60–61 (letter of October 17, 1975, from Acting General Counsel John Barrett to Secretary Mathews).

18. *Id.* at 59–60 (letter of October 17, 1975, from Mathews to Rep. John E. Moss, Chairman of the Oversight and Investigations Subcommittee).

19. *Id.* at 56 (letter of November 12, 1975, from Levi to Mathews).

20. *Id.*

21. “Mathews Subpoena,” *CQ Weekly Report*, November 22, 1975, at 2527.

Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Secretary of State Henry Kissinger, directing him to provide: "All documents relating to State Department recommending covert action made to the National Security Council and the Forty Committee and its predecessor committees from January 20, 1961 to the present." The Forty Committee made recommendations to the President on specific covert actions.²²

The subpoenaed documents were referred to the White House for review. Attorney General Levi examined the documents and recommended that executive privilege be invoked. A letter to Kissinger on November 14 from White House Counsel Philip Buchan confirmed in writing the President's instruction to Kissinger to decline compliance with the subpoena.²³ At stake were ten documents, dating from 1962 through 1972, consisting of recommendations from State Department officials to the Forty Committee, its predecessor (the 303 Committee), or to the President.²⁴

When Kissinger failed to provide the documents by the deadline established in the subpoena (November 11), the committee met in open session on November 14 to determine what action to take against him. By a vote of 10 to 2, the committee recommended that the Speaker certify the committee report regarding Kissinger's contumacious conduct and proceed to a contempt citation.²⁵ Kissinger objected that the subpoena raised "serious questions all over the world of what this country is doing to itself and what the necessity is to torment ourselves like this month after month."²⁶

Acting on the advice of the Justice Department, President Gerald Ford invoked executive privilege on November 14 to keep the material from the committee. In a letter to the committee dated November 19 and released November 20, he said that release of the documents, which included "recommendations from previous Secretaries of State to previous Presidents," would jeopardize the internal decisionmaking process.²⁷ A few days later, in a letter to the committee, Ford cautioned that the dispute "involves grave mat-

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

23. "Kissinger's Tenure, U.S. Foreign Policy Are Clouded by House Panel's Citations," *Wall Street Journal*, November 17, 1975, at 5.

24. H. Rept. No. 94-693, at 13.

25. *Id.* at 2. See "Kissinger Contempt Citation," *CQ Weekly Report*, November 15, 1975, at 2506.

26. George Lardner, Jr., "Committee Votes Contempt Action for Kissinger," *Washington Post*, November 15, 1975, at A6.

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

ters affecting our conduct of foreign policy and raises questions which go to the ability of our Republic to govern itself effectively.”²⁸ Recognizing that Congress had constitutional responsibilities “to investigate fully matters relating to contemplated legislation,”²⁹ Ford told the committee that he directed Kissinger not to comply with the subpoena on the grounds of executive privilege because the documents “revealed to an unacceptable degree the consultation process involving advice and recommendations to Presidents Kennedy, Johnson, and Nixon.”³⁰ Ford pointed out that some of the documents concerned the National Security Council (NSC) and that, as of November 3, Kissinger was no longer his National Security Adviser.³¹ As to those materials, “there has been a substantial effort by the NSC staff to provide these documents.”³²

Kissinger dismissed the contempt proceeding “an absurdity”³³ and “frivolous,” warning that it would have adverse effects worldwide: “I profoundly regret that the committee saw fit to cite in contempt a secretary of state, raising serious questions all over the world what this country is doing to itself.”³⁴ On December 9, three committee members and two staff members visited the White House to determine which documents would be made available.³⁵ The next day, they received an oral briefing on the information that had been the target of the subpoena and an NSC aide read verbatim from documents concerning the covert actions.³⁶ On December 10, the committee chairman announced that the White House was in “substantial compliance” with the subpoena and that the contempt action was “moot.”³⁷

28. *Id.* at 1887.

29. *Id.*

30. *Id.* at 1889.

31. *Id.* at 1889–90.

32. *Id.* at 1890.

33. John M. Crewdson, “Three-Count Contempt Citation of Kissinger Defended in House,” *New York Times*, November 18, 1975, at 15.

34. Judy Gardner, “Pike Pushes Kissinger Contempt Citations,” *CQ Weekly Report*, November 22, 1975, at 2572.

35. “Contempt Vote on Kissinger is Linked to Data Ford Gives,” *New York Times*, December 10, 1975, at 12.

36. Pat Towell, “Contempt Action Against Kissinger Dropped,” *CQ Weekly Report*, December 13, 1975, at 2712.

37. *Id.* at 2711.

Joseph A. Califano, Jr.

