

THE POLITICS OF EXECUTIVE PRIVILEGE

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THE APPOINTMENT POWER

Until the President submits the name of a nominee to the Senate, Congress has no grounds for gaining access to the files relating to the individual's past employment or experience. Matters change fundamentally when the President nominates the person to public office and needs the cooperation and approval of the Senate. At that point he may be forced to surrender documents that could otherwise be withheld under the doctrine of executive privilege. The President might face two options, neither one attractive. One is to surrender sensitive documents to Congress and agree to have executive officials testify before congressional committees. If that choice is unacceptable, the other option is to abandon the nominee. Precisely those conditions emerged with regard to the appointment of Richard Kleindienst in 1972 to be Attorney General and William H. Rehnquist in 1986 to be Chief Justice. At any time in the appointment process, Senate "holds" and the threat of a filibuster can force the release of executive branch documents.

Kleindienst Nomination

President Nixon's nomination of Richard G. Kleindienst in 1972 to be Attorney General precipitated lengthy hearings by the Senate Judiciary Committee, eventually forcing the administration to allow a White House aide to testify. The nomination seemed to go smoothly at first. The committee voted unanimously on February 24 to approve Kleindeinst, who had served as Deputy Attorney General.¹ The administration expected the nomination to come to the floor for easy confirmation.

1. CQ Weekly Report, February 26, 1972, at 452.

Before that could happen, Jack Anderson published several explosive columns charging that the administration had entered into a corrupt deal with the International Telephone and Telegraph Corp. (ITT). A column published on February 29 claimed to have evidence that Attorney General John Mitchell agreed to drop an antitrust case against the company in return for a pledge of \$400,000 to help finance the 1972 Republican National Convention in San Diego.² A March 1 column accused Kleindienst of telling “an outright lie” by denying any connection between the settlement and the cash and by disclaiming any role in the department’s out-of-court settlement.³

The previous year, Kleindienst had been pressured by the White House to drop the antitrust action against ITT. White House aide John Ehrlichman called Kleindienst on April 19, 1971, telling him not to appeal one of the ITT cases. Kleindienst replied that the department would proceed with the appeal as planned. Within a few minutes, President Nixon was on the phone, directing Kleindienst “to drop the goddamn thing. Is that clear?”⁴ Kleindienst told Attorney General Mitchell about the call, explaining that if the President’s order prevailed he would have to resign and so would two others: Richard McLaren, head of the Antitrust Division, and Solicitor General Erwin Griswold. A few days later Mitchell told Kleindienst to proceed with the appeal.⁵

Faced with the sensational allegations in the Jack Anderson columns, Senate Judiciary opened a special hearing on March 2 to have Kleindienst explain his role in the department’s decision to settle the case.⁶ Senate hearings had produced conflicting statements as to whether ITT President Harold S. Geneen had discussed antitrust policy with White House aide Peter M. Flanigan.⁷ Some Senators wanted Flanigan to testify, but White House Counsel John Dean wrote to the committee on April 12, stating that the doctrine of executive privilege protected Flanigan and other White House aides from testifying before congressional committees: “Under the doctrine of separation of powers, and long-established historical precedents, the principle that members of the President’s

2. Jack Anderson, “Secret Memo Bares Mitchell-ITT Move,” *Washington Post*, February 29, 1972, at B11.

3. Jack Anderson, “Kleindienst Accused in ITT Case,” *Washington Post*, March 1, 1972, at B15. A third column summarized the first two; Jack Anderson, “Contradictions Cited in ITT Case,” *Washington Post*, March 3, 1972.

4. Richard Kleindienst, *Justice: The Memoirs of an Attorney General* 91 (1985).

5. *Id.* at 92–93.

6. *CQ Weekly Report*, March 4, 1972, at 510.

7. 1972 *CQ Almanac* 218–19.

immediate staff not appear and testify before congressional committees with respect to the performance of their duties is firmly established.”⁸

Firmly established? That overstates both principle and practice within the executive branch, and certainly a number of Senators refused to accept such a doctrine. By party-line votes of 6 to 6, the committee rejected three motions to subpoena White House aides to testify.⁹ Senator Charles McC. Mathias, Jr. (R-Md.) attempted to arrange a private, informal meeting between Flanigan and the committee, but that never materialized.¹⁰ Senator Sam Ervin insisted that the Senate should not vote on Kleindienst “so long as those fellows aren’t coming up here and the White House is withholding information.”¹¹ Ervin made it clear that if the nomination cleared the committee, he might filibuster it during floor action.¹² Senator John Tunney (D-Cal.) called Ervin a “master of the filibuster.”¹³ Ervin added: “If the President wants to make his nominee for Attorney General a sacrificial lamb on the altar of executive privilege, that will be his responsibility and not mine.”¹⁴

With a filibuster looming, the White House within a few days abandoned Dean’s legal theory. Flanigan advised the committee that he would testify if the questions were limited to his role in hiring Richard J. Ramsden, a financial analyst, and meeting with Geneen. By a 12 to 1 vote the committee accepted those conditions.¹⁵ Flanigan appeared at the hearings on April 20 to discuss the two issues he identified and to respond to some other matters. He later responded to written questions submitted by the committee.¹⁶ Following committee action, the Senate confirmed Kleindienst by a vote of 64 to 19.

