Legal Times
WEEK OF APRIL 16, 2007 • VOL. XXX, NO. 16
ALM

Push Back

Now Congress must check the White House to restore the Framers' balance.

SENS. ARLEN SPECTER AND PATRICK LEAHY/PHOTOS BY DIEGO M. RADZINSCHI

BY AZIZ HUQ AND FREDERICK A.O. SCHWARZ JR.

When White House press secretary Tony Snow proclaimed last month that Congress "does not have constitutional oversight responsibility over the White House," it seemed that two branches of government were on a collision course.

Viewed narrowly, the dispute focuses on what Attorney General Alberto Gonzales has charitably called "confusion" about his and Karl Rove's role in the replacing of eight U.S. attorneys. But the collision also reveals a larger constitutional problem: an inversion of the Framers' balance of power between the executive and the legislature.

So as Gonzales testifies before the Senate Judiciary Committee this week, the underlying problem is twofold. First, power has shifted tremendously from executive departments to White House advisers. And second, practical authority has swung from Congress to the executive branch as a whole.

Consider first the changing White House. One pivotal question in the dispute over the U.S. attorneys is Congress' power to secure testimony from presidential aides such as Rove. White House advisers also figured prominently in disputes over executive privilege during the presidency of Bill Clinton, as former Clinton personnel testified last month.

This should not be a surprise, as these advisers' roles have shifted dramatically in the past 80 years.

For the first century and a half of American life, Congress dwarfed the executive branch in manpower and administrative capacity, and the Cabinet departments dwarfed the White House.

Now, however, the president (and the vice president) have an enormous staff of policy-makers and executors, from White House counsel to national-security advisers. In many instances, these officials have more power than do department heads, who must be selected with the advice and consent of the Senate.

Drawing an unassailable veil of secrecy around these personnel invites troubling uses of power, as the perjury trial of I. Lewis Libby Jr. demonstrated. In Libby's grand-jury testimony, jurors and the public heard how officials in the White House selectively disclosed classified information to promote a not only partisan but also personal agenda.

POWER SHIFTS

The shifting balance of power is not a matter of changes at the White House alone. With the rise of the administrative state, power has shifted more generally from the legislative to the executive. In *Federalist No. 48*, James Madison warned against the "enterprising ambition" of an all-powerful legislative branch. Today it is the executive that enjoys decisive advantages with information, secrecy, and centralization.

The national-security state subtly accreted over the Cold War decades. With $44 billion of national-security bureaucracy at its disposal today, the executive branch does not lack tools to conform facts to fit the policies being sought. As advances in military technology accelerate, the pressure to act with alacrity will grow, making the intelligence bureaucracy's abilities an increasingly central instrument in forming policy.

Congress has so far failed to grasp this transformation. The U.S. Code showcases both an impulse to punt to the executive branch (the politically expedient option), and to take meaningful responsibility (the harder, less traveled path).

Take, for example, the National Security Act. It demands that the congressional intelligence committees be kept "fully and currently informed" of the nation's intelligence activity. At the same time, the act delegates to the executive branch sweeping power to keep secret "sensitive intelligence sources and methods or other exceptionally sensitive matters." To be sure, details of sources and methods ought never to leave an agency's possession. Nevertheless, this exception, a large escape hatch from disclosure, furnishes the White House with power to keep its secrets to itself.

Legislative handling of classification questions shows the same equivocation. Rather than meaningfully fashioning a classification framework, Congress simply delegated this task to the executive branch. Nevertheless, Congress also scrupulously excluded members of both houses from the classification rules. Contrary to popular belief, then, the attorney general errs when he waves secrecy stamps at the Senate Judiciary Committee to justify hiding information about domestic spying by the National Security Agency or interrogation policies of the Central Intelligence Agency.

These changes mean that it is more urgent than ever that Congress recover its history of vigorous oversight, and, in particular, inquiries accomplished through vigorous use of the subpoena power.

A LONG HISTORY

Oversight, including oversight addressing the nation's most pressing questions of security, lies at the heart of Article I responsibilities. As Sen. J. William Fulbright (D-Ark.) explained in 1951, investigations gave Congress "eyes and ears and a thinking mechanism."

The long history of congressional inquiries gives flesh to this claim. Indeed, congressional investigations, and concomitant demands for information, date back to 1790, when the first Congress investigated the conduct of Robert Morris, superintendent of finance.

Two years later, the House demanded, and got, documents concerning a military debacle involving a confrontation with Indian tribes. Although President George Washington reserved the right to not disclose information that harms "the public," Congress undoubtedly had the power to wrest information on military and security matters from executive control.