In 1978, a subcommittee of the House Committee on Interstate and Foreign Commerce began an investigation into the manufacturing process used by drug companies to make generic drugs and to price brand-name drugs. The panel examined charges that drug companies merely put trade names on drugs manufactured by generic drug firms and sold them at much higher prices. One way to claim manufacturing responsibility was for a trade name company to put an employee in a generic drug house while the product was being manufactured. Rep. Al Gore explained the subcommittee's interest: "What we are seeking to do is to determine whether or not the public is being fleeced by a process whereby brand name drug companies are getting generic drugs and calling them special brand name drugs simply because they resort to the rule of having one of their employees stationed at the generic drug plant as the drugs are being made."³⁸

In order to learn more about this "man-in-the-plant" strategy, the subcommittee requested documents from the Department of Health, Education, and Welfare (HEW). The subcommittee had both oversight and legislative interests. A bill (H.R. 12980) had been introduced to limit or eliminate the man-in-the-plant practice.³⁹ In July, subcommittee chairman John Moss sent several letters to HEW Secretary Joseph A. Califano, Jr. for the documents. Califano's involvement added a rich irony. A few years earlier, when Moss sought trade secret data from the FTC, the dispute eventually went to court in the case of *Ashland Oil, Inc. v. FTC*, discussed in Chapter 5. The private attorney the subcommittee hired to represent its interest in court was Califano. He and Moss now found themselves on opposite sides of a similar dispute.

Failing to receive the material, the subcommittee agreed on July 27 to subpoena Califano. The full committee issued a subpoena dated August 4. In a memo of August 9, the Justice Department advised HEW that language in the Food, Drug, and Cosmetic Act, prohibiting FDA employees from disclosing trade secret information, justified the withholding of the material from the subcommittee. Section 301(j) of that statute prohibited the "using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority [of

38. "Contempt Proceedings Against Secretary of HEW Joseph A. Califano, Jr.," 95th Cong., 2d Sess. 42 (Comm. Print No. 95-76, 1978).

39. *Id.* at 1-2.

specified sections] of this title concerning any method or process which as a trade secret is entitled to protection.⁴⁰ The Justice Department memo argued:

Where an agency is barred by statute from disclosing certain information, congressional committees have no right to that information unless there is a clearly expressed congressional intent to exclude committee access from the general restriction on disclosure....

...Indeed, it is significant that section 301(j) explicitly provides for disclosure to one of the coordinate branches of government, *i.e.*, the courts, but makes no comparable provision for disclosure to committees of the Congress.⁴¹

This memo relied in part on Attorney General Levi's memo in 1975 on the Rogers Morton contempt action. If that position were to stand, Congress would lose access to documents covered by many other statutes. At that time, about a hundred statutory sections contained confidentiality provisions that could be interpreted by the executive branch to deny committees information they needed for legislation and oversight.⁴² The subcommittee therefore felt an obligation to challenge the Justice Department analysis. As Gore put it to Califano:

Mr. Secretary, in our society, laws, principles, and rights are often in conflict. We have two in conflict in this instance.

On the one hand we have article I of the U.S. Constitution. On the other we have section 301(j) of the Federal Food and Drug Cosmetic Act.

You have chosen to place more importance on section 301(j) of the Federal Food and Drug Cosmetic Act than on article I of the U.S. Constitution.⁴³

The purpose of Section 301(j), Gore said, was to prevent FDA employees from giving confidential trade secrets to competitor drug companies, not to keep from Congress information that is readily available to the HEW Secretary.⁴⁴ At a meeting with the subcommittee on August 16, Califano produced

40. 21 U.S.C. § 331(j) (1976).

41. *Id.* at 7, 10 (letter from Acting Attorney General Michael J. Egan to HEW Under Secretary Hale Champion).

42. *Id.* at 13 (memorandum of August 7, 1978 from Morton Rosenberg, Legislative Attorney for the Congressional Research Service, to Rep. John Moss).

43. *Id.* at 43.

44. *Id.*

some material but also stated that any documents relating to trade secret information and the manufacturing process would be blackened out because of the Justice Department legal analysis.⁴⁵ Chairman Moss made it clear that the blackened-out material did not comply with the subpoena.⁴⁶ Califano explained that his refusal to release the unredacted material had nothing to do with separation of powers or executive privilege, but rather with the statutory language that prohibited the release of trade secret information. Congress, he said, “has the power to change that statute.”⁴⁷ Califano said he had no question about the committee keeping information confidential: “Your record is impeccable.”⁴⁸

During the discussion with Califano, one subcommittee member asked whether the confrontation between the two branches could be averted if the subcommittee subpoenaed the companies directly for the manufacturing process information. Subcommittee counsel John McElroy Atkisson answered that it would be possible, and that the companies would have no legal ground for defying such subpoenas, but said it “flies in the teeth of the idea . . . that the Congress would exclude itself from the very same information conveniently in the hands of the Secretary which is only down the block here.”⁴⁹ Chairman Moss added that the Justice Department analysis opened “a pandora’s box” to a hundred similar statutes that could be used to deny information to Congress. Moreover, accepting Califano’s suggestion to rewrite the statute would take the committee from an option that enjoys privileged status in the House (a contempt citation) to the process of amending a statute, which is not privileged and could take a year or two.⁵⁰

Moss told Califano that he was “without legal justification in your refusal to comply with the subcommittee’s subpoena.”⁵¹ Califano persisted in his refusal, stating that he was “bound to follow the opinion of the Attorney General.”⁵² The subcommittee then voted 9 to 8 to find Califano in contempt for failing to comply with the subpoena.⁵³ A month later, the subcommittee

45. *Id.* at 4.

46. *Id.* at 5.

47. *Id.* at 18.

48. *Id.* at 48.

49. *Id.* at 49.

