No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY A. WAXMAN, *et al.*,

Plaintiffs-Appellees,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Case No. 01-CV-4530)

BRIEF OF AMICUS CURIAE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF REVERSAL

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CERTIFICATE OF CONSENT

I certify that all parties have consented to the filing of this Brief of Amicus Curiae Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Reversal.

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STATEMENT OF INTEREST

The Bipartisan Legal Advisory Group of the United States House of Representatives presents the institutional position of the House in litigation matters.[1]

Since the founding of the Republic, the political branches have struggled over congressional access to executive branch information. Although it is well established that each House of Congress has the power to issue and enforce compulsory process to obtain information needed for legislative purposes, the legislative and executive branches have vigorously disagreed as to whether (or to what extent) this power extends to the Executive. This question has been frequently debated on the floor of the House and Senate, has been the subject of countless congressional hearings and has been extensively debated by constitutional scholars and other legal experts.

This debate, however, has taken place almost entirely outside the judicial arena. While "the executive has resisted House and Senate attempts to obtain

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[1] The Group consists of the Honorable J. Dennis Hastert, Speaker of the House; the Honorable Richard K. Armey, Majority Leader; the Honorable Richard A. Gephardt, Minority Leader; the Honorable Tom DeLay, Majority Whip; and the Honorable Nancy Pelosi, Minority Whip. The Minority Leader and the Minority Whip declined to support the filing of this brief.

information on numerous occasions,"[2] such disputes have been resolved through political negotiation and accommodation. Congress has legislative tools available to pressure the executive to produce information. For example, Congress "has sought to compel compliance through threats to withhold funding from the agency or operation in question and through resolutions of inquiry directing officials to supply specific information."[3] Where informal demands were unsuccessful, congressional committees have issued subpoenas, voted to hold executive officials in contempt, and submitted contempt reports to the full House for consideration. These actions have generally resulted in Congress obtaining the information it sought, although "[s]ometimes Congress has had to compromise with the executive to end such disputes, for instance, by scaling back the initial request and accepting less information more quickly."[4]

Under the district court's decision below, however, such disputes could be

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[2] Congressional Research Service, History of the U.S. House of Representatives, 1789-1994 234, House Doc. No. 103-324 (1994) (printed under the supervision of the Committee on House Administration) (hereinafter "House History").

[3] Id. at 235; see also Louis Fisher, Congressional Access to Legislative Branch Information: Legislative Tools, 5-11, 13-18 CRS Report for Congress (2001) (describing instances in which the appropriations and appointment powers were used to compel the Executive to produce information to Congress).

[4] House History, supra, at 235.

readily presented for judicial resolution pursuant to the Act of 1928, now codified at 5 U.S.C. § 2954. This decision, if upheld, would radically change the manner in which executive/legislative information access disputes are resolved. Because the district court's decision allows one committee, and even small groups of members within that committee, to bring suit without the authorization of the House or its leadership, it conflicts with House Rules designed to maintain institutional control over the House's investigatory authority. Without such institutional control, the courts, rather than the House, would decide what information is needed for legislative purposes, and when executive agencies may withhold information on matters such as national security or law enforcement.

We wish to make clear that Congress should be able to obtain from the Executive information that it needs to fulfill its legislative and oversight functions. We do not endorse the longstanding position of the Executive that it has wide discretion to withhold information properly requested by the House or its committees. Nor do we agree with the Commerce Department's narrow construction of the Act of 1928, which, as the district court found, conflicts with the statute's plain language. Clearly, the Act of 1928 authorizes Appellees to request information from executive agencies and obligates those agencies to respond in good faith to such requests. However, when disputes arise over

congressional access to executive branch information under the Act of 1928, those disputes should be resolved through negotiation and accommodation, not through the judicial system.[5]

BACKGROUND

I. Executive-Legislative Disputes Over Access to Information

"From its earliest days the House has exercised its right to call on the President and the heads of Departments for information." 3 Asher C. Hinds, Precedents of the House of Representatives §1856 (1907). In 1792, the House established an investigating committee to inquire into a failed military campaign by General St. Clair against Indian tribes in Ohio. The House empowered the committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries."[6] This committee requested documents relating to the St. Clair expedition.

