

THE POLITICS OF EXECUTIVE PRIVILEGE

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HOUSE RESOLUTIONS OF INQUIRY

Another congressional procedure used to obtain information from the executive branch is the House resolution of inquiry. It is defined as “a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch.”¹ These resolutions gather only facts, not opinions. They may not be used to require new investigations by the executive branch.

Resolutions of inquiry are often much more effective than one would conclude from formal committee and floor action. There are many examples where a committee reports a resolution adversely and succeeds in tabling it on the floor, making it appear that the sponsor was defeated on all fronts. Yet these committee and floor actions are frequently justified because the administration has released the necessary documents and satisfied the resolution in full.

There is no counterpart in current Senate practice for resolutions of inquiry, although there are precedents dating to the end of the 19th century and an effort in 1926.² Nothing prevents the Senate from passing such resolutions, but apparently the Senate is satisfied with the leverage it has through other legislative means, including the nomination process and Senate “holds.” Unlike the House, the Senate has no special practices for expediting consideration through committee discharge or non-debatable motions, and resolutions are not generally privileged for immediate consideration.³

1. Deschler's Precedents, H. Doc. No. 94-661, 94th Cong., 2d Sess., vol. 7, ch. 24, §8.

2. Riddick's Senate Procedure, S. Doc. No. 101-28, 101st Cong., 2d Sess. 799, 1205 (1992). The effort in 1926 was challenged on a point of order. When the sponsor of the resolution asked for unanimous consent to proceed, there was objection. 67 Cong. Rec. 2658-59, 2661-62, 2663.

3. Riddick's Senate Procedure, at 1204.

Origins of the Procedure

From its very first years, Congress requested information from the executive branch to further legislative inquiries. Examples already covered include the 1790 investigations into Robert Morris's term as Superintendent of Finance and the annuity given to Baron von Steuben. Those investigations, however, were conducted under the implied authority of Congress to function as the "Grand Inquest." A resolution of inquiry is different. Under it, the House operates by a special *rule* that grants privileged status to a lawmaker's motion to obtain documents from the executive branch. Early House rules contained no procedure for requesting information from the President or Cabinet officials.⁴

In 1820, the House clarified its rules for requesting information from the executive branch. There was concern that the House had not been acting with sufficient consideration before making such requests. In offering an amendment to House rules on December 12, 1820, Rep. Charles Rich noted that "six clerks had been constantly employed, from the close of the last session to the present time, in collecting the materials to enable one of the departments to answer a call at the last session."⁵ Rich wanted requests for information from the President or departmental heads to "lie upon the table one day for consideration, unless otherwise ordered, with the unanimous consent of the House."⁶ On the following day, the House agreed to his language.⁷

Two years later, the House made another change to its rules governing resolutions of inquiry, requiring not merely a day's delay but also committee consideration: "And shall be taken up for consideration on the next day, in the order in which they were presented, immediately after reports are called for from select committees, and, when adopted, the Clerk shall cause the same to be delivered."⁸ The House rule now read:

A proposition, requesting information from the President of the United States, or directing it to be furnished by the head of either of the Executive Departments, or by the Postmaster General, shall lie on the table one day for consideration, unless otherwise ordered by the

4. House rules adopted in 1789 made no mention of legislative procedures for obtaining executive documents; 1 *Journal of the House of Representatives* 8–14 (1826). Nor were such procedures in place in 1794; 4 *Annals of Cong.* 875–82.

5. *Annals of Cong.*, 16th Cong., 2d Sess. 608 (1820).

6. *Id.* at 607.

7. *Id.* at 641.

8. *Annals of Cong.*, 17th Cong., 1st Sess. 748 (1822).

unanimous consent of the House; and all such propositions shall be taken up for consideration in the order they were presented, immediately after reports are called for from select committees; and, when adopted, the Clerk shall cause the same to be delivered.⁹

That language survived until 1879, when the House Rules Committee reported language to eliminate the need for lawmakers to seek unanimous consent from the chamber in order to seek executive documents. Speaker Samuel J. Randall explained that it was “very seldom that it is in order for a member to offer a resolution calling for information; that is the difficulty. Any one member at any time may prevent a call for information.”¹⁰ Agreeing with Randall that procedures had to be changed to permit easier access to executive documents, Rep. Roger Q. Mills nevertheless objected to the requirement for committee referral: “What is the necessity for having a resolution calling for information from one of the Executive Departments referred to a committee? What is the use of my offering a resolution of that kind and having it referred to a committee and there buried?”¹¹

Rep. James Garfield explained that the purpose of committee referral was to avoid the “constant danger of gentlemen upon this floor duplicating calls for information. Some one may want some information and offer a resolution calling for it and it passes by unanimous consent, and the same thing may have been asked already by somebody else and nobody has paid any attention to the fact that the same thing has already been called for...” Garfield thought it better that legislative requests for information “be referred to the committees, in order that they may not be duplicated so as to put the Departments to the necessity of employing a large number of clerks for a useless purpose.”¹²

The House Committee on Rules recommended language that gave committees of jurisdiction full discretion over resolutions referred to them: “Under this call resolutions for information from the Executive Departments of the Government may be offered for reference to the appropriate committees, such committees to have the right to report at any time.”¹³ The language “under this call” referred to a procedure that required resolutions calling for executive information to be offered only during the morning hour of every Monday.¹⁴

9. *Id.* at 756 (the language on this page has “when appointed” rather than “when adopted,” as originally proposed. “Appointed” appears to be a typographical error).