50. *Id.* at 49, 51.

51. *Id.* at 19.

52. *Id.*

53. *Id.* at 87. See “House Panel Votes Contempt Citation Against Califano,” *Wall Street Journal*, August 17, 1978, at 5; Mary Russell, “House Panel Backs Contempt Citation After Califano Refuses to Yield Data,” *Washington Post*, August 17, 1978, at A2; “Moss v. Califano” (editorial), *Washington Post*, August 18, 1978, at A18.

dropped the contempt action after Califano turned over the materials that had been subpoenaed. Califano explained that a further review by the department of the withheld material disclosed that some information had been “inappropriately deleted” from documents given to the panel.⁵⁴

On August 17, the day after the subcommittee voted for contempt, Califano asked the Justice Department to further consider its interpretation of Section 301(j). On September 8, Attorney General Griffin Bell cited additional legislative history in affirming the position of Acting Attorney General Michael J. Egan that the section prohibited Califano from furnishing trade secret data to Congress or its committees.⁵⁵ Notwithstanding that legal analysis, Califano gave the disputed material to the subcommittee.

Charles W. Duncan, Jr.

On April 2, 1980, President Carter imposed a fee on imported oil and gasoline in an effort to reduce domestic consumption. A subcommittee of the House Government Operations Committee requested in writing, on April 8, certain categories of material from the Department of Energy (DOE). With no documents delivered, the subcommittee held a hearing on April 16 to investigate the delay. Thomas Newkirk, the department’s Deputy General Counsel for Regulation, told the subcommittee that he was “not prepared to submit the documents at this time” because White House Counsel Lloyd Cutler was reviewing a pile of documents “between a foot and 18 inches high.”⁵⁶ Newkirk thought the documents might be subject to the claim of executive privilege because they revealed the “deliberative process underlying the President’s decision to impose the gasoline conservation fee.”⁵⁷ The subcommittee voted unanimously to instruct Newkirk to deliver the documents by 5 o’clock that evening.⁵⁸

After the department let the deadline slip, the subcommittee voted unanimously on April 22 to subpoena the materials from Energy Secretary Charles W. Duncan, Jr. On the following day, the subcommittee received 28 docu-

54. “House Unit Ends Bid To Cite for Contempt HEW Chief Califano,” *Wall Street Journal*, September 22, 1978, at 10.

55. 43 Op. Att’y Gen. 116 (1978).

56. “The Petroleum Import Fee: Department of Energy Oversight,” hearings before a Subcommittee of the House Government Operations Committee, 96th Cong., 2d Sess. 3, 27 (1980).

57. *Id.* at 5.

58. *Id.* at 35. See Richard L. Lyons, “On Capitol Hill,” *Washington Post*, April 18, 1980, at A5.

ments but also a letter from Duncan explaining that to the extent the subcommittee request involved “deliberative materials underlying a major Presidential decision,” it would “seriously undermine the ability of the Chief Executive and his Cabinet Officers to obtain frank legal and policy advice from their advisors.”⁵⁹ Newkirk appeared before the subcommittee on April 24 to state that the department would not comply in full with the subcommittee’s request of April 8, but did not rest his case on executive privilege.⁶⁰ By a vote of 9-0, the subcommittee subpoenaed Duncan to appear before the subcommittee on April 29 and bring the requested documents.⁶¹

In the face of these bipartisan, unanimous subcommittee votes, Duncan appeared at the April 29 hearing to tell the subcommittee: “I must decline to turn over the documents and I do not have them with me at this time.”⁶² However, he also offered to allow the subcommittee chairman and the ranking minority member to review the documents “in confidence to assist in defining that request.”⁶³ Rep. Paul McCloskey (the ranking minority member) objected that “the idea that two members of a nine-member committee should be trusted and some should not be is repugnant to the rules of the House.”⁶⁴ After further efforts to reach an accommodation collapsed, the subcommittee voted 8 to 0 to hold Duncan in contempt for not complying with the April 24 subpoena.⁶⁵

The subcommittee held another hearing on May 14, with Secretary Duncan again in attendance. Subcommittee chairman Toby Moffett announced that “at long last the subcommittee has been provided with every document it feels it needs to conduct its inquiry. Subcommittee members and staff have seen every document specifically demanded under the subpoena we issued April 24, and any document we deemed useful to this investigation has now been produced.”⁶⁶ On the previous day, a federal district court had struck down Carter’s April 2 proclamation as invalid, either under the President’s inherent

59. “The Petroleum Import Fee,” hearings, at 100.

60. *Id.* at 98–100.

61. *Id.* at 116–17; Richard D. Lyons, “House Unit Subpoenas Duncan,” *New York Times*, April 25, 1980, at D3.

62. “The Petroleum Import Fee,” hearings, at 122.

63. *Id.* at 123.

64. *Id.*

65. *Id.* at 139. See “House Unit Cites Duncan For Gas-Tax Contempt,” *New York Times*, April 30, 1980, at D18.