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[5] Although the constitutional issues need not be reached in this case, we do not join the Commerce Department's constitutional arguments. In particular, we disagree with any suggestion that civil enforcement of a congressional subpoena against the executive branch is constitutionally problematic. See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 O.L.C. 68, 87-88 (1986); see also United States v. AT&T Co., 567 F.2d 121 (D.C. Cir. 1977).

[6] 3 Annals of Congress 493 (Mar. 27, 1792) (quoted in Fisher, supra, at 3).

President Washington assembled his cabinet to advise him as to how to respond to this request. As reflected by Thomas Jefferson's notes, the cabinet reached the following conclusions:

> First, that the House was an inquest and therefore might institute inquiries. Second, that they might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public. Fourth, that neither the committee nor the House had a right to call on the Head of a department, who and whose papers were under the President alone, but that the committee should instruct their chairman to move the House to address the President.[7]

Although Washington did not utilize the asserted prerogative of withholding documents with respect to the St. Clair investigation, he did so on later occasions. In 1794, when the Senate requested diplomatic correspondence between the United States and France, Washington refused to produce those parts of the correspondence that, based on "public considerations, ought not . . . be communicated."[8] In 1796, Washington refused a request from the House for documents relating to John Jay's negotiation of a treaty with Great Britain.[9]

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[7] John C. Grabow, Congressional Investigations: Law and Practice 20 (1988).

[8] Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability 34-35 (1994).

[9] Id. at 35.

Successor administrations also claimed a right to withhold information from Congress based on the "public interest."[10] Andrew Jackson, for example, "did not shy away from exercising, on numerous occasions, the presidential power to withhold information."[11]

These assertions of executive power led to major battles with Congress. For example, in 1842, "the House vigorously asserted and President Tyler as vigorously denied the right of the House to all papers and information in possession of the Executive relating to subjects over which the jurisdiction of the House extended." 3 Hinds, Precedents of the House of Representatives §1884. Supporting the refusal of his Secretary of War to provide the House with certain investigative reports, Tyler maintained that confidential information in the possession of the President and the heads of the Departments could be withheld from Congress in the discretion of the executive. Id. §1885. Tyler's message was referred to a House committee, which submitted a report in response. The

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[10] See id. at 36-42 (discussing administrations from John Adams to Grover Cleveland); 4 Lewis Deschler, Precedents of the House of Representatives, ch. 15, § 3 (1977); Joel D. Bush, Congressional-Executive Access Disputes: Legal Standards and Political Settlements, 9 J. L. & Pol. 719, 724 (1993) ("[P]ractically every administration since 1792 has clashed with Congress over whether the President, at his discretion, may withhold information requested by the legislative branch.").

[11] Rozell, supra, at 38.

committee acknowledged that some information and papers in the Executive branch were properly treated as confidential, but asserted that "the House has the right to inspect them; and it, and not the Executive, is to be the judge of the propriety of making them public." Id.

Another major conflict occurred in 1886 during the administration of Grover Cleveland, when the Senate's demand for all papers in the Department of Justice relating to the removal of a U.S. attorney was refused by the Attorney General. Id. § 1894. The matter was referred to the Judiciary Committee, which reported that, where papers were "unconditionally demanded" of the President or the heads of the Departments, "they were under a constitutional duty and obligation to furnish to either House the papers called for." Id. Further, "[i]t may be fully admitted that except in respect of the Department of the Treasury there is no statute which commands the head of any Department to transmit to either House of Congress on its demand any information whatever concerning the administration of his Department, but the committee believes it to be clear that from the very nature of the powers intrusted by the Constitution to the two Houses of Congress it is a necessary incident that either House must have at all times the right to know all that officially exists or takes place in any of the Departments of the Government." Id. After a lengthy debate, the Senate adopted a resolution condemning the Attorney

General's refusal to provide the documents as "in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof."[12]

These disputes, and many others like them, "were resolved through negotiation, without recourse to the courts."[13] Thus, for example, the House ultimately did receive most of the papers it sought from President Tyler, while the Senate did not receive the papers it sought from the Cleveland administration. However, it was assumed in the congressional debates that, other than the extreme remedy of impeachment, there were no effective legal, as opposed to political, remedies for executive withholding of information.[14]

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[12] 17 Cong. Rec. 2211 (1886).