As part of Nixon’s efforts to save his presidency, he asked Kleindienst and several others to resign to give an appearance of housecleaning. Kleindienst wanted his name announced separately from the planned resignations of

8. “Sen. Ervin Hints Filibuster on Kleindienst After Panel Rejects Calling of Nixon Aide,” *Wall Street Journal*, April 13, 1972, at 4.

9. 1972 CQ Almanac 221.

10. *Id.*

11. “Panel Votes Not to Subpoena Nixon Aides on I.T.T,” *New York Times*, April 13, 1972, at 8.

12. “Sen. Ervin Hints Filibuster on Kleindeinst After Panel Rejects Calling of Nixon Aide,” *Wall Street Journal*, April 13, 1972, at 4.

13. *Id.*

14. Sanford G. Ungar, “GOP Move Imperils Kleindienst,” *Washington Post*, April 13, 1972, at A24.

15. 1972 CQ Almanac 221.

16. *Id.* at 223; “Richard G. Kleindienst—Resumed” (Part 3), hearings before the Senate Committee on the Judiciary, 92d Cong., 2d Sess. 1585 (1972).

Dean, Ehrlichman, and Bob Haldeman, but the names were announced together.¹⁷ Kleindienst later pled guilty to a misdemeanor for not telling the truth at his confirmation hearing about Nixon's intervention in the ITT case. He could have been sentenced to a year in jail and fined \$1,000. Instead, Judge George L. Hart, Jr. sentenced him to one month in prison and fined him \$100. He then suspended both the sentence and the fine, placing Kleindienst on one month's unsupervised probation.¹⁸

L. Patrick Gray III

On February 17, 1973, President Nixon announced the selection of L. Patrick Gray III to be the new FBI Director. Gray had been serving as acting director since May 3, 1972, following the death of J. Edgar Hoover. When Gray's name was announced, his support in the Senate for confirmation seemed fairly strong.¹⁹ During hearings by the Senate Judiciary Committee on February 28 and March 1, Senators began to express concern about Gray's political background and his performance as acting director on such issues as the Watergate break-in, alleged wiretaps on newsmen, and leaks of FBI documents. To alleviate the concerns of the Senate, Gray offered to open FBI files with regard to the Watergate case and allow Senators to look through them.²⁰ He estimated that it would take a Senator about forty hours to review the files, prompting Senator Robert C. Byrd to dismiss the offer as "not worth a hill of beans" unless Senate staff members were given access. Gray rejected that proposal, except for the staff of the select Senate committee that was investigating Watergate.²¹

To clear up some of the issues that had been raised, Senator Tunney said he planned to ask the Senate Judiciary Committee to issue a subpoena to White House Counsel John Dean.²² Some Senators were concerned that Dean had been present during every FBI interview of a White House staff member, and also had access to FBI documents on the Watergate investigation.²³ At a

17. Public Papers of the Presidents, 1973, at 326–28; Kleindienst, Justice, at 168.

18. Kleindienst, Justice, at 175–76.

19. "FBI Chief: L. Patrick Gray III," CQ Weekly Report, February 24, 1973, at 378.

20. "Patrick Gray: Senators Worry About FBI in Politics," March 3, 1973, at 479.

21. "FBI Director: Watergate Linked to Gray Nomination," CQ Weekly Report, March 10, 1973, at 551.

22. "A Subpoena to White House," CQ Weekly Report, March 10, 1973, at 557.

23. "The White House and Watergate," CQ Weekly Report, March 10, 1973, at 557.

news conference the following day, March 2, President Nixon objected to Dean's appearance: "no President could ever agree to allow the Counsel to the President to go down and testify before a committee."²⁴ At the same time, Nixon said that if the committee asked for information "that a member of the White House Staff may have, we will make arrangements to provide that information."²⁵

On March 13, all nine Democrats and all seven Republicans on the Senate Judiciary Committee invited Dean to appear and testify concerning his relationship to Gray, the FBI investigation of Watergate, and the use of FBI information about that inquiry. Dean declined to come, but offered to provide written responses to questions submitted by the committee. Senator Ervin objected that it was impossible to cross-examine a written response.²⁶ At a news conference on March 15, Nixon was asked if he intended to prohibit Dean from testifying if it meant the defeat of Gray's nomination. Nixon responded that he could not believe the Senate "might hold Mr. Gray as hostage to a decision on Mr. Dean."²⁷ When asked whether he would allow Dean to sit down informally with Senators and respond to questions, Nixon rejected that compromise.²⁸

The deadlock over Dean's appearance before the committee became a major factor in the Senate's decision not to confirm Gray. On April 5, Nixon announced his intention to withdraw Gray's nomination to be FBI Director. He explained that he had asked Dean to conduct "a thorough investigation of alleged involvement in the Watergate episode," and directed Gray "to make FBI reports available to Mr. Dean." Gray's compliance with his order, Nixon said, "exposed Mr. Gray to totally unfair innuendo and suspicion, and therefore seriously tarnished his fine record as Acting Director and promising future at the Bureau."²⁹

With this announcement, Nixon released Gray gently and with respect. Privately, Nixon and his top aides decided that Gray's testimony had threatened the administration and his nomination would have to be abandoned. The press learned that Gray, under White House pressure, had destroyed some Watergate documents. Gray's status within the White House is reflected in Ehrlichman's remark that he should be left to "hang there; let him twist slowly,

24. Public Papers of the Presidents, 1973, at 160.

25. *Id.* at 160–61.

