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CONGRESSIONAL INQUIRY INTO MILITARY AFFAIRS

A STUDY

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PREFACE BY SENATOR J. W. FULBRIGHT, CHAIRMAN, COMMITTEE ON FOREIGN RELATIONS

The question of executive privilege has always been with us in the Congress, but more so in recent years and days. For this reason I requested a memorandum from the Legislative Reference Service of the Library of Congress.

While the memorandum addresses itself specifically to the power of the Congress to compel a military officer to testify about military affairs, it considers this question in the larger context of the conflict between the power of the Congress to demand information from the Executive and the privilege of the Executive to withhold it. For this reason I believe that this memorandum will be of interest to my colleagues and the public generally.

The memorandum was prepared by Mr. Vincent Doyle of the American Law Division of the Legislative Reference Service, to whom I express my appreciation.

CONGRESSIONAL INQUIRY INTO MILITARY AFFAIRS

Introduction

> [I]s it not possible to argue that Congress, especially now that the appropriations for the Armed Forces are the largest items of the budget, should be allowed to inquire in as much detail as it wishes, not only how past appropriations have in fact been spent, but in general about the conduct of the national defense? (Hand, "The Bill of Rights," pp. 17–18 (1958).)

The logic of the argument Judge Learned Hand suggests, that Congress should be allowed to inquire in as much detail as it wishes about the conduct of the national defense, would seem quite compelling. The argument becomes even stronger, if one takes into account the additional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" (U.S. Constitution, art. I, sec. 8). Judge Hand guesses, however, that the Court would refuse to pass on such a controversy.

A Department of Justice study reached the conclusion that:

> Congress cannot, under the Constitution, compel heads of departments by law to give up papers and information; regardless of the public interest involved; and the President is the judge of that interest. ("The Power of the President To Withhold Information From the Congress—Memorandum of the Attorney General," compiled by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 85th Cong., second sess., pp. 3–4 (committee print, 1958) (hereafter cited as committee print).)

The study also indicated that the reason for the rule "that the President and heads of departments are not bound to produce papers or disclose information communicated to them, where, in their own judgment, the disclosure would, on public considerations, be inexpedient," had been succinctly stated in *Marbury* v. *Madison* (1 Cranch 137, 143–144) and reaffirmed in *Cunningham* v. *Neagle* (135 U.S. 1, 63) and *Meyer* v. *United States* (272 U.S. 132–135). According to the Justice study, the reason is that:

> By the Constitution, the President is invested with certain political powers. He may use his own discretion in executing those powers. He is accountable only to his country in his political character, and to his own conscience. To aid the President in performing his duties, he is authorized by law to appoint heads of the executive departments. They act by his authority; their acts are his acts. Questions which the Constitution and laws leave to the Executive, or which are in their nature political, are not for the courts to decide, and there is no power in the courts to control the President's discretion or decision, with respect to such questions. Because of the intimate relation between the President and the heads of departments, the same rule applies to them (committee print, p. 3).

Whatever value such paraphrase of court opinions might have as a partial delineation of the doctrine of separation of powers, it has little value as support for the conclusion that the Constitution gives the President, and through him the department heads, absolute discretion to determine when they will refuse information demanded by Congress.

Nor does it support the conclusion that the validity of such determination to withhold information is a political question which is not for the courts to decide.

There is a very real difference between an Executive decision to act pursuant to a constitutional power and an Executive decision to refuse to furnish Congress the information which led the Executive to decide to act. Although Congress may have no power to prevent the act of the Executive, it may have a duty to respond to it, e.g., to appropriate or to refuse to appropriate moneys necessary to give full effect to the action of the Executive. The response of Congress is less likely to be a reasonable one if it is refused access to the information, the facts, which prompted the Executive to act in the first place.

Neither logic, nor the law, would seem to support so broad a claim as this for an unreviewable right in department heads, at their own discretion, to refuse information demanded by Congress. Nor would either logic, or law, support an absolute right of Congress to demand and receive information about the operations of the departments and agencies. Both logic and the law, however, would seem to support the thesis that, in an appropriate case, the courts would decide whether a claim of executive privilege was a valid response to a congressional demand for information.