[13] Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 N.Y.U. L. Rev. 563, 570 (1991).

[14] See id. at 623-35 & n. 345. For example, in 1909, the Senate demanded documents from the Attorney General and the head of the Bureau of Corporations regarding the reasons that antitrust proceedings had not been brought against a particular company. Rozell, supra, at 42. Senator Bacon offered a resolution to affirm the right of the Senate to obtain all documents in the files of any executive department, but acknowledged that "there was no present or immediate remedy in case the head of a department or the President should refuse." 43 Cong. Rec. 849 (1909) (cited in Archibald Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1420 n.145 (1974)).

II. Congressional Methods of Seeking Information from the Executive

A. Resolutions of Inquiry A resolution of inquiry is one of the formal methods used by the House to obtain information from the executive branch.[15] It is 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."[16] Such a resolution is accorded a privileged status under House Rules and practice. See Rule XIII(7) of the Rules of the U.S. House of Representatives (107th Cong.).

Although less common in modern practice than in the 19th and early 20th centuries, the resolution of inquiry is still used as a means of obtaining information from the executive branch on a wide range of significant matters.[17] Such resolutions are normally complied with by the executive branch, but "there have been a number of instances in which the officer named has refused or declined to

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[15] Wm. Holmes Brown, House Practice: A Guide to the Rules, Precedents and Procedures of the House 799, 104th Cong., 2d Sess. (1996) (hereinafter "House Practice").

[16] 7 Deschler, Precedents of the House of Representatives, ch. 24, §8 (1977).

[17] See Walter J. Oleszek, Congressional Procedures and the Policy Process 314-15 (4th ed. 1996) (discussing 1995 resolution of inquiry seeking documents relating to President Clinton's use of the Exchange Stabilization Fund to shore up the value of Mexico's currency); House Practice 804.

provide some or all of the information sought."[18] There is "no specific provision for enforcing resolutions of inquiry;"[19] thus, "[t]he effectiveness of such a resolution derives from comity between the branches of government rather than from any elements of compulsion."[20]

B. The Subpoena and Contempt Powers Each House of Congress has the inherent constitutional power to demand and compel the production of information needed in support of its legislative function. As the Supreme Court has held:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927). One means of compulsion available to each House is the inherent contempt power, pursuant to which the

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[18] House Practice 804; see, e.g., 6 Chris Cannon, Precedents of the House of Representatives, §§ 434-35 (1936); 2 Hinds, supra, at §§ 1509-13, 1518-19, 1534, 1561.

[19] House Practice, supra, at 804.

[20] 4 Deschler, supra, at ch. 15, § 2.

House or Senate may direct its Sergeant at Arms to arrest a recalcitrant witness for trial and potential imprisonment by that House. See id. at 174-80; Anderson v. Dunn, 19 U.S. (6 Wheat) 204 (1821). Because of the practical difficulties involved with conducting a trial before the bar of either House, however, the inherent contempt power has not been used for more than sixty years.[21]

An alternative mechanism used to enforce congressional subpoenas is the criminal contempt statute, which provides that any person who wilfully fails to comply with a congressional subpoena for testimony or documents is guilty of a crime punishable by fine or imprisonment. 2 U.S.C. § 192. This applies not only to subpoenas issued by either House of Congress, but also to subpoenas issued by congressional committees or subcommittees exercising authority pursuant to a "clear delegation" from the parent House. Gojack v. United States, 384 U.S. 702, 716 (1966).[22] However, before a person may be prosecuted for contempt under this statute, the facts underlying the contempt must be reported by the committee to

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[21] Morton Rosenberg, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry 14, CRS Report for Congress (1995).