10. 9 Cong. Rec. 1018 (1879).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Mills objected to that procedure, pointing out that a resolution calling for information might be “of a partisan character,” because a member of the minority wanted information in the possession of an executive officer of the majority party in the House. Did anyone believe, he asked, “that such a resolution would get out of any committee against the vote of a majority of its members, when the design of the resolution was, perhaps, to expose the malfeasance of some officer belonging to the party of the majority?”¹⁵ Rep. William H. Calkins found Garfield’s argument about duplication unpersuasive. If a lawmaker asked for information that an executive department had already made available to another lawmaker, “it would be a full answer to the resolution for such Department to reply that the information had already been given, and the Department would not be required to go over it again.”¹⁶

As to Mills’s argument that a committee could use its majority party power to block any action on a resolution, Randall pointed out that the majority party could also block floor action on the resolution, because “a single member of that majority could object to it.” Mills conceded that point, but said “there would be a record.”¹⁷ Rep. John H. Baker thought that too much power had been centered in the committees of jurisdiction. Upon receiving a resolution requesting information, it should be “imperative for the committee to report either for or against the resolution, so as to allow the question to come before the House for its determination.” Randall regarded that as “a very good suggestion” that did not occur to the Rules Committee.¹⁸ Rep. Harry White sharpened Baker’s proposal by requiring the committee to report “within one week.”¹⁹ Baker’s amendment, as modified, was agreed to, resulting in this language: “And such committees shall report thereon within one week thereafter.”²⁰

Committee and Floor Procedures

Under House Rule XIII, clause 7, a Member may address a resolution of inquiry “to the head of an executive department.” The resolution is privileged and may be considered at any time after it is properly reported or discharged

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1019.

from committee. If the resolution is not reported to the House by the deadline, a motion to discharge the committee from its consideration is privileged. The time allowed for committee review and consideration was extended from one week to 14 legislative days in 1983.²¹ In calculating the days available for committee consideration, the first day and the last day are not counted.²²

A resolution of inquiry is usually referred to the committee that has jurisdiction over the subject matter, but on a number of occasions two or more committees have been involved in responding to a resolution of inquiry. After a resolution of inquiry is introduced and referred to committee, the committee sends the resolution to the administration for action, requesting a timely response to allow the committee to act within the deadline for a committee report. While waiting for information from the executive branch, the committee may either act on the resolution in the form in which it was referred or consider amendments to it. The committee may vote to report the resolution favorably or adversely. It may also decide not to report at all, forcing the member who introduced the resolution to make a motion to discharge the committee.

When a resolution of inquiry is reported from committee, the chairman of the committee calls up the resolution and becomes floor manager, either to pass the resolution or table it. If the committee decides not to report, the sponsor of the resolution can call up the resolution as privileged business. The privileged status of the resolution applies only to requests for facts within the administration's control and not for opinions or investigations.²³ If part of the resolution is privileged but another is not, because it asks for opinions, the resolution as a whole may lose its privileged character.²⁴

Resolutions of inquiry are directed "to the head of an executive department." There have been parliamentary challenges to resolutions that are directed to executive officials who are not considered the head of an executive department.²⁵ Although the President is not "the head of an executive department," resolutions of inquiry are routinely directed to the President. No one makes a parliamentary challenge that the President is not a departmental head.

21. 129 Cong. Rec. 34 (1983) (paragraph 7).

22. 3 Hinds' Precedents § 1858.

23. See House Rule XIII, Cl. 7 (Rules of the House of Representatives, H. Doc. No. 106-320, 106th Cong., 2d Sess. 619 (2001)).

24. 40 Cong. Rec. 593 (1905) (statement by Speaker Cannon).

25. 22 Cong. Rec. 1874-75 (1891); 38 Cong. Rec. 3181 (1904).

Administrative Discretion

Some House resolutions of inquiry give the administration discretion in providing factual information to Congress, particularly when they are directed to the President. In 1811, a resolution requested from the President, “as far as practicable,” a list of Americans impressed by other countries, “with such other information on this subject as he in his judgment may think proper to communicate.”²⁶ In the same year, a resolution requested from the President information relative to the situation in the Indiana Territory, “which may not be improper to be communicated.”²⁷ Early in 1812, a resolution requested the President to furnish the House with copies of instructions given to the U.S. Minister at London, regarding the impressment of American seamen into the naval service of Great Britain, “excepting so much as it may be improper to disclose, on account of any pending negotiation.”²⁸

In 1876, the House passed a resolution requesting President Ulysses S. Grant to inform the House “if, in his opinion, it is not incompatible with the public interest,” whether since March 4, 1869 (the date his term began) any executive offices, acts, or duties had been performed at a distance from “the seat of Government established by law, and for how long a period at any one time, and in what part of the United States; also, whether any public necessity existed for such performance, and, if so, of what character, and how far the performance of such executive offices, acts, or duties, at such distance from the seat of Government established by law was in compliance with the act of Congress of the 16th day of July, 1790.”

President Grant could have withheld information on the ground stated in the resolution: That disclosure was not compatible with the public interest. Instead, he decided to use constitutional reasons to refuse the information. First, he said he could find nothing in the Constitution to justify congressional interest as to where the President discharged official acts and duties. What the House could require in terms of information from the executive branch was limited “to what is necessary for the proper discharge of its powers of legislation or of impeachment,” neither of which, he said, applied. Asking where executive acts are performed and at what distance from the seat of Government

26. *Annals of Cong.*, 12th Cong., 1st Sess. 370 (1811).

27. *Id.* at 582.

28. *Id.* at 779 (1812).

“does not necessarily belong to the province of legislation. It does not profess to be asked for that object.”²⁹

Second, if the House sought the information to assist in the impeachment process, “it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guaranty which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself.”³⁰ This position was not well reasoned. Other Presidents, including George Washington and James Polk, had made it clear that if the House sought information as part of impeachment proceedings, the information would be supplied.

Third, Grant pointed out that previous Presidents found it necessary to discharge official business outside the nation’s capital, and that “during such absences I did not neglect or forego the obligations of the duties of my office.”³¹ To his letter to the House he appended a study on the number of days other Presidents had conducted official business outside the nation’s capital.

Finally, with regard to the statute of July 16, 1790, Grant said that no act of Congress could limit his constitutional duty to discharge governmental functions outside the nation’s capital, and that the 1790 statute made no attempt to do so. He noted that on March 30, 1791, shortly after passage of the statute cited in the resolution, President Washington issued a proclamation “having reference to the subject of this very act from Georgetown, a place remote from Philadelphia, which then was the seat of Government...”³²

In 1952, the House debated a resolution of inquiry to “direct” the Secretary of State to transmit to the House, “at the earliest practicable date, full and complete information with respect to any agreements, commitments, or understandings which may have been entered into” by President Harry Truman and Prime Minister Winston Churchill in the course of their conversations during January 1952, “and which might require the shipment of additional members of the Armed Forces of the United States beyond the continental limits of the United States or involve United States forces in armed conflict on foreign soil.”³³ The resolution came to the floor accompanied by an adverse report from the Committee on Foreign Affairs.³⁴

29. 9 Richardson 4316.

