AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers/Executive Privilege

*Robert H. Jackson*, **Position of the Executive Department Regarding Investigative Reports** (1941)[[1]](#footnote-1)

*In 1941, the chairman of the House Committee on Naval Affairs requested that the Franklin D. Roosevelt administration provide all reports by the Federal Bureau of Investigation relating to labor disputes and “subversive activities” in connection with labor disputes over the past two years. Attorney General Robert H. Jackson wrote to the House member explaining that the administration would not be providing those investigative reports because they were confidential documents within the executive branch and that it would be contrary to the public interest to provide such materials to Congress. Although Jackson did not use the term “executive privilege” in explaining the administration’s position, he did argue that confidentiality of such files was a long-held position of the executive branch rooted in the constitutional duties of the president.*

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It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counterespionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them, would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants -- sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.

Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.

In concluding that the public interest does not permit general access to Federal Bureau of Investigation reports for information by the many congressional committees who from time to time ask it, I am following the conclusions reached by a long line of distinguished predecessors in this office who have uniformly taken the same view. . . .

Letter of Attorney General Knox to the Speaker of the House, dated April 27, 1904, declining to comply with a resolution of the House requesting the Attorney General to furnish the House with all papers and documents and other information concerning the investigation of the Northern Securities case.

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Letter of Attorney General McReynolds to the Secretary to the President, dated August 28, 1914, stating that it would be incompatible with the public interest to send to the Senate in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Co.

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In taking this position my predecessors in this office have followed eminent examples.

Since the beginning of the Government, the executive branch has from time to time been confronted with the unpleasant duty of declining to furnish to the Congress and to the courts information which it has acquired and which is necessary to it in the administration of statutes. As early as 1796, the House of Representatives requested President Washington to lay before the House a copy of the instructions to ministers of the United States who negotiated a treaty with Great Britain, together with the correspondence and other documents relating to that treaty. In declining to comply with the request, President Washington said:

". . . as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."

In 1825, the House of Representatives requested President Monroe to transmit certain documents relating to the conduct of the officers of the Navy of the United States on the Pacific Ocean, and of other public agents in South America. In his reply, President Monroe refused to comply with the request, stating that to do so might subject individuals to unjust criticism; that the individuals involved should not be censured without just cause, which could not be ascertained until after a thorough and impartial investigation of their conduct; and that under those circumstances it was thought that communication of the documents would not comport with the public interest nor with what was due to the parties concerned.

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This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury v. Madison* (1803); *Totten v. United States* (1876); *Kilbourn v. Thompson* (1881). . . .

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In *Appeal of Hartranft* (Pa. 1877), the Court said:

". . . We had better at the outstart recognize the fact, that the executive department is a coordinate branch of the Government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts."

The information here involved was collected, and is chiefly valuable, for use by the executive branch of the Government in the execution of the laws. It can be of little, if any, value in connection with the framing of legislation or the performance of any other constitutional duty of the Congress. We do not undertake to investigate strikes as to their justification or the lack of it, but confine investigation to alleged violations of law, including of course violation of statutes designed to suppress subversive activity, and to general intelligence to guide executive policy. Certainly, the evil which would necessarily flow from its untimely publication would far outweigh any possible good.

I am not unmindful of your conditional suggestion that your counsel will keep this information "inviolate until such time as the committee determines its disposition." I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

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1. Excerpt taken from Robert H. Jackson, Opinion on the Position of the Executive Department Regarding Investigative Reports (April 30, 1941) 40 *Op. Atty. Gen*. 45. [↑](#footnote-ref-1)