[22] Numerous Supreme Court decisions have upheld convictions of individuals who defied subpoenas of congressional committees for testimony or documents in violation of this statute. See, e.g., Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

the full House, which, if in session, must then vote to refer the matter to the U.S. Attorney for prosecution. 2 U.S.C. § 194; see Wilson v. United States, 369 F.2d 198, 203-04 (D.C. Cir. 1966).[23]

House Rules empower all standing committees and subcommittees to issue subpoenas to compel testimony or the production of documents. Rule XI(2)(m) of the Rules of the U.S. House of Representatives (107th Cong.). If specifically authorized by committee rule, the power to issue a subpoena may be delegated to the chairman of the full committee. Rule XI(2)(m)(3)(A)(i) of the Rules of the U.S. House of Representatives (107th Cong.). Neither the chairman nor the committee, however, may enforce a subpoena except as "authorized or directed by the House." Rule XI(2)(m)(3)(C) of the Rules of the U.S. House of Representatives (107th Cong.); see also In re Beef Industry Antitrust Litigation, 589 F.2d 786, 790 (5th Cir. 1979) (holding that House Rule "requires House authorization not only for

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[23] A rarely used provision of the statute allows the Speaker of the House or the President Pro Tempore of the Senate, as the case may be, to refer a committee contempt report for prosecution when the Congress is not in session. 2 U.S.C. § 194. In the one case which considered such an action, the court reversed the conviction on the ground that the Speaker had failed to exercise independent judgment in considering the propriety of the committee report, thus providing "a substitute for the kind of consideration which would be provided by the house if it were still in session" and a "check against hasty action on the part of the committee." Wilson, 369 F.2d at 203-04 (citation omitted).

direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation . . ., particularly when the purpose is . . . to obtain the effectuation of a subpoena.").

Prior to World War II, congressional subpoenas were rarely directed to executive branch officers. Modern practice has seen subpoenas increasingly used with respect to executive officials, and such subpoenas are now routinely used to compel the production of executive branch information which an executive branch agency resists providing upon simple request.[24] If an executive official fails to comply with a subpoena, the committee can threaten to hold the official in contempt, an action that has been taken against a number of cabinet officials in the years since Watergate.[25] In most cases the executive branch has been compelled to produce the information sought when a congressional committee has escalated a

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[24] See Neal Devins, Congressional-Executive Information Access Disputes: A Modest Proposal – Do Nothing, 48 Admin. L. Rev. 109, 113 (1996) ("When Congress conducts investigations, the single formal tool it can use to compel the production of information it desires is the subpoena. A subpoena allows Congress to tell the agency unequivocally that Congress is entitled to the information and that any attempt to hinder its access will be futile.").

[25] See Peterson, supra, at 571 ("Beginning in the mid-1970s, congressional committees turned with increasing frequency to the threat of contempt of Congress to enforce demands for information from the executive branch."); Fisher, supra, at 23-31 (discussing contempt proceedings against various cabinet officials from the mid-1970s to the late 1990s).

dispute to this level.[26] However, because the executive branch controls the machinery for prosecution, there are also incentives for the legislative branch to attempt to resolve the dispute short of an actual contempt referral to the U.S. Attorney.[27] In fact, there has been only one occasion in history where the full House has voted to refer an executive official (EPA Administrator Anne Gorsuch) to the U.S. Attorney for contempt, and this matter was resolved shortly thereafter without a prosecution.[28]

C. Legislation to Obtain Information Congress has frequently enacted statutes which require the executive branch to provide information to the Congress or its committees. Most of these statutory provisions require a particular

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[26] See Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 Minn. L. Rev. 631, 669-70 (1997) (arguing that an analysis of recent legislative-executive disputes over information demonstrates that the executive branch cannot effectively assert even allegedly valid claims of executive privilege once Congress escalates the dispute beyond the subpoena stage).

[27] United States v. House of Representatives of the United States, 556 F. Supp. 150, 153 (D.D.C. 1983) ("The difficulties apparent in prosecuting [an executive official] for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties.").

[28] See Stanley M. Brand & Sean Connelly, Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials, 36 Cath. U. L. Rev. 71, 77-83 (1986).

agency or official to report specified information to Congress or its committees on a periodic or one-time basis. Current law provides for more than 3,000 such reporting requirements.[29] The Act of 1928 itself was designed to replace some 128 separate reporting requirements that were deemed to be unnecessary or obsolete.