30. *Id.*

31. *Id.* at 4317.

32. *Id.* at 4318.

33. 98 Cong. Rec. 1205 (1952).

34. *Id.*

During debate on the resolution, which passed 189 to 143,³⁵ those who supported the resolution regarded it as non-binding. For example, Rep. John Martin Vorys advised his colleagues that “we cannot by this resolution make the Executive answer. We cannot make the President, we cannot make the Secretary of State, say anything. That has been passed on time and again under the precedents of this House. We can put a question up to them. All we can do, if we pass this resolution, is to say to the Secretary of State and the Department of State: ‘Please try again. That answer you sent down was not very good.’”³⁶ Rep. James P. Richards, who voted against the resolution, said, regarding this resolution, “it is within the province of the President to refuse to divulge information that he considers would be dangerous or incompatible with the interests of our Nation.”³⁷

Discretion over the release of information to Congress has also been given expressly to departmental heads. In 1971 the House considered a resolution directing the Secretary of State to furnish certain information respecting U.S. military operations in Laos, but the language of the resolution included the phrase “to the extent not incompatible with the public interest.”³⁸ The House tabled this resolution, 261 to 118.³⁹ In 1979, in the midst of an energy crisis, a resolution of inquiry requested certain facts from the President, “to the extent possible,” regarding shortages of crude oil and refined petroleum products, refinery capacity utilization, and related matters. It was adopted 340 to 4.⁴⁰

Committee Review

A committee has a number of choices after a resolution of inquiry is referred to it. It may vote the resolution up or down or amend it. It can report favorably or adversely, but an “adverse report” is often accompanied by a substantial amount of information prepared by the executive branch. The quality and quantity of this information can bring the administration into compliance with the resolution, making further congressional action unnecessary. Usually a

35. *Id.* at 1215.

36. *Id.* at 1208.

37. *Id.* at 1209.

38. 117 Cong. Rec. 23800 (1971).

39. *Id.* at 23807. See “Laos Secrets: House Defeat of Disclosure Move,” CQ Weekly Report, July 9, 1971, at 1463–66.

40. 125 Cong. Rec. 15027, 15039 (1979).

committee issues a report on a resolution of inquiry; if it does not, it can be discharged.

Committee Amendments

Resolutions of inquiry may be amended at the committee level before action on the House floor. In 1980, the House acted on H. Res. 745, a resolution directing President Jimmy Carter to furnish information on the role of Billy Carter, the President's brother, as an agent of the government of Libya.⁴¹ The House Judiciary Committee, after considering and adopting a number of amendments, reported the resolution favorably by a vote of 27 to 0.⁴² The amendments included two that had been adopted by the Foreign Affairs Committee.⁴³ A third committee, the Permanent Select Committee on Intelligence, reported on the resolution with regard to classified material that touched on the relationship between Libya and Billy Carter. It concluded that the administration was in substantial compliance with H. Res. 745.⁴⁴

During floor action, the chairman of House Judiciary, Peter Rodino, asked unanimous consent that the committee amendments be considered en bloc. There was no objection to his request and the committee amendments were agreed to.⁴⁵ He then noted that out of the previous 33 resolutions of inquiry, dating back to 1932, motions to table carried 25 times, largely because there had been substantial compliance to the committee of jurisdiction. It was Rodino's judgment that the administration had substantially complied with H. Res. 745 and that the issue was therefore "moot" and he would make a motion to table the resolution.⁴⁶

Rep. Robert McClory, a member of the Judiciary Committee, disagreed with Rodino's position and his proposal to table the resolution. In McClory's view, "there has been something less than substantial compliance with the terms of the resolution," and that one omission from the materials assembled by the administration was President Carter's "conversation on June 17, 1980, with the Attorney General concerning the Billy Carter investigation."⁴⁷

41. 126 Cong. Rec. 24948 (1980).

42. H. Rept. No. 96-1213 (Part 1), 96th Cong., 2d Sess. (1980).

43. 126 Cong. Rec. at 24950 (statement by Rep. Rodino); H. Rept. No. 96-1213 (Part 2), 96th Cong., 2d Sess. (1980).

44. H. Rept. No. 96-1269, 96th Cong., 2d Sess. (1980).

45. 126 Cong. Rec. at 24949.

46. Id. at 24951.

47. Id. at 24953.

Rodino's motion to table the resolution was rejected on a vote of 124 to 260, after which the House voted to agree to the resolution.⁴⁸ In defeating the tabling motion, 116 Democrats joined 144 Republicans.⁴⁹

Adverse Reports

The fact that a committee reports a resolution of inquiry adversely does not mean that the committee opposes the purpose of the resolution or that the administration refuses to supply information. The documents delivered by the executive branch may bring it in substantial compliance with the resolution, thus making it unnecessary for the committee to report the resolution favorably for floor action. It often happens that a committee reports a resolution adversely and tables it on the floor, after the sponsor of the resolution has received all the information requested.

A good example of this executive-legislative exchange comes from 1979, when 81 Members supported H. Res. 291, a resolution that directed President Carter to provide the House with information on the energy crisis: shortages of crude oil and refined petroleum products, methods used in allocating oil supplies, possible actions within the private industry to withhold or reduce oil supplies, and any reduction in the supply of crude oil from any foreign country.⁵⁰ Within a week, 21 additional Members joined as sponsors of the resolution.⁵¹

The House Committee on Interstate and Foreign Commerce reported the resolution unfavorably and recommended that it not pass.⁵² However, the committee had been seeking the information in a number of hearings, and had asked the Department of Energy to provide the information requested in the resolution. The committee stated that much of the information could be found in departmental publications, and that some of the information had been obtained in the course of committee investigations. Yet it also faulted the administration: "it cannot be said that all information necessary to a full understanding of the supply problem is collected by the DOE, nor that the information which is collected is timely. To the contrary, the Committee has found the DOE lacking vital information on such matters as secondary stocks and actual sales of products." The information supplied by the department was "rarely timely, as a result of long lag times in sending out forms and retrieving them," and the department was "heav-

48. *Id.* at 24961.