Twentieth-century investigations revealed serial misconduct in the executive branch, beginning with the Senate's 1922 investigation into the Teapot Dome scandal. Beginning in 1941, then-Sen. Harry Truman (D-Mo.), chairman of the Committee to Investigate the National Defense Program, called 1,798 witnesses, held 432 hearings, issued 51 reports, and documented billions of dollars of wartime waste and mismanagement. Even the heat of World War II did not stifle the need, or the power, of Congress to ensure accountability.

In short, legislative inquiry has long been a vital window into mismanagement, corruption, and self-dealing in the administrative state. No less than land management or federal contracting, the conduct of military operations raises first-order questions about the responsible and ethical use of executive power.

Oversight by committee is especially vital because Congress' other tools, such as spending power and impeachment authority, are too unwieldy to be effective as an ongoing guarantee for a full flow of information. Big guns simply cannot be wheeled out on every occasion.

JUDICIAL REVIEW

When addressing this type of congressional oversight, the courts, despite being increasingly staffed by judges bearing résumés laden with executive posts, need to recall the important history of judicial enforcement of congressional demands for information.

Two incidents, one from the troubled infancy of the republic and another from the roiled post-Watergate era, illustrate the critical role played by federal courts.

The new republic faced threats of sedition, most notoriously from Aaron Burr. The troublesome former vice president fled

south after his deadly duel with Alexander Hamilton, seeking in 1805 to muster an army and march on Mexico.

In a subsequent treason trial, Burr demanded that President Thomas Jefferson hand over correspondence material to his defense. Presiding over the trial was Chief Justice John Marshall, who was no stranger to the exigencies of executive secrecy. Marshall had been part of the mission to France to negotiate a new treaty, a mission that ended in the public fiasco known as the XYZ Affair. Later, Marshall became secretary of state for President John Adams.

During the Burr trial, the president's lawyers claimed an absolute privilege to withhold information. The president stood apart from judicial process, they argued, and it would be "incompatible with his dignity to appear under the process of the court." But Chief Justice Marshall rejected any claim to unfettered executive discretion to hide information, even while he acknowledged that some correspondence ought not to be "forced into public view."

With his quintessential mastery of compromise, Marshall crafted a procedural scheme to maximize both parties' goals while homing in on the core areas of dispute. The president would give his reasons for withholding, objections could be made by Burr, and the court would winnow down the areas of disputed secrecy incrementally.

AFTER WATERGATE

The role of courts in managing interbranch conflicts about information was not extinguished by the rise of the administrative state. The second historical example, which comes from the post-Watergate fallout, shows that courts, even in this new context, can knock heads together until resolution is reached.

In December 1974, *New York Times* reporter Seymour Hersh disclosed massive CIA spying on anti-war activists and other domestic dissidents. Set alongside the Watergate scandal, Hersh's story catalyzed congressional inquiries into the CIA and coordinate security agencies. Pivotal among these was the Senate Select Committee led by Frank Church (D-Idaho), which comprehensively documented how far intelligence agencies had strayed from their security mandates without oversight.

Church successfully negotiated access to necessary classified information, carefully sorting needed facts from unnecessary ones. In scrutinizing the use of confidential informants, for instance, the Church Committee carefully negotiated agreements specifying that the identities of informants would remain undisclosed, but other relevant information would be released.

But other congressional bodies entered more direct confrontations. In 1976, an oversight subcommittee of the House Committee on Interstate and Foreign Commerce sought documents about the NSA's domestic warrantless wiretapping. (Sound familiar?) Negotiations with the Justice Department broke down over how the executive branch's classification decisions were to be verified—whether by staff members or by the committee chairman personally. Subpoenas were issued. The issue was joined in federal court.

A district court dismissed the case, finding the executive's claim to privilege reasonable. But the U.S. Court of Appeals for the D.C. Circuit reinstated the case. Faced with "patently conflicting assertions of absolute authority," Judge Harold Leventhal of the D.C. Circuit insisted on the possibility of compromise. He paused the case to allow further negotiations but nevertheless insisted on the judiciary's continuing power to guide the parties to a constitutionally sound resolution.

Under the shadow of judicial insistence, the Justice Department and the subcommittee reached a functioning compromise, and the case was dismissed in December 1978.

One lesson from both the Burr trial and congressional inquiries of the 1970s is clear: The executive lacks unfettered power to withhold discrete pieces of classified information from Congress. Because the risk of executive-branch corruption or malfeasance is pervasive and inevitable, Congress always has power to peek behind the scrim of secrecy to ascertain that it is not being misled.

This legislative power cannot be deployed without procedural constraints. But it properly extends to oversight of all executive officials at 1600 Pennsylvania Ave. who can misuse authority for partisan ends.

And that's something Congress should remember—both with Attorney General Gonzales this week and with the other executive-branch officials who may testify later.

Aziz Huq and Frederick A.O. Schwarz Jr. work at the Brennan Center for Justice at New York University School of Law. Schwarz served as chief counsel for the Church Committee.