In addition, Congress has enacted a number of statutes that require executive branch agencies to provide information upon request of a particular legislative branch entity.[30] The first such statute was the Act of September 2, 1789, which provided that "it shall be the duty of the Secretary of the Treasury . . . to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives . . . ."[31] Similarly, statutes enacted in the 19th and early 20th centuries required executive officials such as the Commissioner of Agriculture, the Secretary of Commerce and Labor, and the Commissioner of Corporations to make special investigations and/or reports on particular subjects when requested to

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[29] House History, 246-47; Reports to Be Made to Congress, House Doc. No. 106-37 (1999).

[30] See, e.g., 22 U.S.C. § 2680(b); 2 U.S.C. § 190d(a).

[31] 1 Stat. 65-66 (1789); see also Raoul Berger, Executive Privilege v. Congressional Inquiry (Part I), 12 UCLA L. Rev. 1043, 1060-61 (1965).

do so by either House of Congress.[32]

1. The General Accounting Office The information access statute which has received the most sustained congressional attention and interest is that of the General Accounting Office ("GAO"), a legislative agency under the direction of the Comptroller General. As enacted in 1921 as part of the Budget and Accounting Act, the statute originally provided:

> All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

42 Stat. 26 (1921); see 31 U.S.C. § 716(a).

Despite this broad language, executive agencies frequently denied GAO access to records requested. For example, in 1958 the Secretary of the Air Force denied GAO copies of a Inspector General report relating to the management of a ballistic missile program, claiming that GAO's statutory authority could not prevent the head of a department from exercising the executive's constitutional prerogative

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[32] See Herman Wolkinson, Demands of Congressional Committees for Executive Papers (Part II), 10 Fed. Bar J. 223, 249-51 (1949).

"to keep appropriate information confidential in the public interest."[33] GAO rejected this contention and the House Committee on Government Operations, which held hearings on the matter, threatened to use the appropriations power to enforce GAO's right of access.[34]

Another controversy involved GAO's inability to obtain from the executive branch certain internal reports evaluating the foreign aid programs in various countries. After GAO was denied these reports on a number of occasions, a subcommittee of the House Government Operations Committee held a hearing and demanded the evaluation reports.[35] This demand was likewise refused. The chairman then introduced legislation which specifically required that such reports be produced to the GAO or to any congressional committee or subcommittee upon request. The legislation was enacted, but President Eisenhower, in approving the bill, stated that it was "not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of

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[33] Availability of Information from Federal Departments and Agencies, Hearings Before the Subcomm. on Government Information of the House Committee on Government Operations, 85th Cong., 2d Sess. 3675 (1958) (hereinafter "Moss Hearings").

[34] Moss Hearings, supra, at 3695-96.

[35] See Robert Kramer & Herman Marcuse, Executive Privilege – A Study of the Period 1953-1960 (Part II), 29 Geo. Wash. L. Rev. 827, 847-50 (1961).

information, documents and other materials."[36] This statement, which the sponsor described as "nullifying the amendment solemnly adopted by the Congress,"[37] led to repeated efforts to enact legislation which would make funding of foreign aid programs dependent on full information being given to GAO and congressional committees.[38]

GAO strenuously opposed these and other denials of information, contending that the executive branch's claimed "privilege to withhold information where such action is deemed necessary in the best interest of the country" could not overcome "GAO's clear statutory right of access to such information."[39] However, GAO noted that "[w]ith regard to enforcement remedies that are available to GAO to compel disclosure by Federal agencies where such agencies have refused to cooperate, except to report such refusals to Congress GAO does not

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[36] Id. at 855.

[37] Id. at 856.

[38] Id. at 856-60.

[39] GAO "Memorandum on Right of Comptroller General and the General Accounting Office to have Access to the Records of the Emergency Loan Guarantee Board" (Sept. 21, 1971), reprinted in Refusals by the Executive Branch to Provide Information to the Congress, 1964-1973, A Survey Conducted by the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess. 315 (1974) (hereinafter "Executive Branch Refusals 1964-1973").

have any enforcement remedies available."[40]

As a consequence of this lack of remedy, legislation was introduced in the 1970s to allow the GAO to enforce its statutory right of access in court. In 1978, hearings on this legislation before a subcommittee of the House Committee on Government Operations, the Comptroller General provided a description of many instances of agency refusals to provide information and testified that "[o]ne of the principal needs of GAO is a means for enforcing the Comptroller General's existing rights of access to information in the possession of the executive branch."[41] The executive branch strongly objected to this proposal, arguing that it would circumvent the process of accommodation between the branches and suggesting an appeals procedure within the executive branch instead. Ultimately, the legislation was enacted in an amended form which (1) required that 20 days prior to filing suit the Comptroller General provide a report to Congress, the President, the Attorney General and others; and (2) provided that the President or the Director of OMB, in their unreviewable discretion, could block any suit by

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[40] Id. at 317.