If there is to be a judicial test, the initiative will probably have to come from the Congress. Because of its broad claims, the Executive would have more to lose than gain by such a test. There is reason to suppose, from statements in cases in which private parties have sought information from the Government, that not even the President's constitutional role as "Commander in Chief of the Army and Navy" would give him or his department heads absolute discretion to refuse a proper demand from Congress for information needed in the exercise of its own powers to "declare War," "raise and support Armies," "provide and maintain a Navy", and "make Rules for the Government and Regulation of the land and naval Forces". In any case, because there has been no decision, there is no certainty that these are questions "which the Constitution and laws leave to the Executive" and which are "not for the courts to decide" as claimed in the Department of Justice study. As we shall see, Congress has at its disposal the means to initiate, or precipitate, depending upon the method it chooses, a judicial action of which the courts must make some disposition.

The Literature and Precedents

The literature dealing with the conflict between the power of Congress to demand information and the privilege of the Executive to withhold it is voluminous and its conclusions varied. Both its volume and variety stem from the paucity of judicial precedents and the ability of writers to drape the language of such judicial dicta as there are over the framework of their own arguments. This addition to the literature is subject to the same limitations. Nevertheless, however persuasive, for either side, may be the arguments drawn from the cases, there is no case holding that the Executive has the absolute discretion to determine that a department head or other officer may refuse to furnish information demanded by Congress.

To be sure, as the Department of Justice study stated:

> American history abounds in countless illustrations of the refusal, on occasion, by the President and heads of departments to furnish papers to Congress, or its committees for reasons of public policy (committee print, p. 1).

The writers disagree, however, about the purport of many of the refusals. For example, in 1796, a resolution of the House asked the President for a copy of the instructions given the U.S. Minister who negotiated a treaty with the King of Great Britain. Apparently the House desired this information before it appropriated the money necessary to carry out the treaty. Washington's refusal to furnish the information was based in part upon his "understanding that the assent of the House of Representatives is not necessary to the validity of a treaty" and a conviction that "the boundaries fixed by the Constitution between the different departments should be preserved." Of this example, one writer says:

> Washington's message respecting the Jay Treaty, after stressing the occasional need for secrecy in "foreign negotiations," concluded that this was the reason for confining such information "to a small number of members" (i.e., to the Senate) through the medium of the advice and consent clause. Here was a treaty clamorously assailed by the public, and yet Washington felt constrained to put the "secret" information before the Senate, disclaiming any "disposition" (claim of privilege) to withhold any information that either House had a "right" to require. His turnover to the Senate, while denying to the House the "right" to treaty information, constitutes recognition of the Senate's *right* to it. Vice President Adams was of the opinion that the House too had a right to the information. This is scarcely stuff from which to fashion a wholesale claim of executive privilege (Berger, "Executive Privilege Versus Congressional Inquiry," pt. II, 12 UCLA L. Rev. 1287, 1291 (1965), footnotes omitted).

There is equally strong disagreement among the partisans of congressional power and executive privilege about the conclusions to be drawn from some of the other instances of executive refusal to furnish information. Whatever conclusions may be drawn from such historical precedents, however, it cannot be said that, by its acquiescence in refusals, Congress has been estopped from denying the existence of an absolute privilege in the Executive to withhold information from Congress at its discretion. If the Constitution gives Congress the power to demand information, that power cannot be abandoned, even by a continued failure to exercise it. No more can the Executive be said to have abandoned its privilege, if the Constitution give it one, by the frequency with which it has acceded to the demands of Congress, even after an initial refusal based on grounds of public policy.

The Ultimate Problem

Individual Members or committees of Congress have, at one time or another, acknowledged the existence of circumstances in which it might be completely appropriate for the President, or even a department head, to refuse to furnish information or documents which Congress has requested. See Kramer and Marcuse, "Executive Privilege—A Study of the Period 1953–1960, Part II" (29 Geo. Wash. L. Rev. 827, 900–902 (1961)). Most of the congressional complaint, however, is directed either to the exercise of the privilege by subordinate officers rather than by the President or his department heads, or to the validity of particular determinations, even if made by the President, that giving this or that piece of information to Congress would be contrary to the public interest.