49. CQ Weekly Report, September 13, 1980, at 2740.

50. 125 Cong. Rec. 12626 (1979).

51. *Id.* at 12979.

52. H. Rept. No. 96-261, 96th Cong., 1st Sess. (1979).

ily reliant on unverified industry data despite the clear directives from the Congress in a variety of statutes, such as the Energy Supply and Environmental Coordination Act of 1974, and the Department of Energy Organization Act.⁵³

The committee offered several reasons for reporting the resolution adversely: (1) the department had provided “all of the requested documents which were available at the time [the] resolution was considered, and has promised to provide the Committee additional information when it becomes available;” (2) much of the information was of a confidential or proprietary nature, which was appropriate to share with the committee of jurisdiction but less appropriate to share with the entire Congress; (3) the cost of reproducing the documents was substantial and unnecessary; (4) whatever information was available to the department had been shared with the committee and Congress; and (5) the data requested would probably not “quell public skepticism relating to the Nation’s gasoline problems.”⁵⁴ The committee then added a sixth reason:

The Committee wishes to make clear that it is extremely interested in reliable information concerning the nature of our petroleum supply problems. The information currently available is far from adequate, and the Committee in reporting this resolution adversely does not suggest that the Congress and the public have been fully informed concerning these matters. Nor does the Committee wish to indicate that the Congress does not have a right to such information. To the contrary, the Congress clearly has such a right. Rather, the use of a resolution of inquiry is not the appropriate mechanism for obtaining this readily available data: it simply will not result in any new data.⁵⁵

When the resolution came to the floor on June 14, Rep. John Dingell pointed to a desk covered with information provided by the Energy Department, including “the tables, data, and other documents. The total is a stack of papers nearly a foot high.” Yet he also conceded that all of the committee members “believe that the Department’s gathering system is inadequate and that data concerning the energy supplies, demands, and prices is not timely provided.”⁵⁶ Dingell said he was not critical of those who filed the resolution of inquiry: “I do believe that continued inquiry by the Congress is highly desirable. I believe that the information must be made plain.”⁵⁷

53. *Id.* at 4.

54. *Id.* at 7.

55. *Id.* at 8.

56. 125 Cong. Rec. 14952 (1979).

57. *Id.* at 14953.

Instead of the mass of material sitting on the desk, several members wanted a summary of what the documents contained. Dingell said the department had prepared a summary but it was not yet available from the printer. After several members objected to voting on the resolution without a summary, Dingell agreed to withdraw his initial motion for the immediate consideration of the resolution.⁵⁸

Debate continued the next day, with a number of members expressing dissatisfaction with the quality of departmental data. Minority Leader John J. Rhodes, who had introduced the resolution, said that “as far as the technicalities of the situation are concerned, those questions were answered, but they were answered in such a way as to be almost incomprehensible, and certainly not to inform either the House or the American people as to the reasons for the existence of these shortages.”⁵⁹ When Dingell moved to table the resolution of inquiry he lost heavily, 4 to 338.⁶⁰

As the debate moved along and members of both parties expressed support for the resolution, Dingell got the message: “I understand the temper of the House very clearly. I want to have my colleagues know that we have had the resolution of inquiry fully and fairly and properly complied with by the DOE, and it will be further fully, fairly, and properly complied with according to the letter of the rules of the House if this resolution is adopted.” He wanted his colleagues to know he had “no objection to the vote which will take place, and I want them to know that the vote will, I regret to advise them, procure no new information other than that which was available at the committee table and which was made available to my Republican colleagues yesterday in response to the resolution.” He pledged to “persist in my efforts to procure the information which I and my colleagues desire to have on this particular matter, and that the motion to table made earlier by me was simply to save the time of the House and to see to it that the information requested by the sponsors of the resolution of inquiry was presented to the House in a proper and appropriate fashion.”⁶¹ The resolution of inquiry passed on a vote of 340 to 4, with Dingell adding his support.⁶²

Another example comes from 1986, after Rep. Leon Panetta introduced H. Res. 395 to receive documents regarding the administration’s use of \$27 million in appropriated funds for humanitarian assistance for the Nicara-

58. Id. at 14955.

59. Id. at 15028.

60. Id. at 15029.

61. Id. at 15035.

62. Id. at 15039.

guan democratic resistance. A subcommittee of the House Foreign Affairs Committee held a hearing on the resolution and made a tentative recommendation that the resolution be reported favorably to the full committee.⁶³ The subcommittee, after reviewing documents provided by the administration, agreed to recommend that the full committee report adversely if the subcommittee received information covering six categories.⁶⁴ A second effort by the administration convinced both the subcommittee and Panetta that the executive branch was in essential compliance with the resolution, but the subcommittee and Panetta also agreed that the documents demonstrated that the administration “has not complied with the law requiring it to set up appropriate monitoring procedures with respect to the so-called humanitarian assistance for the Contras authorized by the Congress.”⁶⁵ Panetta, having met with representatives from the Central Intelligence Agency to review classified documents, wrote to the chairman of the full committee that the administration had complied with his resolution of inquiry.⁶⁶

Competing Investigations

A committee may decide to report a resolution of inquiry adversely because it competes with other investigations that are regarded as more appropriate. In 1980, for example, H. Res. 571 directed the Attorney General to furnish the House with “all evidence compiled by the Department of Justice and the Federal Bureau of Investigation against Members of Congress in connection with the Abscam investigation,” which was a Justice Department undercover operation that led to charges of criminal conduct against several members of Congress. The resolution also asked for “the total amount of Federal moneys expended in connection with the Abscam probe.”⁶⁷

The House Judiciary Committee reported the resolution adversely.⁶⁸ Committee opposition to the resolution was unanimous.⁶⁹ The Justice Department “vigorously oppose[d]” the resolution.⁷⁰ The objections raised by the depart-

63. H. Rept. No. 99-585, 99th Cong., 2d Sess. 1 (1986).

64. *Id.* at 4–5.

65. *Id.* at 5.