66. “The Petroleum Import Fee,” hearings, at 142. See also Dale Tate, “President’s Oil Import Fee Assailed in Congress, Court,” *CQ Weekly Report*, May 17, 1980, at 1308; Elder Witt, “Carter Foiled in First Tilt With Executive Privilege,” *CQ Weekly Report*, May 17, 1980, at 1352.

power or under statutory authority.⁶⁷ A White House spokesman said that he didn't think executive privilege was ever formally asserted, either by President Carter or Secretary Duncan, although there was consideration of doing so.⁶⁸ In any event, the subcommittee received the material it requested.⁶⁹

James B. Edwards

The following year, at the start of the Reagan administration, Secretary of Energy James B. Edwards narrowly avoided a contempt citation from the House Government Operations Committee. The dispute involved legislative access to documents regarding contract negotiations between the Energy Department and the Union Oil Company to build an oil shale plant in Colorado. Committee members were concerned that the department was moving too hastily in awarding billions of dollars in federal subsidies to major oil companies, particularly prior to the Reagan administration's plans to create a Synthetic Fuels Corporation.⁷⁰ Failing to obtain the requested materials, the Environment, Energy and Natural Resources Subcommittee voted 6 to 4 on July 23 to hold Edwards in contempt.

The dispute was not merely executive-legislative. The administration was also split. Edwards wanted to sign the contract, but OMB Director David Stockman opposed federal subsidies to the synthetic fuels program and had taken steps to block the contract with Union Oil.⁷¹ The full committee was scheduled to vote on the contempt citation on the morning of July 30, 1981. Edwards said he would not produce the documents until the contract between the Energy Department and Union Oil had been signed. President Reagan agreed to the project and officials from the Energy Department and Union signed the contract. At that point, thirteen boxes of documents on the contract negotiations were delivered to the committee.⁷²

67. *Independent Gasoline Marketers Council v. Duncan*, 492 F.Supp. 614 (D.D.C. 1980).

68. "Executive Privilege, Revisited," CQ Weekly Report, June 21, 1980, at 1753.

69. The subcommittee's confrontation with Secretary Duncan, including correspondence, is discussed in H. Rept. No. 96-1099, 96th Cong., 2d Sess. 18-30, 33-56 (1980).

70. "DOE's Enforcement of Alleged Pricing Violations by the Nation's Major Oil Companies," hearing before a Subcommittee of the House Committee on Government Operations, 97th Cong., 1st Sess. 2, 57-60 (1981).

71. Martin Schram, "Reagan Overrides Stockman, Backs Edwards on Synfuel," *Washington Post*, July 30, 1981, at A2.

72. Andy Plattner, "Edwards' Contempt Citation Headed Off by Approval of Synthetic Fuel Contract," CQ Weekly Report, August 1, 1981, at 1425.

James Watt

In 1981, Interior Secretary James Watt refused to give a House subcommittee 31 documents relating to a reciprocity provision in the Mineral Lands Leasing Act. The reciprocity provision involved Canada. Watt based his refusal on the judgment of Attorney General William French Smith that the documents were “either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations.”⁷³ Smith’s decision led to President Reagan’s first claim of executive privilege.⁷⁴ The confrontation escalated to a recommendation by the House Committee on Energy and Commerce to cite Watt for contempt.

Attorney General Smith insisted that “the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interests when specific legislative proposals are in question.”⁷⁵ Congressional oversight, he said, “is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws.”⁷⁶ That argument lacked historical and legal support. The first major investigation by Congress—of General St. Clair’s defeat—was not conducted for the purpose of legislation. The Supreme Court recognizes that the power of Congress to conduct investigations “comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.”⁷⁷ Courts have consistently held that the investigative power is available not merely to legislate or when a “potential” for legislation exists, but even for pursuits down blind alleys.⁷⁸ Moreover, Congress could easily neutralize Smith’s argument by introducing a bill whenever it wanted to conduct oversight.

Smith’s second major argument for withholding the documents was based on the need to protect the deliberative process, especially “predecisional, de-

73. 43 Op. Att’y Gen. 327, 328 (1981). See also “Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior,” prepared for the use of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. 2 (Comm. Print, Nov. 1981) (hereafter “Executive Privilege: Watt”).

74. Martha M. Hamilton, “Executive Privilege Invoked to Back Watt,” *Washington Post*, October 15, 1981, at D12.

75. 43 Op. Att’y Gen. at 331.

76. *Id.*

77. *Watkins v. United States*, 353 U.S. 178, 187 (1957).

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

liberative memoranda.” Even after decisions have been made, disclosure of documents to Congress “could still deter the candor of future Executive Branch deliberations.”⁷⁹ While Exemption 5 of FOIA exempts from public disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,”⁸⁰ Congress specifically provided in FOIA that the listed exemptions are “not authority to withhold documents from Congress.”⁸¹ Congress has often gained access to predecisional, deliberative memoranda in the executive branch.⁸²

As a third point, Smith argued that the documents “relate to sensitive foreign policy considerations.”⁸³ However, foreign policy is not an exclusive power of the President or the executive branch. In seeking the documents from Watt, Congress had a constitutionally-based need for the information: its power to “regulate Commerce with foreign Nations.”⁸⁴ Throughout its history, Congress has legislated on international trade, foreign assistance, arms sales, and other matters of foreign policy.