To be sure, delegation is a problem; but it is not the ultimate problem. Moreover, the problem exists for both branches. It must be just as disturbing to the Executive when an individual Member of Congress makes unreasonable demands for information as it is to the House or Senate or a committee of either pursuing its duly authorized legislative duties when a departmental subordinate makes an unreasonable refusal.

In *Reynolds* v. *United States* (345 U.S. 1, 7–8 (1953)), the Court stated that the claim of privilege "is not to be lightly invoked * * * [and must be] lodged by the head of the department * * * after actual personal consideration by that officer." From a practical point of view, however, even if not from the legal, the identity of the person claiming the privilege is not likely to be decisive. Even if it be assumed that the privilege can be claimed only by the President and that a court would compel disclosure if it were exercised by a subordinate officer, no test involving a subordinate officer's refusal seems likely to reach the courts. If a military officer, for example, should claim the privilege while testifying before a Senate committee and the Senate gave evidence that it intended to press its demand, it seems likely that the President would either adopt the claim as his own or order the officer to accede to the Senate's demand.

The President's response, in any particular case, would probably be influenced by the degree of congressional determination. A committee resolution would be less impressive than a Senate resolution which would in turn be less impressive than a concurrent resolution. A Congress determined enough to pass a concurrent resolution asking for information would seem to be a Congress determined enough to resort to one or another of the responses which even the most extreme advocates of executive privilege admit are available to a thwarted Congress: failure to appropriate, abolishment of an agency, impeachment of the offending officer.

Though admittedly available, such responses would rarely, if ever, be wise, and should never be resorted to if another remedy is available. The ultimate, and unresolved, constitutional question is whether another remedy is available; the ultimate question is whether the President's decisions to withhold information from the Congress are, as has been claimed, unreviewable by the courts.

Judicial Review of Claims of Executive Privilege

The keystone of the argument for executive privilege, exemplified by the statements in the Department of Justice study, supra, at page 1, is that determinations to exercise it, whether made by the President or his department heads, are not reviewable by the courts. Among the text writers cited by the Attorney General as "confirming the soundness" of the conclusion that there is lodged in the executive branch "the power to to determine what information to divulge and what to keep secret" was Professor Corwin who, at pages 281–282 of "The President, Office and Powers," states:

> * * * Thus neither the President nor the Secretary of State is ever "directed" by the house to furnish desired information or papers, but only "requested" to do so, and then only if it is "in the public interest" that they should comply—a question left to be determined by the President. More than that, however, Presidents have sometimes intervened to exonerate other heads of departments than the Secretary of State, and even lesser administrative officials, from re-

sponding to congressional demands for information, either on the ground that the powers sought were "private," "unofficial," or "confidential," or that the demand amounted to an unconstitutional invasion of presidential discretion.

Thus far at least, Corwin does not contradict the Attorney General's conclusion, though what he says does not really "confirm the soundness" of it either. But the Corwin statement continues:

> Nevertheless, should a congressional investigating committee issue a subpena duces tecum to a Cabinet officer ordering him to appear with certain adequately specified documents and should he fail to do so, I see no reason why he might not be proceeded against for contempt of the house which sponsored the inquiry. And the President's power of pardon, if measured by that of the King of England, does not extend to contempts of the houses of Congress (pp. 281–282; committee print, 43).

Instead of supporting an absolute discretion in the Executive, Corwin states that Congress can hold a Cabinet officer in contempt for refusing information. It should be mentioned, of course, that the Attorney General's study attempts to show—

> that Mr. Corwin is probably in error in stating that a Cabinet officer can be held in contempt by reason of a failure to produce papers or give testimony which he or the President considers confidential in the public interest (ibid).