26. "Nixon, the Senate, the FBI: To the Battle Stations," CQ Weekly Report, March 17, 1973, at 630.

27. Public Papers of the Presidents, 1973, at 203.

28. *Id.* at 205.

29. *Id.* at 257.

slowly in the wind.”³⁰ Afterwards, FBI agents found in Gray’s safe some Watergate documents, given him by the CIA, that Gray had never shared with FBI investigators.³¹

Judicial Nominations

In recent decades, a number of nominations for judgeships have been delayed while the Senate waits for documents that the White House refuses, initially, to release. The congressional leverage is such that continued refusal would mean the loss of the candidate. The pressure builds until the White House offers some sort of accommodation to satisfy the needs of the Senate Judiciary Committee. An alternative is for the White House to hold firm, hoping that the next election will produce a Senate more supportive of presidential nominations. An administration strategy of delay is more attractive for lower court nominees than for openings that appear on the Supreme Court.

Rehnquist for Chief Justice

On July 31, 1986, President Reagan refused to give the Senate Judiciary Committee certain internal memos that his nominee for Chief Justice, William Rehnquist, had written while serving in the Justice Department as head of the Office of Legal Counsel (OLC) from 1969 to 1971. The reason for invoking executive privilege was familiar: to protect the confidentiality and candor of the legal advice submitted to Presidents and their assistants.³² At least with regard to OLC memos, this position is strained. Unlike many legal memos produced within the executive branch, OLC memos are regularly published.

Rehnquist agreed to the release of the documents, but the White House did not.³³ Whatever the merits of the administration’s legal theory, the political setting was not favorable. With Democrats on the committee rounding up votes to subpoena the papers,³⁴ the dispute threatened to prevent action not only on Rehnquist but also on the nomination of Antonin Scalia to be Associate Justice. The Senate planned to vote on both Rehnquist and Scalia on Au-

30. Fred Emery, *Watergate* 247 (1995); John Ehrlichman, *Witness to Power* 374 (1982).

31. Emery, *Watergate*, at 349.

32. Al Kamen and Ruth Marcus, “Reagan Uses Executive Privilege to Keep Rehnquist Memos Secret,” *Washington Post*, August 1, 1986, at A1.

33. *Id.*

34. Howard Kurtz and Ruth Marcus, “Democrats Seek to Subpoena Papers,” *Washington Post*, August 2, 1986, at A1.

gust 14.³⁵ Scalia had headed the OLC office under President Ford, from 1974 to 1977. Senator Paul Laxalt (R-Nev.) negotiated with the administration to see whether a compromise could be reached.³⁶

In an op-ed piece for the *Los Angeles Times*, Senator Ted Kennedy put the matter succinctly: “Rehnquist: No Documents, No Senate Confirmation.”³⁷ Kennedy said the committee needed to review Rehnquist’s OLC memos in such areas as domestic surveillance of the military, wiretapping of journalists, mass arrests of anti-war demonstrators, reform of the classification system, investigation of security leaks, and the part he played in the nomination and confirmation of federal judges. Kennedy agreed with the position advanced by Senator Ervin some years back that Presidents have no right to demand confirmation of a nominee while withholding information that Senators need to perform their constitutional role.

In an effort to move the Rehnquist and Scalia nominations, President Reagan agreed to allow the committee access to some of Rehnquist’s OLC memos. Instead of the original request for all of his memos on such broad issues as “civil rights” and “civil liberties,” the list was narrowed to about 25 to 30 documents.³⁸ A bipartisan majority of the committee—eight Democrats and two Republicans—had lined up in support of a subpoena. Under the agreement, six Senators and six staff members were allowed to read the OLC memos.³⁹ Later, the committee requested and received additional documents prepared by Rehnquist while in the Justice Department.⁴⁰ Having satisfied its needs for information within the executive branch, the Senate then confirmed Rehnquist and Scalia on September 17.

Robert Bork

In 1987, President Reagan nominated Robert Bork to be Associate Justice of the Supreme Court. As part of committee preparation, Senator Joe Biden

35. George Lardner, Jr. and Al Kamen, “Senators to Push for Rehnquist Memos,” *Washington Post*, August 5, 1986, at A4.

36. Kurtz and Marcus, “Democrats Seek to Subpoena Papers,” at A1.

37. Edward M. Kennedy, “Rehnquist: No Documents, No Senate Confirmation,” *Los Angeles Times*, August 5, 1986, Part II, at 5.

38. Al Kamen and Howard Kurtz, “Rehnquist Told in 1974 of Restriction in Deed,” *Washington Post*, August 6, 1986, at A1.