66. *Id.* at 6.

67. 126 Cong. Rec. 4071 (1980).

68. H. Rept. No. 96-778, 96th Cong., 2d Sess. (1980).

69. 126 Cong. Rec. 4073 (statement by Rep. McClory).

70. H. Rept. No. 96-778, at 2 (letter of Assistant Attorney General Philip B. Heymann).

ment, with which the committee agreed, centered on the concern that disclosure of evidence to the House would jeopardize the ability of the department to successfully conduct grand jury investigations and to prosecute any indictments, and that the release of unsifted and unevaluated evidence “would injure the reputations of innocent people who may be involved in no ethical or legal impropriety.”⁷¹

Other considerations were present. The House Standards of Official Conduct Committee, conducting its own inquiry into Abscam, unanimously opposed the resolution of inquiry.⁷² The committee had begun the process of negotiating with the Justice Department to obtain access to evidence needed for investigation by the House.⁷³ Moreover, two subcommittees of the House Judiciary Committee were planning hearings into the proper standards for the Justice Department to conduct undercover operations, particularly against members of Congress.⁷⁴ During House debate, Rep. John J. Cavanaugh expressed concern that Abscam “raises serious questions of the separation of powers and the ability of one branch of our Government—the executive—to employ investigative methods that are capable of subverting and intimidating and compromising the independence, the constitutional independence, of another and separate branch of our Government.”⁷⁵

In this case, Congress chose not to interrupt or interfere with Justice Department prosecutions because it might appear to be self-serving. Rep. William J. Hughes noted: “I can think of nothing that would be more damaging to the Congress than to be perceived as having obstructed an active criminal investigation.”⁷⁶ Forcing the Justice Department to release evidence that might help some members who faced criminal prosecution would look as though lawmakers had greater protection than the average citizen.⁷⁷ By a vote of 404 to 4, the House decided to table the resolution of inquiry.⁷⁸

In other situations, where members of Congress are not implicated in a criminal investigation, Congress may choose to investigate a scandal even if it jeopardizes successful prosecutions. In terms of public policy, it may be more important to investigate a matter promptly rather than wait years for the Jus-

71. *Id.*

72. 126 Cong. Rec. 4075 (statement by Rep. Bennett).

73. *Id.*

74. *Id.* (statement by Rep. Rodino).

75. *Id.* at 4077.

76. *Id.* at 4076.

77. *Id.* (statement by Rep. Lungren).

78. *Id.* at 4078–79.

tice Department or an independent counsel to investigate, prosecute, and pursue appeals. Such was the case with Iran-Contra, where both Houses of Congress concluded that the value of timely legislative investigation outweighed the needs of prosecutors. Lawrence Walsh, the independent counsel for Iran-Contra, recognized that if Congress “decides to grant immunity, there is no way that it can be avoided. They have the last word and that is a proper distribution of power... The legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need.”⁷⁹

Discharging a Committee

If a committee receives a resolution of inquiry and fails to report it within the requisite number of days, a motion to discharge the committee is privileged. That procedure was used in 1971 after Rep. James M. Collins introduced H. Res. 539 directing the Secretary of Health, Education, and Welfare (HEW) to furnish certain documents.⁸⁰ The resolution directed the release, “to the extent not incompatible with the public interest,” of any documents containing a list of the public school systems, from August 1, 1971 to June 30, 1972, that would be receiving federal funds and would be engaging in busing schoolchildren to achieve racial balance. Also requested were any documents regarding HEW rules and regulations with respect to the use of any federal funds administered by the department for busing to achieve racial balance.⁸¹ The resolution was referred to the Committee on Education and Labor.

When the committee failed to report the resolution by the deadline, which was seven days in 1971, Collins moved to discharge the committee. His motion was agreed to, 252 to 129.⁸² Rep. Thomas P. (Tip) O’Neill, Jr., who at that time was the House Majority Whip, voted against the discharge motion but admitted that he was uncertain about the meaning of the resolution: “What does the resolution do? Is there anything wrong? Is it a serious resolution? Is it something we should have had up today? Is it of that import?”⁸³

79. Lawrence E. Walsh, “The Independent Counsel and the Separation of Powers,” 25 *Houston L. Rev.* 1, 9 (1988).

80. 117 *Cong. Rec.* 24936 (1971).

81. *Id.* at 28863.

82. *Id.*

83. *Id.* at 28864.

He said that when Members came to the floor they were told: “Well, if you are for busing, you vote ‘nay.’ If you are against busing, you vote ‘yea.’”⁸⁴ He now realized that the guidance given to Members was “inaccurate.”⁸⁵ The vote was not for or against busing, but for or against receiving information from HEW. With this new understanding, O’Neill announced that he had no objection to the resolution and that “I will, and I hope all other Members will vote for the resolution.”⁸⁶

O’Neill asked the chairman of Education and Labor, Carl Perkins, why the committee had not acted on the resolution. Perkins explained that he and the committee’s ranking member, Albert Quie, had difficulty in obtaining a quorum to discuss the resolution because they were marking up the Economic Opportunity Act. Perkins added: “To be perfectly truthful and frank, both he and I forgot about it. Neither of us, I believe, took the resolution too seriously because it was of the nature that the sponsor of the resolution could have picked up the telephone and gotten the information from HEW.”⁸⁷

Rep. Edith Green emphasized that the resolution “is simply a request for information,” not “a bill to legislate.” She could not understand what was wrong in asking the HEW Secretary “in a perfectly orderly fashion to supply within 60 days the amount of money that is now being spent and in which districts for busing and the guidelines, rules and regulations which HEW has drawn up to enforce this busing to achieve some magical racial balance.”⁸⁸ With the purpose of the resolution clarified, it passed 351 to 36.⁸⁹

Military Operations in Vietnam

Members of the House frequently use resolutions of inquiry to obtain information on matters of military policy. An especially heavy reliance came during the Vietnam War. In 1971, the House voted on two resolutions to give Members access to the “Pentagon Papers,” the Defense Department study entitled “United States-Vietnam Relationships, 1945–1967.” One of the cosponsors of the resolution, Rep. Bella Abzug, stated that the procedures adopted by the House Armed Services Committee, which had a single copy of the study, did not pro-