Whatever arguments may be made for unreviewability of claims of executive privilege when interposed against the Congress, a problem the courts have not yet considered, the courts have left no doubt that they will review such claims when interposed against private parties who seek governmental information through court process. In *United States* v. *Reynolds*, the Supreme Court stated that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" (345 U.S. 1, 9–10 (1953)). Is it any more logical or necessary for Congress to abdicate to "executive caprice" control over the evidence it needs to make an appropriation or enact other legislation?

Berger examines exhaustively, and rejects, the arguments against justiciability of the conflict between the Congress and the executive branch (12 UCLA L. Rev. at 1333–1360). He observes that:

> The power finally to decide whether Congress has an absolute right to demand information or whether the executive has an absolute right to refuse it plainly was not lodged in either of those branches. Essentially this is a dispute about the scope of intersecting powers; if one branch has the claimed power the other branch necessarily has not. It seems axiomatic that one branch cannot finally decide the reach of its own power when the result is to curtail a power claimed by another. Madison said in the Federalist that neither of the departments "can pretend to an exclusive or superior right of settling the boundaries between their respective powers. * * *" Unless the two branches are to be remitted to the "trial of physical strength" which *United States* v. *Texas* decried, the power to decide such disputes must reside in the courts (id. at 1354 (footnotes omitted)).

If, as Berger concludes, claims of executive privilege are reviewable by the courts, two questions remain:

1. How might the courts deal with a claim based on the need for secrecy of military matters?
2. How can Congress get into court?

Judicial Disposition of Claims of Privilege Based on the Need for Military Secrecy

The cases involving executive resistance to disclosure of military secrets have arisen out of attempts by private parties, rather than Congress, to obtain evidence they thought necessary to proper dispo-

sition of their claims. Perhaps two observations might be made about demands for information made by Congress. It seems likely that the courts would consider the right of Congress to information superior to that of any private litigant. Perhaps more important is the fact that disclosure to the Congress need not be the equivalent of disclosure to the public. In 1843, a House committee observed that:

> Information * * * may be referred to a committee under a charge of secrecy until an examination of it can be made, when, if the committee concur in opinion with the Executive, its publication will be dispensed with. This is the true parliamentary course. It furnishes at once a security against secret abuses and the irresponsibility of public officers and agents which would follow the denial of the right of the House to demand information, and at the same time protects the State against the discovery of facts so important for the time to be concealed. (H. Rept. 271 (27th Cong., third sess.), p. 7 (1843)).

The Senate also recognizes certain needs for secrecy and provides measures for its enforcement. Rule 35, section 5, provides that:

> Whenever, by the request of the Senate or any committee thereof, any documents or papers shall be communicated to the Senate by the President or the head of any department relating to any matter pending in the Senate, the proceedings in regard to which are secret or confidential under the rules, said documents and papers shall be considered as confidential, and shall not be disclosed without leave of the Senate.

Rule 35, section 3, provides, in part, that:

> All confidential communications made by the President of the United States to the Senate shall be by the Senators and officers of the Senate kept secret.

And rule 35, section 4, provides that:

> Any Senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a Senator, to suffer expulsion from the body; and if an officer, to dismissal from the service of the Senate, and to punishment for contempt.

Presumably, congressional assurances of secrecy would not be given lightly, lest the Executive use such assurances to hide administrative ineptitudes rather than military secrets.

A further observation about the cases is that, even when the courts have denied the privilege they have not ordered executive disclosure. This is not necessarily because such an order would be beyond the power of the courts or because there would be no "coercive means to compel" performance of the duty to disclose but because an acceptable alternative was available—the Government would lose its case. The courts had no hesitation about enjoining the seizure of the steel companies ordered by the President (*Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952)). To avoid the appearances of an infringement by the judicial branch on the coequal executive branch such orders may be rationalized on the ground that when an executive officer acts in excess of his constitutional power he ceases to be an executive officer and an order to rescind the act or to do something to repair it is not an order to an executive officer but to an individual.