39. Howard Kurtz and Al Kamen, “Rehnquist Not in Danger Over Papers,” *Washington Post*, August 7, 1986, at A1, A14.

40. “Senators Are Given More Rehnquist Data,” *Washington Post*, August 8, 1986, at A3.

of the Judiciary Committee wrote to Attorney General Meese for “certain material in the possession of the Justice Department and the Executive Office of the President.” The list of documents included written products by Bork while he was Solicitor General. For example, the committee wanted all documents from 1973 through 1977 regarding Bork’s views on the constitutionality of the President’s “pocket veto” power. Among the documents requested: the decision not to petition for certiorari in the case of *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1977), the entry of the judgment in *Kennedy v. Jones*, 412 F.Supp. 353 (D.D.C. 1976), and the policy regarding pocket vetoes publicly adopted by President Ford in April 1976. Additional documents covered Bork’s role during the Watergate investigation, especially his dismissal of Archibald Cox as Special Prosecutor and communications that Bork had with President Nixon, Alexander Haig, Leonard Garment, Fred Buzhardt, Elliot Richardson, and William Ruckelshaus. The committee request also dealt with Bork’s participation as Solicitor General in seven cases decided by the Supreme Court.⁴¹

The Justice Department gave Biden the documents. Some were forwarded, such as memos from the Solicitor General’s office on the pocket veto issue. Others, under seal by order of a federal district court, had to be unsealed and supplied to the committee. A few were converted to redacted versions (deleting a few sentences of classified material) or in unclassified form. The department explained that “the vast majority of the documents you have requested reflect or disclose purely internal deliberations within the Executive Branch, the work product of attorneys in connection with government litigation or confidential legal advice received from or provided to client agencies within the Executive Branch.” Releasing such materials “seriously impairs the deliberative process within the Executive Branch, our ability to represent the government in litigation and our relationship with other entities.” Yet the department waived those considerations “to cooperate to the fullest extent possible with the Committee and to expedite Judge Bork’s confirmation process.”⁴²

When the Senate Judiciary Committee issued its report on Judge Bork’s nomination, it included a fifteen-page memo that he wrote as Solicitor General on the constitutionality and policy considerations of the President’s pocket veto power.⁴³ In the end, after a tumultuous confirmation hearing, the Senate rejected Bork 58 to 42. During the administration of George W. Bush, this

41. 149 Cong. Rec. S2886–88 (daily ed. February 27, 2003).

42. *Id.* at S2888 (letter of August 24, 1987 from Laura Wilson, for Assistant Attorney General John R. Bolton, to Senator Joseph R. Biden, Jr.).

43. S. Exec. Rept. No. 100-7, 100th Cong., 1st Sess. 313 (1987).

type of document from the Solicitor General's office would be withheld from the Senate regarding the nomination of Miguel Estrada.

Stephen Trott

The nomination of Stephen S. Trott for Ninth Circuit judge was held up for four months in 1988 because Senators Ted Kennedy and Howard Metzenbaum wanted internal documents from the Justice Department. Trott had been Assistant Attorney General of the Criminal Division. Kennedy and Metzenbaum used his nomination to gain access to a report by the department's Public Integrity Section, which sources claimed contained a recommendation to Attorney General Meese to seek the appointment of an independent counsel to probe Faith Ryan Whittlesey, former ambassador to Switzerland. Meese later decided against an independent counsel. Justice Department officials argued that the confidentiality of the report was protected by statute.⁴⁴

Refusing to release the report, the department explained: "As you know, it is a longstanding policy of the Department not to provide copies of internal, deliberative memoranda to persons outside the Department."⁴⁵ That may have been "longstanding policy," but the Trott nomination was not going to move unless and until the department yielded, which it did. Internal departmental documents about its investigation into Whittlesey were turned over to the Senate Judiciary Committee. Senators on the committee, and three staff aides from each side, were allowed to look at three "decisional memoranda."⁴⁶ Having received the documents they wanted, Kennedy and Metzenbaum released their hold on the nomination.⁴⁷

Miguel Estrada

In a replay of earlier fights over nominees to federal courts, President George W. Bush's nomination of Miguel Estrada to the D.C. Circuit in 2002 sparked requests by Senate Democrats for memoranda he wrote while a

44. "Justice Aide Kept on Hold," *Washington Post*, March 23, 1988.

45. Ruth Marcus, "Impasse Over Justice Department Ends," *Washington Post*, March 25, 1988, at A23 (quoting Assistant Attorney General John R. Bolton).

46. *Id.*

47. "After 4-Month Hold, Senate OKs Trott to U.S. Appeals Court," *Los Angeles Times*, March 25, 1988, Part I, p. 15.

lawyer in the Office of Solicitor General from 1992 to 1997. Unlike Bork, who wrote many decisions while on the D.C. Circuit and published widely in law reviews and other outlets, Estrada had much less of a written record to guide the judgment of Senators. The nomination was significant because the D.C. Circuit is often viewed as a stepping-stone to the Supreme Court, and it appeared likely that Bush would want to name the first Hispanic to the Court.

The White House, pointing to a letter from several former Solicitors General, refused to release the documents, arguing that to do so would inhibit lawyers from offering candid advice.⁴⁸ As with Rehnquist, Estrada said he had no objection to sharing the documents with the Senate Judiciary Committee: “If it were up to me, I would be more than proud to have you look at everything that I have done as a lawyer.”⁴⁹

Why would release of Estrada’s memos chill the willingness of government lawyers to provide frank advice? Paul Wolfson, who worked as an assistant to the Solicitor General from 1994 to 2002, explains that it is in the SG’s office that “DOJ’s litigation and policy decisions come together.”⁵⁰ That, by itself, shouldn’t shield agency documents. Wolfson offers other reasons for keeping these memos private: “Sometimes they contain unflattering descriptions of the reasoning of a judge, or a federal agency’s rationale for a regulation, or Congress’ wording of a statute.”⁵¹ This remark seems to call attention to a writing style that can be disparaging or derisive toward other agencies and branches. Such language might be very illuminating and useful for Senators who need to judge the qualifications, temperament, and maturity of a judicial nominee.