[41] Strengthening Comptroller General's Access to Records: New Procedure for Appointment, Hearings before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 95th Cong., 2d Sess. 15 (May 17 and June 26, 1978); see id. 22-31, 63-71.

making certain certifications provided for by the statute. See 31 U.S.C. § 716(b), (d); Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 Admin. L. Rev. 197, 232 (1992) (explaining how this statute promotes negotiation and informal dispute resolution).

2. Act of 1928 In comparison to the GAO statute, the Act of 1928 has received relatively little attention. The Act was originally proposed as a committee amendment to a bill, H.R. 12064, the purpose of which was

> to repeal certain acts or parts of acts requiring the submission to Congress, to the extent of such requirement, of the reports, and statements listed in the bill. Many of these statutory requirements are absolete [sic], while others require reports or statements that have no value and serve no useful purpose. Some of the departments and establishments have discontinued submitting these valueless reports and statements to the Congress, while others still comply with the statutory requirement.

H.R. Rep. No. 1757, 70th Cong., 1st Sess. 2-3 (1928) (Report of the House Comm. on Expenditures in the Executive Departments). The House report notes that "[t]o save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof." Id. at 6. Believing this to be a "wise provision," the Senate Committee on Expenditures in the Executive Departments added an

amendment to give the same power to itself or any five members, thereby "mak[ing] it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body." S. Rep. No. 1320, 70th Cong., 1st Sess. 4 (1928). In this form the Act was passed by both houses without objection.

It does not appear that the Act of 1928 had much impact in the years that followed its enactment. There is no evidence that either the House or Senate Committee on Expenditures relied on this provision in information access disputes with the executive branch, nor that either committee enjoyed an advantage over other congressional committees in obtaining executive branch information.

On the contrary, in 1948 the House Committee on Expenditures declared that "[t]he practice of the Executive in denying to congressional committees information sought by those committees has gradually widened in scope," and cited examples of information withheld from its subcommittees.[42] As a remedy, the Committee recommended legislation that would explicitly criminalize executive withholding of information from congressional committees. During the lengthy debate on this controversial measure, there was no mention of the Act of 1928, much less any

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[42] H.R. Rep. No. 1595, part I, 80th Cong., 2d Sess. at 2 (1948); see 4 Deschler, supra, at ch. 15, §5.3.

suggestion that it provided a mechanism to compel executive branch compliance with legislative demands for information.[43]

Problems with executive branch withholding of information continued, and, if anything, intensified, during the 1950s. Typical was President Eisenhower's May 17, 1954 directive to the Secretary of Defense, directing him not to permit any employees to testify before a subcommittee of the Senate Committee on Government Operations[44] regarding internal deliberations and communications, and a supporting memorandum from the Attorney General declaring that the President and the heads of the departments have "an uncontrolled discretion to withhold the information and papers in the public interest."[45] This was followed by the Attorney General's submission to a Senate committee on April 10, 1957 of a lengthy Department of Justice memorandum supporting this alleged "uncontrolled

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[43] 94 Cong. Rec. 5700-5743, 5807-5822 (1948).

[44] The House and Senate Committees on Government Operations were the successors to the Committees on Expenditures in the Executive Departments.