The privilege against revealing military secrets is well established in the law of evidence, although "judicial experience with the privilege which protects military and state secrets has been limited in this country" (*United States* v. *Reynolds*, 343 U.S. 1, 6, 7 (1953)). *Reynolds*, however, would seem to dispel any inference which might be drawn from earlier cases that the privilege is an absolute one which the courts will not review. Although the Court, in *Reynolds*, sustained

the claim of privilege, one factor in its holding was the failure on the part of the moving party to accept a Government offer which resulted in posing the question "with the formal claim of privilege set against a dubious showing of necessity" (id. at 11). The Court's further comments on the claim of privilege would seem to indicate how the Court will deal with such claims:

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter. *The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect* (id., at 7–8). [Emphasis added, footnotes omitted.]

* * * * * * *

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers (id., at 9–10).

In a subsequent case, *Halpern* v. *United States* (258 F. 2d 36, 44 (2 Cir., 1958)) the court stated that "the privilege relating to state secrets is inapplicable when disclosure to court personnel in an in camera proceeding will not make the information public or endanger the national security." Can the rights of Congress be inferior to those of a private litigant and can Congress be considered any less a guardian of the national security than the officers of either the executive or judicial branches?

Congressional Initiation of a Judicial Test

Contempt of Congress by reason of failure of a witness, summoned by authority of either House, to testify or produce papers, is punishable as a misdemeanor (R.S., sec. 102, as amended; 2 U.S.C. 192 (1964)). Another provision (R.S., sec. 104, as amended, 2 U.S.C. 194 (1964)), sets forth a procedure for certification of such failure "to the appropriate U.S. attorney, whose duty it shall be to bring the matter before the grand jury for its action." Congress seems never to have reported to a U.S. attorney any failure of an executive officer to testify by reason of a claim of executive privilege. Bishop observes that such a certification seems improbable and goes on to say that:

> Even if Congress should certify such a case to a U.S. attorney, it seems intrinsically likely that the Attorney General would take the position that Congress could not constitutionally command its prosecution (*The Executive's Right of Privacy: An Unresolved Constitutional Question,* 66 Yale L. J. 477, 484 (1957)).

There is no necessity, however, if Congress is determined to test a claim of executive privilege, to certify a case to the Attorney General and await his decision to prosecute, or not, under the provisions of 2 U.S.C. 192. There can be no doubt that either House of Congress has the power to seize a recalcitrant witness, try him before the bar of the House, and punish him for contempt by imprisoning him in the Capitol (*Jurney* v. *McCracken*, 294 U.S. 125 (1935), *McGrain* v.

Daugherty, 273 U.S. 135 (1927)). Should this be done, the judicial test would come when the prisoner seeks his release by way of a writ of habeas corpus (Bishop, supra, 66 Yale L. J. 477, 484–85 (1957)).

There can be no doubt that a less dramatic method for testing a claim of privilege would be more desirable if one were available. Berger suggests that one might be: 28 U.S.C. 1345 gives the U.S. district courts "original jurisdiction of all civil actions, suits, or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress"; 28 U.S.C. 2201 provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *

Further relief may be granted on the basis of a declaratory judgment under the provisions of 28 U.S.C. 2202. Berger suggests that any doubts about the existing availability of this route could be eliminated by relatively simple clarifying legislation (12 UCLA L. Rev. at 1333–34).

Conclusion

An unreviewable discretion on the part of the Executive to withhold information could operate to deprive Congress of the tools it needs to fulfill its own constitutional role.

An unlimited power on the part of Congress to demand and receive information from the Executive could operate to infringe upon the constitutional role of the Executive.

When a claim of privilege is interposed against a committee, the House or Senate is more likely to get the information, without initiating a judicial action, if it demands it by way of House or Senate resolution than if the committee acts alone. A Congress determined enough to demand information would seem to be a Congress determined enough to refuse to appropriate if the demand was not met.

If a controversy between the Executive and the Legislature were to reach the courts in a proper case, it seems a good possibility that the courts would decide the issue in much the same manner as they have reviewed claims of executive privilege when interposed against private parties seeking information and convictions of private parties for contempt of Congress.

It seems probable that the courts would find the executive privilege of withholding information to be less broad than the Executive has sometimes claimed, yet not so narrow as some Members or committees of Congress would like it to be.

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Legislative Attorney.

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