In the past, Congress had access to internal deliberative documents in the Justice Department, including the conduct of open and closed cases. Those precedents were detailed during a hearing before the House Government Reform Committee on February 6, 2002, regarding FBI corruption in its Boston office. After a confrontation with the Bush administration and the first invocation of executive privilege by President Bush, the documents were released. That dispute is discussed in the next chapter.

48. Neil A. Lewis, “Fight Brews Over a Judicial Nominee,” *New York Times*, September 24, 2002, at A21.

49. Neil A. Lewis, “Bush Judicial Choice Imperiled by Refusal to Release Papers,” *New York Times*, September 27, 2002, at A26.

50. Paul Wolfson, “Looking for a Paper Trail,” *National Law Journal*, October 21, 2002, at A20.

51. *Id.*

No committee action was taken on Estrada in 2002, when Democrats controlled the Senate Judiciary committee 10 to 9. After the fall elections gave the Republicans control of the Senate and a 10-9 edge on the committee, they approved Estrada's nomination by a party-line vote. Minority Leader Tom Daschle announced that the Democrats might pursue a filibuster to block Estrada's confirmation.⁵² When the filibuster began, Daschle remarked that until Estrada's SG opinions were made available, "we will not be in a position to allow a vote to come to the Senate floor."⁵³ The White House continued to withhold Estrada's memos.⁵⁴ To break the deadlock, Senate Majority Leader Bill Frist offered to make Estrada available for a second hearing, on the condition that the Democrats would allow a vote after that.⁵⁵ The Democrats turned down the offer, insisting that the administration release the memos and other work papers from Estrada's tenure in the Office of Solicitor General.⁵⁶

Ambassador to Guyana

In 1991, the appointment of George Fleming Jones to be U.S. Ambassador to Guyana was delayed 17 months until Senator Jesse Helms received documents he wanted from the State Department.⁵⁷ During a visit by Helms to Chile in 1986, one of his aides was accused of leaking U.S. intelligence information to the government of former Chilean President Augusto Pinochet. At that time, Jones was deputy chief of mission in the U.S. Embassy. Helms insisted that the State Department show him secret cable traffic regarding the visit. The department shared with him a number of documents but refused to turn over two cables, which they called internal memoranda.⁵⁸

52. Helen Dewar, "Filibuster Over Estrada Considered," *Washington Post*, February 6, 2003, at A4.

53. Neil A. Lewis, "Filibuster on Judgeship Halts Business in the Senate," *New York Times*, February 12, 2003, at A18.

54. Helen Dewar, "Deadlock Over Estrada Deepens," *Washington Post*, February 13, 2003, at A4.

55. Helen Dewar, "Bush Calls for Limit to Senate Debates," *Washington Post*, March 12, 2003, at A4.

56. Jennifer A. Dlouhy, "Democrats Snub Frist's Compromise Offer to Hold New Estrada Hearing," *CQ Today*, March 12, 2003, at 3.

57. Al Kamen, "Ambassador to Guyana is Appointed After 17-Month Standoff," *Washington Post*, November 29, 1991, at A40.

58. *Id.*

For the next few years, Helms bided his time, waiting for the appropriate moment to strike. The opportunity came in June 1990, when Jones was nominated for the position of ambassador to Chile. Helms now had the necessary leverage. After Helms renewed his request for the cables and the State Department again refused, he blocked the nomination. As the months rolled by and Helms held firm, Deputy Secretary of State Lawrence Eagleburger took a drive to Capitol Hill and stopped by Helms' office to show him the cables, which had been critical of both Helms and his aide. The memos had not been written by Jones. The State Department had merely decided to withhold from Helms documents that he might find offensive. After looking at the cables, Helms released his hold and Jones's nomination went forward.⁵⁹

Environmental Crimes Section (DOJ)

In the early 1990s, the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee began an investigation into the work of the Environmental Crimes Section (ECS) within the Justice Department, particularly the shift of prosecution responsibilities from U.S. Attorneys in the field to Washington officials. By 1994, this investigation had become entangled with the nomination of Lois Schiffer to be Assistant Attorney General of the Environment and Natural Resources Division.

Subcommittee hearings in September 1992 reviewed the concern of Congress over the past decade in inadequate criminal investigative resources at the Environmental Protection Agency. Chairman John D. Dingell (D-Mich.) said that EPA's criminal enforcement record, under legislative prodding, "has come a long way—only to be stifled by the activities of the Department of Justice."⁶⁰ He charged that ECS had acquired a veto power over environmental prosecutions nationwide, and that local U.S. attorney's offices and "even the line attorneys" in ECS objected to DOJ's decisions in Washington, D.C.⁶¹ Focusing on six cases, Dingell criticized the department for failing to prosecute responsible corporate officials or for entering into plea bargains that collected only modest monetary fines.⁶²

59. *Id.*

60. "EPA's Criminal Enforcement Program," hearing before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, 102d Cong., 2d Sess. 1 (1992).

61. *Id.* at 1–2.

62. *Id.* at 2.