In response to Smith’s legal position, the subcommittee prepared a contempt citation against Watt.⁸⁵ Some of the documents, during this period, were shared with the subcommittee. On February 9, 1982, the subcommittee voted 11 to 6 to hold Watt in contempt.⁸⁶ By that time, all but seven of the 31 subpoenaed documents had been given to the subcommittee.⁸⁷ On February 25, the full committee voted 23 to 19 for contempt.⁸⁸ White House Counsel Fred Fielding offered to brief committee members on the seven documents, but lawmakers rejected his offer.⁸⁹

79. 43 Op. Att’y Gen. at 330.

80. 5 U.S.C. §552(b)(5) (2000).

81. *Id.* at §552(d).

82. Memorandum from House General Counsel Stanley M. Brand, November 10, 1981, to Rep. John Dingell, in “Executive Privilege: Watt,” at 7–8.

83. 43 Op. Att’y Gen. at 328.

84. U.S. Const., art. I, §8, cl. 3.

85. “House Subcommittee Moving to Cite Interior Secretary Watt for Contempt,” *Washington Post*, November 27, 1981, at A9.

86. William Chapman, “House Subcommittee Votes to Cite Watt for Contempt,” *Washington Post*, February 10, 1982, at A1.

87. “Watt Says Congress Likely to Hold Him in Contempt,” *Washington Post*, February 11, 1982, at A9.

88. Philip Shabecoff, “House Panel Finds Watt in Contempt,” *New York Times*, February 26, 1982, at D16.

89. William Chapman, “Hill Panel Votes to Cite Watt for Contempt,” *Washington Post*, February 26, 1982, at A5.

Although Watt said he would rather go to jail than surrender the remaining materials,⁹⁰ those documents were reviewed by subcommittee members. The administration established several conditions. The documents would be delivered to a room in the Rayburn House Office Building, where committee members would have four hours to examine the documents and take notes. Lawmakers could not photocopy the documents or show them to committee staff. Also, the committee agreed not to release any information that might harm the national interest in dealing with Canada.⁹¹

A newspaper account reports that the ranking Republican on the subcommittee, Marc L. Marks, concluded there was “nothing sensitive in these documents. Watt would have given over the papers had the White House not intervened.”⁹² During a committee meeting, Marks attributed the impasse with Watt to “an irrational decision made by the White House, put into effect by a President who I cannot believe understood the ramifications of what he was doing.”⁹³ Marks regretted the decision to exclude staff, calling it “illegal because...the first person that we are going to turn to that everybody expects us to turn to to discuss what the papers show, will naturally be our staff person.”⁹⁴ Rep. Mike Synar pointed out that “23 members of the Interior Department and other departments saw these documents. We found in one case it was a law student, an intern at the time, who later became an official.”⁹⁵

Gorsuch Contempt

The experience with James Watt should have given the executive branch a better appreciation of legislative prerogatives. It was not to be. Senior attorneys in the Justice Department decided that their theory of executive privi-

90. Eleanor Randolph, “Watt Says He’d Rather Go to Jail Than Give Papers to Subcommittee,” *Los Angeles Times*, February 11, 1982, at 10.

91. “Contempt of Congress,” hearings before the House Committee on Energy and Commerce, 97th Cong. 385–94 (1982); H. Rept. No. 898, 97th Cong., 2d Sess. (1982); Margot Hornblower, “White House Avoids Hill Showdown Over Documents,” *Washington Post*, March 17, 1982, at A5; Philip Shabecoff, “Data That Caused Citing of Watt Will Be Provided to House Group,” *New York Times*, March 17, 1982, at A21.

92. Margot Hornblower, “White House Avoids Hill Showdown Over Documents,” *Washington Post*, March 17, 1982, at A5.

93. “Contempt of Congress,” hearings, at 386.

94. *Id.* at 389.

95. *Id.*

lege, having failed spectacularly with the Watt documents, had been correct all along. They waited for an opportunity to try it again, this time with perhaps greater success. Their second attempt came at great cost to many officials in the executive branch.

When the oversight subcommittee of the House Public Works Committee sought documents on the EPA's enforcement of the "Superfund" program, it was advised by the agency that there would be no objection "so long as the confidentiality of the information in those files was maintained."⁹⁶ The subcommittee had been investigating the \$1.6 billion program established by Congress to clean up hazardous-waste sites and to prosecute companies responsible for illegal dumping.

Shortly thereafter the Reagan administration decided that Congress could not see documents in active litigation files. The administration's reversal may have been triggered by subpoenas from other committees for comparable documents. Another oversight panel from the House Energy and Commerce Committee wanted access to the same type of information. The administration expressed concern that executive branch control would be undermined by these multiple requests.⁹⁷ Both oversight subcommittees had reason to suspect that the major chemical companies were not paying their full share of the costs, requiring taxpayers to pick up the balance.⁹⁸

EPA Administrator Anne Gorsuch, acting under instructions from President Reagan (meaning the Justice Department), refused to turn over "sensitive documents found in open law enforcement files." Reagan's memorandum to her, dated November 30, 1982, claimed that those documents represented "internal deliberative materials containing enforcement strategy and statements of the government's positions on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites" by the EPA or the Department of Justice.⁹⁹ On December 2, the administration withheld 64 documents from the subcommittee.¹⁰⁰ The administration's initial, discredited position in the Watt dispute had not changed. It still assumed that since documents shared with Congress might find their way into the public realm, they should not be shared at all. Following that logic, congressional oversight would have to be put on hold for years until the government completed its enforcement and litigation actions.