84. Id. at 28866.

85. Id.

86. Id. at 28867.

87. Id. at 28864.

88. Id. at 28866.

89. Id. at 28869.

vide Members adequate access to the 47-volume study: “they cannot take notes, cannot have staff people review and comment, cannot report on what they have read. Under such limitations, a Congressman must have an elephantine memory to retain the facts that would enable him to exercise his constitutional duty.”⁹⁰

H. Res. 489 directed the President “to furnish the House of Representatives within fifteen days after the adoption of this resolution with the full and complete text” of the Pentagon Papers. The House Armed Services Committee reported the resolution adversely, 25 to 2, and it was tabled on the floor, 272 to 113.⁹¹ H. Res. 490, containing the identical language, was also reported adversely and tabled.⁹²

Abzug and other legislators continued to press for facts about the war. In 1971, the House considered several resolutions of inquiry to obtain information about U.S. covert operations in Laos. H. Res. 492 directed the Secretary of State, “to the extent not incompatible with the public interest,” to provide the House with any documents containing policy instructions or guidelines given to the U.S. Ambassador in Laos regarding covert CIA operations in Laos, Thai and other foreign armed forces operations in Laos, U.S. bombing operations other than those along the Ho Chi Minh Trail, U.S. armed forces operations in Laos, and U.S. Agency for International Development operations in Laos that assisted, directly or indirectly, military or CIA operations in Laos.⁹³ Rep. Benjamin Rosenthal, a cosponsor of the resolution, explained its purpose:

This administration has steadfastly refused to report to the people and to the Congress the nature of the CIA covertly declared war in Laos where the CIA agents are advising the Meo tribesmen. The administration has steadfastly refused to admit that we are hiring Thai mercenaries and ferrying them to Laos in American aircraft to conduct a war in defense of the Laotian Government—a war which this administration has not declared.... Yet it is widely reported in the papers—the New York Times and the Washington Post and other newspapers, Life magazine and the Christian Science Monitor—that all of these events are taking place. We in Congress are forced to depend on what we are advised of in the public newspapers as to our involvement in Laos.⁹⁴

90. 117 Cong. Rec. 23026 (1971).

91. H. Rept. No. 92-318, 92d Cong., 1st Sess. (1971); 117 Cong. Rec. at 23030–31.

92. H. Rept. No. 92-319, 92d Cong., 1st Sess. (1971); 117 Cong. Rec. at 23031.

93. 117 Cong. Rec. at 23800.

94. *Id.* at 23801.

After the House Foreign Affairs Committee reported the resolution adversely, it was tabled, 261 to 118.⁹⁵ Another resolution of inquiry, directing the Secretary of State—“to the extent not incompatible with the public interest”—to furnish the House with additional information regarding U.S. policy involving Laos,⁹⁶ was also tabled.⁹⁷

House resolutions of inquiry are typically reported from committee without holding hearings. However, in 1972 the House Armed Services Committee held hearings on H. Res. 918, a resolution of inquiry introduced by Abzug to obtain information on U.S. bombing in Vietnam. Most of the resolution requested specific facts on U.S. military personnel in South Vietnam, the number of sorties flown during specific periods, the tonnage of bombs and shells fired or dropped during specific periods, and other statistics.⁹⁸ Testifying at the hearings, she said that the level of bombing constituted “the most dramatic proof yet that the Nixon administration is entirely committed to a full-scale and long-term U.S. air war in Indochina instead of negotiating a full withdrawal in return for the release of our captured pilots.”⁹⁹ At the hearings, Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs, provided information on some of the elements in H. Res. 918.¹⁰⁰

The committee reported the resolution adversely, 32 to 4.¹⁰¹ During floor debate, Chairman F. Edward Hébert explained that the information sought in the resolution was in committee files, “available to any Member of the House for his examination, subject, of course, to the rules established by the committee which preclude the release or public use of such information without the consent of the committee.”¹⁰² After describing the material available in the committee’s sessions, both open and closed, he said that the resolution “is directed to giving the Congress the information which is here printed for them to see. Every question is answered.”¹⁰³ Another committee member, William J. Randall, noted that when the committee went into executive session, the answers

95. *Id.* at 23807–08.

96. *Id.* at 23808.

97. *Id.* at 23810.

98. 118 Cong. Rec. 13497–98 (1972).

99. “Full Committee Hearing and Consideration of H. Res. 918, a Resolution of Inquiry Concerning the Bombing in Vietnam by the United States Government,” hearing before the House Committee on Armed Services, April 18, 1972, at 9043.

100. *Id.* at 9057–150.

101. H. Rept. No. 92-1003, 92d Cong., 2d Sess. (1972).

102. 118 Cong. Rec. 14349 (1972).

103. *Id.*

to the questions put by Abzug “were spread upon the record. We were given the very latest facts and figures on all of the things asked for in the resolution.”¹⁰⁴

House floor debate on the Abzug resolution, occupying 87 pages in the *Congressional Record*, includes the transcript from the open hearings before the Armed Services Committee and a number of articles on military operations in Vietnam. Some of the members who voted to table the resolution objected only to the part asking the administration to give the target date for full independence for Saigon. Otherwise, said Rep. Paul Findley, “the resolution seems to deal entirely with facts of past actions that should be available to Congress.”¹⁰⁵ The House voted 270 to 113 to table the resolution.¹⁰⁶ Although the resolution was not agreed to, it forced delivery of information from the administration to the Armed Services Committee, and from there to individual members.

A similar pattern emerged in 1973, when the House acted on H. Res. 379, which directed the Secretary of Defense to furnish the House information on military operations in Cambodia and Laos: the number of sorties flown by the U.S. during certain periods, the tonnage of bombs and shells fired or dropped during certain periods, the number and nomenclature of U.S. aircraft lost over Cambodia and Laos, and other statistics.¹⁰⁷ The House Armed Services Committee held a hearing to review the 19 specific questions addressed in the resolution. Chairman Hébert asked the Defense Department “to be as responsive as possible to each of the questions, and to the maximum extent possible provide this information in open session.” If necessary, the committee would go into closed session to “receive such additional classified information as may be necessary to permit the Department to be fully responsive to this privileged resolution.”¹⁰⁸

In open session, Deputy Assistant Secretary Doolin provided answers to each of the questions, with two exceptions. He told the committee that he would not be able to provide the answer for Question 10 for another 24 hours, at which time the committee received the information and placed it in the hearing record.¹⁰⁹ He also noted that Question 18, regarding the legal authority for U.S. military activity in Cambodia and Laos since January 27, 1973,

104. *Id.* at 14433.