Dingell wrote to the Justice Department on June 2, 1993, requesting copies of specific documents on six closed cases, communications to and from the six companies, calendars and daily diaries of certain departmental officials, and other documents.⁶³ Responding by letter on June 17, the department agreed to allow the subcommittee to interview nine departmental officials in connection with the environmental crimes program. The interviews could begin before the document request had been responded to.⁶⁴ The department advised the DOJ attorneys that “the subcommittee may be empowered to subpoena you if you choose not to be interviewed....”⁶⁵ President Clinton did not intervene in this subcommittee-department dispute. White House Communications Director Mark Gearan announced: “We will not assert any privilege or waiver.”⁶⁶

In March 1994, the subcommittee subpoenaed the records of six cases handled by the Environment and Natural Resources Division. In addition to sending the subpoenas, Dingell and ranking minority member Dan Schaefer (R-Colo.) released letters to the Senate Judiciary Committee, asking that the confirmation of Lois Schiffer be delayed.⁶⁷ She had been serving as Acting Attorney General of the Environment and Natural Resources Division and had been nominated for the permanent position on February 2, 1994. Schaefer expressed his concern about her confirmation because of what he described as “obstruction of the subcommittee’s work on oversight of the nation’s environmental laws.”⁶⁸ The correspondence from Dingell and Schaefer to Senate Judiciary carried extra punch because of its bipartisan stature.

As the dispute deepened, ECS chief Neil S. Cartusciello announced his resignation.⁶⁹ By that time, the subcommittee had begun receiving some of the documents it had subpoenaed.⁷⁰ After Schiffer moved to find a replacement for Cartusciello, the hearing on her nomination tentatively was scheduled.⁷¹ Further delays set in, but after the subcommittee was satisfied with the coop-

63. Letter from Dingell to Associate Attorney General Webster L. Hubbell, June 2, 1993.

64. Letter from Hubbell to Dingell, June 17, 1993.

65. Form letter from Anthony C. Moscato to the nine attorneys, June 28, 1993.

66. Jim McGee, “House Panel Subpoenas Justice,” *Washington Post*, March 12, 1994, at A4.

67. *Id.*

68. *Id.*

69. Jim McGee, “Chief of Environmental Crimes Section Quits,” *Washington Post*, April 2, 1994, at A4.

70. *Id.*

71. Al Kamen, “Teaming Up,” *Washington Post*, July 13, 1994, at A15.

eration it had received from the Justice Department, Schiffer was confirmed by the Senate on October 6, 1994.⁷²

This type of executive-legislative dispute illustrates that Congress has sufficient tools at its command to wrest from the administration the documents it needs to fulfill congressional duties. The question is whether lawmakers will press their advantage. As noted by Neal Devins, the issue is “not the adequacy of congressional power to obtain information, *but* the willingness of committee chairs and staffers to aggressively pursue information.”⁷³

Senate “Holds”

The informal practice of imposing “holds” allows any Senator to request that floor action on a bill or nomination be deferred. The Senate Majority Leader may then decide whether to honor the request. Although there have been objections to “secret holds”—holds that are not identified with a particular Senator—holds are frequently a legitimate means of pursuing legislative interests. Efforts to place limits on holds, such as requiring Senators to make their actions known to the sponsor of a bill, have been extremely difficult to enforce.

There are many reasons for placing a hold, but often it is to obtain information that the executive branch has refused to release to Congress. A typical power struggle occurred in the Senate in 1989, when two Democratic committee chairmen, Donald W. Riegle, Jr. of Michigan and Alan Cranston of California, advised the White House that their committees would not schedule confirmation hearings on nominees until the administration provided FBI reports on the nominees to the majority and minority staff directors. Riegle’s committee had jurisdiction over the nomination of more than two dozen officials of the Department of Housing and Urban Development, as well as nominees for the Securities and Exchange Commission, the Council of Economic Advisers, and other executive agencies. Cranston’s committee had ju-

72. See 140 Cong. Rec. 28360 (1994). For further details on this controversy, see “Damaging Disarray: Organization Breakdown and Reform in the Justice Department’s Environmental Crimes Program,” 103-T, Staff of Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 103d Cong. (Comm. Print 1994); Neal Devins, “Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing,” 48 Admin. L. Rev. 109, 123–25 (1996).

73. Devins, “Congressional-Executive Information Access Disputes,” at 133 (emphasis in original).

risdiction over the Department of Veterans Affairs and the Court of Veterans Appeals. White House Counsel C. Boyden Gray offered to allow the committee chairman and ranking minority members access to the FBI reports.⁷⁴ On an impasse like this, a Senate threat carries high credibility.

Senator John Warner announced in 1993 that he would release his hold on the intelligence authorization bill after receiving assurance from the CIA that it would search its files for information on Defense Department nominee Morton Halperin. The CIA had previously said that it could not find the documents requested by Republican members of the Senate Armed Services Committee. CIA Director James Woolsey promised to search agency files and provide a timely response. He had planned to brief committee Republicans on this issue but apparently was ordered not to do so by White House Counsel Bernard Nussbaum.⁷⁵

In 1997, Senator Charles Grassley used holds to force the State Department to comply with a statutory procedure that required the administration to submit to Congress on November 1 of each year the names of countries that the administration would certify as cooperating on drug control. After the administration had missed several deadlines and extended deadlines in submitting the list, he put a hold on nominations for ambassadors to Bolivia, Haiti, Jamaica, and Belize. As Senator Grassley said: “we need to get the administration’s attention so that they will abide by the law.”⁷⁶ No doubt this tactic prompts the administration to order agency compliance with statutory requirements.

