



Recommendation 90-7

Administrative Responses to Congressional Demands for Sensitive Information

(Adopted December 18, 1990)

The routine sharing of information between congressional committees and administrative agencies constitutes one of the most important interactions between the political branches of our national government. The process of exchanging information affects the ability of the executive and legislative branches to carry out their constitutionally assigned tasks. The quality of Congress's legislative and oversight work often depends on agency information. The control of the disclosure of sensitive information also affects the executive's ability to fulfill its functions.

The Constitution of the United States operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Because it does not expressly acknowledge a congressional entitlement to information or an executive prerogative to withhold information, the Constitution provides less a set of clearly understood rules than a framework within which each branch articulates its asserted right to demand or withhold information.

The judicial view regarding disputes over sensitive information between the political branches, as distilled from a very few opinions, respects elements of the views of both branches. While several cases imply what the Supreme Court's view might be,¹ there is no Supreme Court adjudication of any executive privilege dispute with Congress. Consequently, there is no opinion that resolves the principled contentions that such disputes involve.

By all accounts, most congressional demands for information are handled without confrontation, and it is clear that agencies generally respond to requests by providing whatever information Congress is seeking. Moreover, the branches do have a strong and continuing interest in the success of their overall relationship, despite an institutional competitiveness that is augmented when the two branches are controlled by different parties. Nevertheless, serious

¹ See *U.S. v. Nixon*, 418 U.S. 683 (1974) which held that the executive has a constitutionally based privilege to withhold information, the release of which would impede the performance of executive branch responsibilities. See also *McGrain v. Daugherty*, 273 U.S. 135 (1927) which recognized a constitutionally implied power of congressional investigation and said further that Congress need not have before it a specific legislative purpose in order to trigger its investigative authority.



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contentious cases do arise, especially in areas of great concern to the public, and improved mechanisms for resolving such disputes would benefit both political branches, as well as the courts, which shy away from involvement in such cases.

An understanding of the several factors that may affect the outcome of particular demands as well as the process by which a resolution is achieved is required if improvements are to be recommended for resolving information disputes in a way that enables both branches optimally to fulfill their constitutional functions. One major factor affecting the successful navigation of a dispute is the perceived stakes or interests of each branch. What is at stake for Congress is usually the performance of one of its primary functions. These include routine oversight, the contemplation of possible legislation, the review of nominations requiring the advice and consent of the Senate, or the investigation of possible official wrongdoing. The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These include protecting national defense and foreign policy secrets, protecting trade secrets or confidential commercial or financial information, protecting the candor of presidential communications or intra-branch policy deliberations, preventing unwarranted invasions of personal privacy, whether of government officials, employees, or private persons, and protecting the integrity of law enforcement investigations and proceedings. In some cases, the executive may regard such information as sensitive, meaning that its disclosure could compromise the capacity of the executive branch to discharge its constitutional or statutory responsibilities. Disputes over information often have a purely political basis as well. Congress may seek information in an effort to gain particular political advantage; the executive may seek to withhold such information to cover up mistakes.

The prospects for a nonconfrontational resolution are good if the branches perceive a particular dispute boils down to a contest only between Congress's ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns mentioned, rather than a fundamental readjustment in the institutional power of each branch in relation to the other. Accommodation is possible in such a situation because several intermediate arrangements exist between complete disclosure or complete non-disclosure that allow for a balance of the branches' competing interests.

Among the intermediate arrangements available for settlement of a dispute are: (1) The release of information by the executive in timed stages that allow it to conclude a law enforcement investigation or policymaking process without premature scrutiny; (2) the release of information under protective conditions ranging from Congress's promise to maintain



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confidentiality to congressional inspection of the materials required while they remain in executive custody; (3) the release of requested information in expurgated or redacted form; or (4) the release of the requested information in the form of prepared summaries.

Important, however, to the resolution of disputes along these lines is the formation of a new operational process or arrangement. Under this arrangement, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the arrangement would contain agreements aimed at steering negotiations away from categorical questions of prerogative and toward the pragmatic resolution of immediate disputes. Toward that end, an arrangement should specify at least those interests in the control of the information that each branch could invoke in negotiations, a commitment to invoke those interests in highly specific terms should disputes arise, and a commitment to explore in negotiation how the interests of each branch would be advanced or harmed in the particular dispute by the use of various compromise strategies attempted in the past.

The scope of the new arrangement should include both executive and independent agencies. There is nothing in the constitutional relationship—as distinguished from the statutory relationship—between administrative agencies and either Congress or the President that suggests that labeling an agency as executive or independent yields greater or lesser authority for the President to control agency information or greater or lesser authority for Congress to demand information. In addition, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information.

Congress might also consider placing in one office the responsibility of coordinating the negotiation of disputes with the executive over information. This would be akin to the practice of the executive branch with respect to the Office of Legal Counsel at the Department of Justice which stores information regarding the resolution of disputes and provides counsel to agencies embroiled in disclosure disputes. At a minimum, Congress ought to more regularly familiarize its members with the information and counsel that the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House of Representatives can provide to committees that are engaged in disputes over information. Congress should consider alternative means for resolving particularly controversial cases in addition to the current criminal contempt procedures. Alternatives could range from third-party mediation to referral to other agencies or to less draconian judicial procedures.



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Recommendation

1. Congress and the President should create an on-going process for negotiating the conditions under which sensitive information² in the agencies should be disclosed to or withheld from Congress.
2. This operational arrangement should seek to achieve improved cooperation and relations between the executive and Congress. Specifically, the executive should respect Congress's legitimate legislative and oversight interests, including the pressure of time and the need to have information immediately available. In return, Congress should respect the executive's legitimate interests including, for example, protection of confidentiality in matters pertaining to presidential communications, national security, civil and criminal law enforcement, personal privacy and commercial confidentiality, and the free-flow of staff advice that might be inhibited by outside scrutiny of deliberative documents. However, both branches should invoke these interests only in highly specific terms and should commit themselves to explore in negotiation how the interests of the branches could be reconciled. In designing this arrangement, Congress and the executive should consider adding mechanisms for dispute resolution beyond the negotiations and discussions that currently take place.
3. Such an arrangement need not require legislation, but should be memorialized in some fashion. Counsel of both Houses of Congress and the Office of Legal Counsel in the Department of Justice should retain information concerning the informal resolution of disclosure disputes. Appropriate consideration should also be given to roles these Counsel can play as sources of advice regarding disputes over sensitive information.
4. In addition, Congress should consider establishing procedures for resolving impasses over congressional access to sensitive agency information which could be invoked to help resolve exceptional cases as an alternative to contempt proceedings.³

² Sensitive information is defined as information whose public disclosure could compromise the capacity of the executive to discharge its constitutional or statutory responsibilities.

³ An example worth consideration might be a declaratory judgment procedure that could be invoked by Congress or the agency after the exhaustion of informal means such as negotiations between the congressional committee leadership and the agency head—for resolving disputes in which some type of adjudication appears unavoidable. (To avoid constitutional problems, any action brought by an agency under this proposal should be filed against the congressional employee who served the subpoena in question.) In addition, particularly controversial cases might be referred for resolution to *in camera* panels consisting of retired federal judges, members of Congress, or



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5. No general distinction should be made between executive and independent agencies for the treatment of contested information for resolving disputes over sensitive information.

Citations:

55 FR 53272 (December 28, 1990)

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executive branch officials. Other disputes might be avoided by designating an issue of controversy for study by the General Accounting Office.