105. *Id.* at 14432.

106. *Id.* at 14434.

107. 119 Cong. Rec. 14990–91 (1973).

108. “Full Committee Consideration of Privileged Resolution H. Res. 379, Concerning Certain Military Actions in Cambodia and Laos,” hearing before the House Committee on Armed Services, 93d Cong., 1st Sess. 1–2 (1973).

109. *Id.* at 5–6.

would be addressed by DOD General Counsel J. Fred Buzhardt, who proceeded to provide a legal analysis.¹¹⁰ As noted in the following exchange with Rep. Charles Wilson, all of the information given by Doolin and Buzhardt was released in open session:

MR. CHARLES WILSON. There was no difficulty in presenting this to us in open session, was there?

MR. DOOLIN. No, sir. I have tried to be as forthcoming as possible.

MR. CHARLES WILSON. This information could have been furnished by a resolution asked for by any Member of the Congress, I assume?

MR. DOOLIN. Yes, sir.¹¹¹

Toward the end of the hearing, Chairman Hébert noted that the resolution “asks for certain information to be brought to the attention of the Congress. That information is now before the attention of the Congress. Therefore, making, in effect, the resolution a moot question.” The sponsor of the resolution, Rep. Robert L. Leggett, agreed that “we answered all of the questions I think really very well.”¹¹² When Chairman Hébert said “the resolution becomes moot,” Leggett responded: “I concur in that.”¹¹³ The committee then voted 36 to zero to report the resolution adversely.¹¹⁴ The answers to the 19 questions were placed in the *Congressional Record*, at which point the resolution was tabled.¹¹⁵

Forcing Other Legislative Actions

Resolutions of inquiry have been successful in prompting Congress to take other legislative actions that address the lack of information from the administration. The two examples included here relate to the calling of supplemental hearings beyond the scope of a resolution of inquiry and the adoption of substitute legislation.

Supplemental Hearings

A resolution of inquiry, after being partially satisfied by answers from the administration, can trigger supplemental information obtained through con-

110. Id. at 11–12.

111. Id. at 17.

112. Id. at 32.

113. Id. at 33.

114. Id. See H. Rept. No. 93-170, 93d Cong., 1st Sess. (1973).

115. 119 Cong. Rec. 14991–94.

gressional hearings. This was the result of H. Res. 552, introduced by Rep. Benjamin Rosenthal on June 18, 1975, to seek information about the administration's proposed sale of Hawk and Redeye missiles to Jordan.¹¹⁶ On the following day, the House Committee on International Relations forwarded the resolution to President Gerald Ford, requesting a prompt reply. The White House responded on June 25, providing responses to the 20 questions put by the resolution.¹¹⁷

However, committee chairman Thomas E. Morgan questioned whether the resolution was a bona fide "privileged resolution of inquiry" under House rules. On June 26, the committee voted to table the resolution on the ground that it was not restricted to factual answers, but instead required "investigation" on the part of the President to answer several of the questions.¹¹⁸ Rosenthal, having announced his intention to call up H. Res. 552 for House action because the committee had not reported on his resolution, agreed to withhold that motion in exchange for committee hearings. Morgan advised Rosenthal that the committee "should get the facts regarding the proposed sale, and I will be glad to cooperate with him in making that happen."¹¹⁹

The hearings came at an important time. Congress was about to decide whether to block the sale of the missiles by passing a resolution of disapproval under Section 36(b) of the Foreign Military Sales Act. On July 9, Rosenthal said that information about the proposed sale "was leaked to the press, not formally announced," and that "[n]o attempt was made to inform the Congress about the sale in the past 2 months, and there would have been none were it not for the questions posed in House Resolution 552, the resolution of inquiry." When the administration acknowledged the sale, it indicated that formal notice would be reported to Congress in late July or early August. Rosenthal pointed out that "Congress probably will be in recess at that time and unable to act on this very important arms sale and policy decision."¹²⁰

Formal notice of the sale reached Congress on July 10. Under Section 36(b), Congress had 20 calendar days to pass a concurrent resolution of disapproval. Legislative action on the disapproval resolution therefore had to be completed by July 30. On July 14, Rep. Jonathan Bingham and ten other members introduced H. Con. Res. 337 to disapprove the sale. On July 16 and 17, a subcommittee of the House International Relations Committee held two days of hear-

116. 121 Cong. Rec. 19616 (1975).

117. *Id.* at 21664–67.

118. *Id.* at 21664.

119. *Id.* at 21882.

120. *Id.* at 21884.

ings on the proposed sale.¹²¹ Administration officials defended the sale on the first day; eight Members of Congress raised their objections the following day.

With the disapproval resolution moving toward a vote, President Ford withdrew the proposed sale on July 28 and entered into negotiations with Congress. The administration announced a compromise on September 16, limiting the missiles to “defensive and non-mobile anti-aircraft weapons.”¹²²

Triggering Legislation

In 1991, just prior to U.S. military operations against Iraq, Rep. Barbara Boxer and six Democratic colleagues introduced H. Res. 19 to call for certain information regarding casualty estimates, biological and chemical weapons, financial assistance from other countries (burden sharing), and other information.¹²³ House Minority Leader Bob Michel objected to Majority Leader Dick Gephardt that the resolution of inquiry “constitutes nothing less than legislative harassment.” Michel said that “[j]ust how the sponsors of this resolution believe that implying the commander in chief is deceiving Congress will help the morale of our troops is beyond me.”¹²⁴

Members of both parties recognized that the House was entitled to budgetary and other information from the executive branch, but decided on a different approach. After the war began, Charles Schumer and Leon Panetta introduced H.R. 586 on January 18, for the purpose of requiring regular reports from the administration on U.S. expenditures for military operations and the financial contributions from other countries.¹²⁵ Action on a bill would avoid the 14-day deadline imposed by a resolution of inquiry.¹²⁶

On February 21, the House moved to suspend the rules to pass H.R. 586. During debate on the bill, several members pointed out that the General Accounting Office had not been given access to any of the costs incurred in connection with the war.¹²⁷ Schumer said that until the resolution of inquiry and his bill were introduced, “we just were not getting those answers when we

121. “Proposed Sales to Jordan of the Hawk and Vulcan Air Defense Systems,” hearings before the Subcommittee on International Political and Military Affairs of the House Committee on International Relations, 94th Cong., 1st Sess. (1975).