In 1999, several Senators wrote to the State Department, expressing their concern about the department’s treatment of Linda Shenwick, who worked at the U.S. mission to the United Nations. After providing Congress information on mismanagement at the UN, she was threatened with a suspension and transfer to another job. Senator Grassley charged that Shenwick “is guilty of committing the crime of telling the truth. And when you commit truth, you’re history in the State Department.”⁷⁷ As a way of getting the department’s attention, Grassley placed a hold on the nomination of Richard Holbrooke to be U.S. ambassador to the UN. He explained that if lawmakers did not pro-

74. Ann Devroy, “White House, Senators Feud on FBI Data,” *Washington Post*, May 19, 1989, at A1.

75. Bill Gertz, “CIA Offer of Help on Nominee Frees Up Authorization Bill,” *Washington Times*, November 5, 1993, at A5.

76. 143 Cong. Rec. S11632 (daily ed. November 4, 1997).

77. Statement by Senator Grassley, 145 Cong. Rec. S7587 (daily ed. June 24, 1999); “Sen Grassley’s ‘hold,’” Editorial, *The Hill*, August 11, 1999, at 10.

protect agency whistleblowers, “a valuable source of information to Congress will likely dry up.”⁷⁸ After being reassured that Shenwick would not be punished by the State Department, Grassley lifted his objections to Holbrooke, who was confirmed. However, Grassley blocked approval of three other ambassadorial nominees to underscore his intention to protect Shenwick.⁷⁹

Reform proposals to regulate and restrict holds in the Senate have been unsuccessful. Senators are jealous of their ability to act independently and are unlikely to see that capacity diminished. In 1993, Senator Majority Leader George Mitchell announced some general guidelines on the use of holds. He denied that Senators have the right to “indefinitely postpone and, therefore, defeat outright nominations or legislation in the Senate.”⁸⁰ He summarized the policy followed by Democratic and Republican leaders over the years, requiring Senators to notify their leaders about any need to consult with them about a bill or nomination. Before the scheduling of a bill or nomination, Senators had an obligation to discuss the issue with the committee chairman and/or the ranking member or sponsor. If Senators planned to object to a unanimous consent request, they should be on the floor at the announced time for the legislation or nomination.⁸¹

It is precisely this procedure for unanimous consent motions that gives great power to an individual Senator and makes it so difficult to regulate the use of holds. The House of Representatives has a Rules Committee that determines how much time shall be allowed to debate a bill, and what kind of amendments are to be allowed. In the Senate, such matters are handled by the Democratic and Republican leaders who draft a unanimous consent request. To do that, they need to touch base with every Senator to make sure that their needs are accommodated. Otherwise, when the majority leader comes to the floor and announces “I ask unanimous consent...,” an individual Senator can object, forcing the party leaders to hammer out another unanimous consent agreement.

Mitchell explained his policy on the use of holds. He pledged to respect requests by Senators for advance notifications of actions on a bill or nominee:

78. Sen. Chuck Grassley, “Holds Practice Needs Big Changes,” Letter to the Editor, *Roll Call*, August 2, 1999, at 4.

79. George Archibald, “Grassley Shifts Tack; Holbrooke Path Clear,” *Washington Times*, August 5, 1999, at A6; Helen Dewar, “Holbrooke Nomination Clears Hurdle,” *Washington Post*, August 5, 1999, at A4. For Senate debate on Grassley’s hold on Holbrooke, see 145 *Cong. Rec.* S10216–17, S10268–74 (daily ed. August 4–5, 1999).

80. 139 *Cong. Rec.* 10202 (1993).

81. *Id.* at 10202–03.

“I believe this is a reasonable procedure and I think a Senator is entitled to a reasonable period of time to prepare for legislation or to consult with a nominee.”⁸² He then stated:

So I do believe that Senators have the right, as a part of this process, to raise policy concerns with the administration. But it should be clear that no Senator has the right to insist that the administration agree with his or her position on a policy or on a project, as a specific price to be paid for action on a nominee or on legislation.

That is to say, a Senator cannot reasonably expect that a hold can be used as a way of indefinitely postponing or killing outright a bill or nomination, simply because the administration does not agree with the Senator’s position on a particular policy or a project.⁸³

Mitchell told Senators what they could “reasonably expect.” As one reporter put it, his policy could be translated as “No more hostage-taking.”⁸⁴ However, not every Senator will agree to be “reasonable” when the stakes are high, either in terms of needs back home or larger questions of national and international policy. In such cases, a Senator may decide to impose a hold for a long period of time until the administration takes certain actions, which may be the release of agency documents or an agreement not to take sanctions against a whistleblower who a Senator believes is being unjustifiably punished for telling the truth.

Objections are raised to “secret” holds: where a Senator blocks action without being named. Critics of this process insist that all holds “should be announced publicly—what or whom is being held, and who is doing it—and should not apply for more than two weeks.”⁸⁵ Some Senators have pushed this reform proposal, but with little success. In 1997, Senator Ron Wyden offered an amendment to make it a standing order of the Senate that a Senator who notifies the leadership of his or her intention to object to proceeding to a motion or matter “shall disclose the objection (hold) in the Congressional Record not later than 2 session days after the date of said notice.”⁸⁶ Wyden objected not to holds but to anonymous holds: “I think when one Member of the U.S.