96. H. Rept. No. 968, 97th Cong., 2d Sess. 11 (1982).

97. *Id.* at 15, 21.

98. *Id.* at 7-9.

99. *Id.* at 42, 76.

100. 8 Op. O.L.C. 101, 107 (1984).

By a vote of 9 to 2, a subcommittee of the House Public Works Committee decided to cite Gorsuch for contempt.¹⁰¹ The full committee did likewise, after rejecting a Justice Department proposal to give briefings on the contents of the documents.¹⁰² The House of Representatives voted 259 to 105 to support the contempt citation. Although partisan overtones were present, 55 Republicans joined 204 Democrats to build the top-heavy majority.¹⁰³ Pursuant to the statutory procedures for contempt citations, the Speaker certified the facts and referred them to the U.S. Attorney for presentation to a grand jury.

The Justice Department, anticipating the House vote, moved quickly: "Immediately after the House vote and prior to the delivery of the contempt citation,"¹⁰⁴ the department chose not to prosecute the case. Instead, it asked a district court to declare the House action an unconstitutional intrusion into the President's authority to withhold information from Congress.¹⁰⁵ U.S. Attorney Stanley S. Harris, responsible for bringing the case to the grand jury, listed his name on the Justice Department complaint and advised Congress that "it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved."¹⁰⁶

The Justice Department faced a conflict of interest. First it had advised Gorsuch to withhold the documents, and now it decided not to prosecute her for adhering to the department's legal analysis. In court, the department argued that the contempt action marked an "unwarranted burden on executive privilege" and an "interference with the executive's ability to carry out the laws." Counsel for the House of Representatives urged the court not to intervene, requesting it to dismiss the case.¹⁰⁷

The court dismissed the government's suit on the ground that judicial intervention in executive-legislative disputes "should be delayed until all possibilities for settlement have been exhausted."¹⁰⁸ The court urged both parties

101. Mary Thornton, "House Subcommittee Votes to Cite EPA Administrator for Contempt," *Washington Post*, December 3, 1982, at A6.

102. 8 Op. O.L.C. at 107.

103. 128 Cong. Rec. 31746-76 (1982).

104. Stanley M. Brand and Sean Connelly, "Constitutional Confrontations: Preserving Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials," 36 *Cath. U. L. Rev.* 71, 79 (1986).

105. Dale Russakoff, "Prosecution of Gorsuch Ruled Out," *Washington Post*, December 12, 1982, at A1.

106. H. Rept. No. 98-323, 98th Cong., 1st Sess. 49 (1983).

107. Al Kamen, "Attacked by Lawmakers, Executive Branch Defends Privilege," *Washington Post*, February 2, 1983, at A3.

108. *United States v. U.S. House of Representatives*, 556 F.Supp. 150, 152 (D.D.C. 1983).

to devote their energies to compromise and cooperation, not confrontation.¹⁰⁹ After the court's decision, which the Justice Department chose not to appeal, the administration agreed to release "enforcement sensitive" documents to the House Public Works Committee, beginning with briefings and redacted copies and eventually ending with the unredacted documents, which could be examined by committee members and up to two committee staff persons.¹¹⁰

The House Energy and Commerce Subcommittee on Oversight and Investigation, chaired by Rep. John Dingell, refused to accept an agreement with all these hoops. The documents covered by the subpoena were to be delivered to the subcommittee. There were to be no briefings and no multi-stage process of redacted documents leading to unredacted documents. The subcommittee agreed to handle any "enforcement sensitive" document in executive session, giving it confidential treatment. Even so, the subcommittee reserved for itself the right to release such documents or use them in public session, after providing "reasonable advance notice" to the EPA. If the agency did not agree, the documents would not be released or used in public session unless the chairman and ranking minority member concurred. If they did not concur, the subcommittee could vote on the release and use in public session. With regard to staff access, that would be decided by the chairman and ranking minority member.¹¹¹

One of the casualties of the House investigation into the Superfund program was former EPA official Rita M. Lavelle. The House Energy and Commerce Committee voted unanimously to find her in contempt for defying a committee subpoena to testify.¹¹² The House voted 413 to zero to hold her in contempt.¹¹³ She was sentenced in 1984 to six months in prison, five years' probation, and a fine of \$10,000 for lying to Congress about her management of the Superfund program. She was the only EPA official indicted in the scandal, but more than 20 other top officials, including Anne Gorsuch, left the

109. *Id.* at 153.

110. "Memorandum of Understanding Between the Committee on Public Works and Transportation and the Department of Justice Concerning Documents Subpoenaed from Environmental Protection Agency," February 18, 1983; H. Rept. No. 323, at 18–20. For further details on the Gorsuch affair, see Ronald L. Claveloux, "The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy," 1983 *Duke L. J.* 1333 (1983).

111. "EPA Document Agreement," *CQ Weekly Report*, March 26, 1983, at 635.