122. 1975 CQ Almanac 358–59.

123. 137 Cong. Rec. 105 (1991).

124. Susan B. Glasser, “Liberals Seek to Revive Little-Used Device for Desert Storm Oversight,” Roll Call, February 7, 1991, at 8.

125. 137 Cong. Rec. 1910 (1991).

126. Glasser, “Liberals Seek to Revive,” at 8.

127. 137 Cong. Rec. 3900 (statements by Rep. Spratt and Rep. Panetta).

asked questions.”¹²⁸ Lawmakers received information on what allies had pledged but not “about how much they had actually paid.”¹²⁹ Boxer announced that she would support H.R. 586 and the tabling of her resolution.¹³⁰ In a letter dated February 20, Brent Scowcroft of the administration provided specific information in response to H. Res. 19.¹³¹ After H.R. 586 passed 393 to 1,¹³² the House engaged in a brief debate on H. Res. 19 before tabling it by a vote of 390 to 0.¹³³ In discussing the resolution of inquiry, Rep. Dante Fascell said that it “has proven to be a catalyst for the executive branch to be more forthcoming with the Congress in providing necessary and appropriate information in order to satisfy the oversight responsibilities of the Congress.”¹³⁴

Mexico Rescue Package

In 1995, the Clinton administration offered a multibillion dollar rescue package for the Mexican peso. Rep. Marcy Kaptur responded with a resolution of inquiry requesting President Clinton to submit information to the House “concerning actions taken through the exchange stabilization fund to strengthen the Mexican peso and stabilize the economy of Mexico.”¹³⁵ The House Banking and Financial Services Committee voted 37 to 5 to report the resolution favorably, but with a substitute directing the President to submit the documents “if not inconsistent with the public interest.”¹³⁶ On March 1, the House adopted the committee substitute and agreed to the resolution, 407 to 21.¹³⁷

Although the resolution established a deadline of 14 days, White House Counsel Abner J. Mikva sent a letter to Speaker Newt Gingrich stating that the administration would not be able to provide the documentary material until May 15, or two months after the date set in the resolution.¹³⁸ By April 6, the

128. *Id.* at 3902.

129. *Id.*

130. *Id.* at 3903.

131. *Id.* at 3904.

132. *Id.* at 3906–07.

133. *Id.* at 3907–11.

134. *Id.* at 3909.

135. H. Res. 80, 104th Cong., 1st Sess. (February 10, 1995).

136. H. Rept. No. 104-53, 104th Cong., 1st Sess. (1995).

137. 141 Cong. Rec. 6422 (1995).

138. “House GOP Considers Stance on Bailout of Mexico,” CQ Weekly Report, March 25, 1995, at 880.

Treasury Department had supplied Congress with 3,200 pages of unclassified documents and 475 pages of classified documents, with additional materials promised.¹³⁹ The White House said it was in “substantial compliance” with the resolution.¹⁴⁰

Iraq’s Declaration on WMD

On February 12, 2003, Rep. Dennis Kucinich introduced a resolution of inquiry to give the House access to the 12,000-page Iraqi declaration on its weapons of mass destruction. The declaration had been provided to the UN Security Council on December 7, 2002. In his floor statement on H. Res. 68, Kucinich said that if the administration was intent on going to war against Iraq, “I believe it is incumbent upon them to make the document which was portrayed as evidence of an Iraqi threat available for all to evaluate.” He asked that “the primary documents be transmitted in their complete and unedited form.”¹⁴¹

The administration gave a copy of the declaration to the House on March 7, after which the House International Relations Committee voted to report H. Res. 68 adversely.¹⁴² Rep. Doug Bereuter, who chaired the committee markup, said that the administration’s release of the document rendered the resolution moot: “I would say, in short, Mr. Kucinich has won his point.”¹⁴³ When the declaration reached the House on March 7, the Speaker directed the Permanent Select Committee on Intelligence to retain custody because of its facilities for handling classified documents. The declaration was available for review by members and to House staff “with appropriate security clearances who have executed a nondisclosure oath or affirmation.”¹⁴⁴

House resolutions of inquiry have been an effective means of obtaining factual material from the executive branch. Even when committees report the resolutions adversely or succeed in tabling them on the House floor, a substantial amount of information is usually released to Congress. Agreement that

139. “Treasury Says Congress Given Papers on Mexico,” *Washington Post*, April 7, 1995, at F1.

140. 1995 CQ Almanac 10–17.

141. 149 Cong. Rec. H396 (daily ed. February 12, 2003).

142. CQ Today, March 13, 2003, at 16.

143. *Id.*

144. H. Rept. No. 108-38, 108th Cong., 1st Sess. 2 (2003).

the administration has complied with a resolution is frequently the reason for reporting it adversely and tabling it on the floor. On occasion, a resolution of inquiry is reported adversely because it competes with other investigations (either in Congress or in the executive branch) that are considered the more appropriate avenue for inquiry. In some situations, resolutions of inquiry have been instrumental in triggering other congressional methods of obtaining information, such as through supplemental hearings or alternative legislation.

Members turn to resolutions of inquiry for different reasons. A member may not be politically well positioned within a committee of jurisdiction to seek the information through regular investigatory procedures, or the committee might have advised the lawmaker that it had no intention of investigating the matter. Also, a resolution of inquiry is often a useful way for a member to bring attention to an issue, receive basic information from the administration, and perhaps spark more extensive legislative investigations. There is broad support within Congress whenever a member seeks factual information from the administration. Only in exceptional cases could an administration withhold from Congress facts that are readily available within the executive branch.