82. *Id.* at 10203.

83. *Id.*

84. Helen Dewar, “Impasse on Clinton Nominees Eases,” *Washington Post*, May 19, 1993, at A13.

85. Norman Ornstein, “Senatorial Choke Hold,” *New York Times*, May 18, 1993, at A21.

86. 143 Cong. Rec. S9872 (daily ed. September 24, 1997).

Senate moves to effectively block the consideration of a bill or a nomination, they ought to make it clear to their constituents that they are the individual blocking this matter.”⁸⁷ Ironically, when Wyden asked unanimous consent to speak on his amendment the following day for ten minutes, objection was heard.⁸⁸ Four years later, in 2001, a reporter observed that the effort in the Senate to eliminate secret holds “seems to be a dead letter.”⁸⁹ Toward the end of 2001, Senator Patrick Leahy objected that “one or more Republicans Senators”—he didn’t know who—had held up final passage of the 21st Century Department of Justice Appropriations Authorization Act.⁹⁰

Must the Senate Always Act?

The Senate filibuster of Miguel Estrada in 2003 led to proposals to force the Senate to vote on nominees, either up or down. On May 9, 2003, Senate Majority Leader Bill Frist introduced S. Res. 138, designed to gradually reduce the number of votes needed to close debate: from its present 60 votes to 57, after the second cloture motion, and “by 3 additional votes on each succeeding motion, until the affirmative vote is reduced to a number equal to or less than an affirmative vote of a majority of the Senators duly chosen and sworn. The required vote shall then be a simple majority.”⁹¹

Majority rule is an important principle in democratic government, but it is not an overriding or preeminent value. If it were, minority rights could be given short shrift, the President would be elected by the majority vote of the people rather than through the Electoral College, and there would be no reason for the supermajorities that govern constitutional amendments, impeachment, veto overrides, treaties, and expelling members of Congress. The fact that the Constitution expressly provides for these supermajorities does not make additional supermajorities unconstitutional. In a 1971 opinion decided by a unanimous Court, Chief Justice Warren Burger remarked: “Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our

87. *Id.*

88. *Id.* at S9874.

89. Helen Dewar, “Senate Pact on ‘Holds’ Seems to Be a Dead Letter,” *Washington Post*, November 12, 2001, at A23; Helen Dewar, “Senator Seeks to Stamp Out Secretive ‘Holds,’” *Washington Post*, November 17, 2001, at A4.

90. 147 Cong. Rec. S13290 (daily ed. December 14, 2001).

91. S. Res. 138, 108th Cong., 1st Sess. 4 (2003).

history, or our cases that requires that a majority always prevail on every issue.”⁹²

To equate the congressional process with majority rule does not reflect legislative practice. Under Section 5 of Article I, each House of Congress “may determine the Rules of its Proceedings.” Both chambers have adopted rules that require a supermajority for certain legislative actions. Political power is deliberately parceled out to small groups, such as committees and subcommittees, often making it difficult for a majority to prevail, or at least quickly. In committee, a small number of Senators decide whether to act at all on a presidential proposal.

Nothing in the U.S. Constitution compels Congress to act on a presidential proposal, whether for legislation, a treaty, or a nomination. The deliberative process implies legislative choice, including the freedom to do nothing. Of course Congress must as a practical matter act on certain measures, such as appropriations bills and nominations to federal office. Otherwise, government could not function. However, there is no legal obligation on the part of the Senate to act on a particular nominee, whether for an executive agency or the federal courts.

Not only is there no constitutional requirement to take a floor vote for or against a nominee, there is no requirement for a committee to act. There is no offense to constitutional requirements if a committee receives a nominee and concludes that the qualifications of the individual do not warrant a committee hearing or committee action. Perhaps the committee learns of defects in the nominee that would needlessly embarrass the individual or the administration through a public hearing. The committee may postpone action for any number of reasons, including the administration’s decision not to release documents that the committee believes are necessary to give full consideration to the nominee’s qualifications. If the Senate as a whole decides that the committee has unfairly blocked action that deserves a floor vote, procedures are available to discharge the committee. Otherwise, it is the committee’s call. The full Senate generally defers to committee actions not to act on a nominee.

Senate action or inaction depends on how the President nominates a judge. It is possible to read the constitutional text as granting the President the exclusive role in nomination: “he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...” Presidents, however, consult with Senators during the nomination phase to facilitate confirmation. If the President builds an interbranch consensus, he more easily secures the Senate’s con-

92. *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

sent. If the President excludes the Senate from offering advice on the nomination and submits a controversial choice, the Senate will be more inclined to take no action at all, either in committee or on the floor. For controversial nominees that are reported out of committee, one would expect lengthy debate on the floor and possibly a filibuster. If a President wants to be assured of a floor vote—up or down—on a nominee, the answer lies not in a change in Senate rules but in the President’s willingness to consult closely and meaningfully with Senators.

Senate control over nominations gives it a decided edge in demanding information from the executive branch. The message from a committee of jurisdiction is quite blunt: “To evaluate this nominee, we need the following documents.” In the case of Rehnquist and other nominees, an administration may decide to abandon cherished, “long-standing” doctrines of executive privilege in order to move a nomination out of committee and onto the floor. This type of Senate threat is not always effective. An administration may prefer to keep the documents and drop the nominee, or perhaps wait for the next election to produce a Senate more supportive of presidential choices.