112. Cass Peterson, "House Panel Votes to Cite Rita Lavelle," *Washington Post*, April 27, 1983, at A3; Joseph A. Davis, "House Panel Votes to Cite Rita Lavelle for Contempt," *CQ Weekly Report*, April 30, 1983, at 839.

113. 129 *Cong. Rec.* 12717–25 (1983).

EPA amid allegations of perjury, conflict of interest, and political manipulation of the agency.¹¹⁴

Following the Gorsuch contempt, the Office of Legal Counsel wrote an opinion on May 30, 1984, concluding that as a matter of statutory interpretation and separation of powers analysis, a U.S. Attorney is not required to bring a congressional contempt citation to a grand jury when the citation is directed against an executive official who is carrying out the President's decision to invoke executive privilege.¹¹⁵ The memo regarded the threat of criminal prosecution from a congressional contempt citation as an "unreasonable, unwarranted, and therefore intolerable burden" on the President's exercise of constitutional authority, pointing out that Congress "has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks."¹¹⁶ If an administration defies a committee subpoena, what effective methods exist other than contempt? The memo cautioned that its analysis was "limited to the unique circumstances that gave rise to these questions late in 1982 and early 1983,"¹¹⁷ and suggested that "prudence" should limit the conclusions in the memo "to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis."¹¹⁸

Travelgate and Jack Quinn

The House Committee on Government Reform and Oversight conducted an investigation into the 1993 firings of seven Travel Office employees in the Clinton White House. Although President Clinton had full authority to fire the employees, the manner of their discharge led to investigations by Congress, the General Accounting Office, the press, and the independent counsel. On May 19, 1993, they were dismissed with the charge that they followed poor management practices. Dee Dee Myers, Clinton's press secretary, also stated that the FBI had been asked to examine the records in the Travel Office, suggesting that the employees might have been guilty of criminal action as well.

114. "Burford Resigns From EPA Post Under Fire," 1983 CQ Almanac 332–35; Al Kamen, "Lavelle Gets Prison Term, \$10,000 Fine," *Washington Post*, January 10, 1984, at A2.

115. 8 Op. O.L.C. 101 (1984).

116. *Id.* at 102.

117. *Id.*

118. *Id.* at 103.

The way the White House replaced the seven employees soon raised charges of nepotism and cronyism.¹¹⁹

The House Committee on Government Reform and Oversight received the documents it requested from the Justice Department and other federal agencies, but in September 1995 the White House informed the panel that President Clinton might claim executive privilege and refuse to turn over some or all of 907 documents.¹²⁰ In January 1996, the committee subpoenaed the records from the White House, and in May it announced that it would hold the White House in contempt unless it turned over the materials.¹²¹ White House Counsel Jack Quinn drafted a remarkably insolent letter and sent it to Committee Chairman William F. Clinger, Jr.: “Let me be blunt: this threat can only be characterized as a desperate political act meant to resuscitate interest in a story that long ago died.” Quinn objected to a legislative inquiry that had become, he said, “a tiresome fishing expedition” and a “wild good chase.”¹²² On May 9, the committee voted 27 to 19 to hold Quinn in contempt as well as two others: former White House Director of Administration David Watkins and his aide, Matthew Moore.¹²³

Clinger offered to delay the next step—sending the contempt citation to the House for a vote—to leave open the possibility of an accommodation with the White House.¹²⁴ He offered to have Quinn come to the committee before floor action.¹²⁵ Thereafter, the administration released about 1,000 pages of documents to the committee just hours before the House was scheduled to take up the contempt vote.¹²⁶

119. Louis Fisher, *Constitutional Conflicts between Congress and the President* 78–79 (1997 ed).

120. Ann Devroy, “Clinton May Assert Executive Privilege,” *Washington Post*, September 8, 1995, at A11.

121. Susan Schmidt, “House Prober Presses Demand for Travel Office Documents,” *Washington Post*, May 3, 1996, at A2.

122. “Correspondence Between the White House and Congress in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore,” a report by the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 409 (Comm. Print, May 1996).

123. Business Meeting in the Proceedings Against John M. Quinn, David Watkins, and Matthew Moore,” House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 88 (Comm. Print, June 1996) (hereafter “Business Meeting: Quinn”); R. H. Melton, “House Panel Votes for Contempt Citation,” *Washington Post*, May 10, 1996, at A4.

124. “Panel Moves to Gain Travel Office Files,” *New York Times*, May 10, 1996, at A26.

125. “Business Meeting: Quinn,” at 46.