[45] The Power of the President to Withhold Information from the Congress, Memorandums of the Attorney General Compiled by the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess. 74 (Comm. Print 1958) (hereinafter "The Power of the President to Withhold Information from the Congress").

discretion."[46] This memorandum explicitly addressed the Act of 1928, stating the view that the "Constitution and the manner in which the decisions cited have interpreted it, would entirely negate an intent or desire by Congress, entirely unexpressed in the legislative history of the bill, to compel heads of departments to surrender information or papers against the wishes of the President, or their own better judgment, and against the public interest."[47]

Although the Eisenhower Administration's position on withholding of information from the legislature engendered widespread congressional opposition and condemnation, there appears to have been little or no reaction to its position with respect to the Act of 1928. A subcommittee of the House Committee on Government Operations held sixteen sets of hearings on executive withholding of information from November 1955 to November 1958, during which it heard testimony from numerous agencies and agency counsel, congressional lawyers,

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[46] Id. at 1-72. Although this was apparently the first formal release of this memorandum, it was initially drafted much earlier by a Department of Justice attorney, who published a law review article containing this analysis in 1949. See Herman Wolkinson, Demands of Congressional Committees for Executive Papers, (Parts I, II and III), 10 Fed. B.J. 103, 223, 319 (1949); see also Cox, supra, at 1397 n.54.

[47] The Power of the President to Withhold Information from the Congress, supra, at 58.

independent legal experts and others, yet there was apparently no challenge to the executive branch position on the Act of 1928, nor any suggestion of enforcing the statute through a lawsuit.[48]

During the Eisenhower administration and the administrations that followed, executive agencies withheld, on numerous occasions, information requested by the House and Senate Committees on Government Operations (and successor committees).[49] Although there have been occasional instances where these committees or individual members thereof have relied on the Act of 1928 as a basis for requesting information,[50] there has not been, prior to this case, any attempt by these committees or their members to judicially enforce the statute.

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[48] Moss Hearings, supra, at 1-3916.

[49] See Executive Branch Refusals 1964-1973, supra, at 143-51, 255-87; Robert Kramer & Herman Marcuse, Executive Privilege - A Study of the Period 1953-1960 (Part I), 29 Geo. Wash. L. Rev. 623, 635-37, 643, 650-53, 655-80 (1960) (describing numerous instances of information withheld from these committees during the 1953-60 time period).

[50] See. e.g, Withholding of Information by Department of Agriculture, Hearing before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations, 85th Cong., 2d Sess. 4-5 (1958) (request for information by the chairman of subcommittee pursuant to Act of 1928). In 1994, 11 members, including Representatives Clinger and Hastert, relied upon the Act of 1928 in requesting information from the FDIC.

ARGUMENT

At a minimum, the history described above establishes that if the Act of 1928 and other information access statutes which contain no explicit enforcement mechanism are (and have been for 50 years or more) judicially enforceable, this fact has escaped the attention of the Congress and its committees.[51] Moreover, a change that would "so profoundly affect Congress" would be expected to have been made explicitly, or at least to have been recognized in the many congressional hearings, reports and debates on the subject of executive withholding of information. See Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) (congressional silence would be particularly unexpected

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[51] The fact that lawsuits under the Act of 1928 have not been brought by committees in the past might be ascribed to institutional self-restraint, but it is doubtful that this same explanation would apply to individual members, who have not hesitated to bring litigation against the executive branch to obtain information or for other reasons. See, e.g., EPA v. Mink, 410 U.S. 73 (1973) (33 Members of Congress brought suit, in their official and private capacities, under FOIA to obtain documents pertaining to underground atomic explosion); Raines v. Byrd, 521 U.S. 811 (1997) (Members of Congress challenge line item veto); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), cert. denied, 531 U.S. 815 (2000) (31 Members of Congress seek declaratory judgment against President regarding the legality of the war in Kosovo); Chenoweth v. Clinton, 181 F.3d 112, 114-15 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000) (discussing numerous other congressional lawsuits).

on a legislative change that would "profoundly affect Congress").[52]

Even more important, however, is the fact that the judicial enforcement mechanism recognized by the district court would conflict with House rules and traditional practice, and would radically change the dynamic of executive-legislative disputes over information access. Under the House rules a committee subpoena cannot be enforced without the approval of the House. Thus, while a committee can issue a subpoena to an executive agency, the entire body must concur before that subpoena can be enforced. This provides an incentive for a committee to resolve most information access disputes by negotiation and compromise, and limits the escalation of disputes to those in which both branches have strong and irreconcilable interests.