126. Eric Schmitt, “White House Gives Committee More Papers in Dismissal Case,” *New York Times*, May 31, 1996, at A20; Ann Devroy and John E. Yang, “White House Gives

Contempt Action against Reno

Late in 1997, Attorney General Janet Reno responded to a subpoena from the House Government Reform and Oversight Committee, chaired by Rep. Dan Burton. She declined to give the committee a memorandum sent to her by FBI Director Louis J. Freeh, who had urged the appointment of an independent counsel to investigate allegations of criminal conduct in campaign finance. Justice Department officials said that both Reno and Freeh advised the committee that it was inappropriate to provide a congressional committee with a departmental document that included analysis about an ongoing investigation. They agreed on the need to withhold the document because of “the need to protect the confidentiality and independence of an ongoing investigation and our prosecutorial decisionmaking.”¹²⁷

On July 27, 1998, the Justice Department refused to turn over two internal documents that recommended the appointment of an independent counsel in the campaign finance investigation. The House committee had subpoenaed a 27-page memo to Reno by Freeh and a 94-page report by Charles G. LaBella, former head of the department’s campaign finance task force. Instead of turning over the two documents, the Justice Department offered to brief the committee members on the contents of the memos. Burton rejected the proposal.¹²⁸

After the department’s refusal to release the documents, the House committee voted 24 to 19 on August 6 to cite Reno for contempt. She warned that release of the documents would “provide criminals, targets and defense lawyers alike with a road map to our investigations.”¹²⁹ Again, this response assumed that whatever the committee received, so would the public. Reno offered to brief the committee in public session “on the legal rationale” presented in the two memos, but only after she had made a decision on whether to seek an independent counsel.¹³⁰ At a news conference, she said that for a

Congress 1,000 Pages of Travel Office Papers,” *Washington Post*, May 31, 1996, at A10. The contempt actions against Quinn, Watkins, and Moore are summarized in H. Rept. No. 104-598, 104th Cong., 2d Sess. (1996).

127. Roberto Suro, “Reno Declines To Hand Over Freeh Memo,” *Washington Post*, December 9, 1997, at A6.

128. Roberto Suro, “Justice Dept. Defies House Subpoena for Campaign Finance Probe Memos,” *Washington Post*, July 28, 1998, at A8.

129. George Lardner, Jr., “House Panel Votes to Hold Reno in Contempt,” *Washington Post*, August 7, 1998, at A1.

130. *Id.* at A21.

committee to ask for an internal department document before she reached a decision “is a form of political tampering that no prosecutor in America can accept.”¹³¹

The following month, Reno gave Chairman Burton access to heavily redacted versions of the memos, leaving him roughly thirty percent to read.¹³² Burton asked Reno to allow three former prosecutors and a former White House deputy counsel to review the memos and give their opinions to him and to the House Republican leadership. She rejected that proposal.¹³³ She did agree, however, to allow six other Republican members of the committee to view the redacted copy, but insisted that Burton withdraw the subpoena and drop the contempt citation.¹³⁴ After these attempts to find common ground failed, Burton moved forward with the contempt citation. Although the committee recommended holding Reno in contempt, the matter was not taken to the floor for House action.

As part of the impeachment action against President Clinton, members of the House Judiciary Committee were allowed to read the Freeh and LaBella documents. On December 2, 1998, U.S. District Judge Norma Holloway Johnson granted the committee limited access to the two memos.¹³⁵ On June 6, 2000, the House Government Reform Committee released the Freeh and LaBella memos along with other Justice Department documents related to the refusal to appoint an independent counsel to investigate campaign finance issues of the 1996 presidential election.¹³⁶ WorldNetDaily made the two memos available to the general public on its website (www.worldnetdaily.com).

131. Sumana Chatterjee, “Panel Steps Up Confrontation Over Campaign Finance Memos, Voting to Cite Reno for Contempt,” *CQ Weekly Report*, August 8, 1998, at 2175. For background documents on the contempt citation against Reno, see “Contempt of Congress,” report by the House Committee on Government Reform and Oversight, H. Rept. No. 105-728, 105th Cong., 2d Sess. (September 17, 1998).

132. Sumana Chatterjee, “Reno Still Faces Citation for Contempt,” *CQ Weekly Report*, September 5, 1998, at 2330.

133. Amy Keller, “Burton Pushes Contempt Against Reno,” *Roll Call*, September 21, 1998, at 3.

134. “The Contempt Citation” (editorial), *Washington Post*, September 22, 1998, at A16.

135. Robert Suro and Ruth Marcus, “Justice Memos May Yield Very Little,” *Washington Post*, December 3, 1998, at A18.

136. George Lardner, Jr., “Memos: Reno Was Warned,” *Washington Post*, June 7, 2000, at A1.

Committee subpoenas and contempt citations have been effective instruments for gaining access to executive branch documents that are initially withheld. The pressure that builds from these two techniques generally results in the administration offering accommodations that satisfy legislative needs. Although both branches at times seek assistance from the courts, the general message from federal judges is that an agreement hammered out between the two branches is better than a directive handed down by a court. The contempt actions discussed in this chapter all resulted in access to disputed documents.

Executive-legislative conflicts offer several lessons about access to information. Congress has as much right to agency documents for oversight purposes as it does for legislation. Executive claims of “deliberative process,” “enforcement sensitive,” “ongoing investigation,” or “foreign policy considerations” have not been, in themselves, adequate grounds for keeping documents from Congress. On the issue of withholding information from Congress, there are often sharp differences within an administration, especially between the Justice Department and the agencies.

Statutory language that authorizes withholding information from the public is not a legitimate reason for withholding information from Congress. Sharing sensitive information with congressional committees is not the same as sharing information with the public. Courts assume that congressional committees will exercise their powers responsibly. Legislative committees have demonstrated that they have reliable procedures for protecting confidentiality. Finally, congressional capacity to subpoena agency documents from private organizations is not an adequate substitute for receiving them directly from the agency.