Even where a true political impasse has been reached, the courts have been reluctant to intervene in executive-legislative information access disputes.[53] But the mechanism recognized by the district court is not even limited to situations where the branches have been unable to reach a resolution. Instead, it would allow a small

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[52] See also Reed v. County Comm'rs of Delaware County, 277 U.S. 376, 389 (1928) (holding that a Senate committee would not be deemed "authorized by law to sue" absent some "definite indication" that the Senate "intended to depart from its established usage.").

[53] See AT&T, 567 F.2d at 130-33.

group of members of a single committee to enforce a demand for information regardless of the views of a majority of the committee, much less of the House itself.

A recent dispute between the House Committee on Government Reform and the Department of Justice illustrates this point. In September 2001, the Committee issued a subpoena to Attorney General Ashcroft seeking two distinct categories of internal Justice Department memoranda: (1) those relating to the recent investigation of campaign finance abuses during the Clinton Administration; and (2) those relating to corruption and misconduct in the handling of confidential informants by federal law enforcement officials in Boston during organized crime investigations of the 1960s and 1970s. President Bush invoked executive privilege and instructed the Attorney General not to comply.

The Government Reform Committee then held a number of hearings related to the invocation of executive privilege, and specifically with regard to the question of whether there was any legal or historical precedent with respect to the withholding of the Boston documents. It quickly became apparent at these hearings that there was a strong bipartisan consensus on the Committee that the executive branch's position with respect to the Boston documents was utterly without merit. While many members also believed that the campaign finance

documents should be produced, this issue was potentially more politically divisive and of less immediate interest to the Committee. Accordingly, as a result of the pressure generated by these hearings, the Committee was able to reach an accommodation with the Justice Department that allowed the Committee to obtain access to the Boston documents, but not to the campaign finance memoranda.

If a minority of the Committee could sue the executive branch under the Act of 1928, this process of negotiation and compromise could be dramatically altered. If any seven members (less than one-sixth of the Committee in the current Congress) disagreed with the proposed compromise, they could sue (or threaten to sue) for more information. This would very likely eliminate or drastically reduce the executive branch's incentive to compromise, and thereby undermine the Committee's negotiating posture.

Even worse, from the House's institutional perspective, is the fact that it would have no say in which disputes were presented for judicial resolution. While the executive branch could prevent weak claims of executive privilege from being litigated simply by producing the information demanded, the House would not be able to stop a small group of members from litigating a case in which the executive's interest in non-disclosure appeared relatively strong in comparison to the congressional need for the information. In the long run, judicial resolution of

such cases would inevitably undermine the House's ability to obtain information from the executive branch.[54]

These results would conflict with the spirit, if not the letter, of the House rule prohibiting the enforcement of congressional subpoenas without approval of the body. There would be little point in having a check on hasty and ill-considered action of a congressional committee if this check could be circumvented by the committee, or a few members thereof, simply by bringing suit pursuant to the Act of 1928.

Finally, it is difficult to see how the district court's decision could be limited to the Act of 1928 itself. There are numerous information access statutes which, under the logic of the decision below, would also be judicially enforceable. For example, the law provides that the Congressional Research Service "shall have authority, when so authorized by a committee and acting as the agent of that committee, to request of any department or agency of the United States the production of such books, records, correspondence, memoranda, papers, and documents as the Service considers necessary, and such department or agency of

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[54] See United States v. AT&T Co., 551 F.2d 384, 394 (D.C. Cir. 1976) ("A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance.").

the United States shall comply with such request." 2 U.S.C. § 166(d). If the district court's decision is affirmed, this or similar statutes could be used as a basis for bringing suit against the executive branch, thereby flooding the judiciary with even more legislative-executive information access disputes and further exacerbating the House's institutional concerns.[55]

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[55] Of course, if Congress had intended that information access statutes like the Act of 1928 to be judicially enforceable, it would have had no need to provide GAO with an explicit, but limited, judicial remedy. Paradoxically, the district court's decision would mean that the Congressional Research Service and the Congressional Budget Office would have by implication a more expansive judicial remedy than that which Congress gave explicitly to GAO. See 2 U.S.C. § 601(d) (CBO information access statute).

CONCLUSION

For the reasons stated herein, the district court's decision should be reversed.

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