

1997

Congressional Inquests: Suffocating the Constitutional Preogative of Executive Privilege

Randall K. Miller

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Miller, Randall K., "Congressional Inquests: Suffocating the Constitutional Preogative of Executive Privilege" (1997). *Minnesota Law Review*. 2143.

<https://scholarship.law.umn.edu/mlr/2143>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege

Randall K. Miller*

[W]e just simply can't have another Watergate, and another destroyed administration. So I think the President needs to jettison any thought of executive privilege.

— Sen. Howard Baker¹

[Y]ou aren't President; you are temporarily custodian of an institution, the Presidency. And you don't have any right to do away with any of the prerogatives of that institution, and one of those is executive privilege. And this is what was being attacked by the Congress.

— President Ronald Reagan²

In a country where people are presumed innocent, the President isn't. You've got to go prove your innocence

— President Bill Clinton³

* Associate, Kirkpatrick & Lockhart LLP; J.D., George Washington University Law School, 1996. For their invaluable guidance and personal support, I wish to pay special thanks to Robert Park, Beth Nolan, and Chip Lupu.

I am also indebted to Harold H. Bruff, Gary R. Greenstein, Edward Keynes, Dolores Lyons, Christine C. Miller, Theodore B. Olson, Todd D. Peterson, Peter Raven-Hansen, Peter M. Shane, David L. Tubbs, and Colleen Zack for their assistance and encouragement.

1. 133 CONG. REC. S128 (daily ed. Jan. 6, 1987) (statement of Sen. Howard Baker). Senator Baker's remarks concerned the possible assertion by President Ronald Reagan of executive privilege during the Iran-Contra investigation.

2. President Ronald Reagan, Remarks and a Question-and-Answer Session With Reporters, 19 WEEKLY COMP. PRES. DOC. 390, 392-93 (Mar. 11, 1983). President Reagan was responding to criticisms regarding his assertion of executive privilege to withhold Environmental Protection Agency (EPA) enforcement documents from a House oversight committee.

3. President Bill Clinton, Interview on MTV's "Enough is Enough" Forum, 30 WEEKLY COMP. PRES. DOC. 836, 843 (Apr. 19, 1994). President Clinton was justifying his decision to produce documents (over which he might have claimed a privilege) to an Independent Counsel and Senate committee investigating Whitewater.

INTRODUCTION

Over the past two decades, Congress and the President have engaged in increasingly bitter constitutional warfare over access to information. Two implicit constitutional doctrines have collided in these episodes: executive privilege and congressional investigatory power. The most recent conflict was sparked by the Clinton administration's May 9, 1996 assertion of executive privilege to resist disclosure of a small subset of documents subject to a congressional subpoena. The subpoena called for materials related to the administration's 1993 firings of the White House Travel Office staff. A constitutional confrontation ensued and, on June 25, 1996, as a result of media and congressional pressure, the White House surrendered its claim of executive privilege.⁴

No Supreme Court decision has attempted to balance the constitutional claims presented in these disputes although separately, the Supreme Court has recognized the competing constitutional doctrines. Congress's constitutional power to investigate, issue subpoenas, and punish recalcitrant witnesses has the longer history of Supreme Court recognition dating from 1821.⁵ It was not until 1974 that the Supreme Court acknowledged executive privilege as a constitutionally-based prerogative.⁶ Beginning with George Washington, presidents throughout history have asserted authority to resist congressional requests for information.⁷ Since 1974, although the D.C.

4. See *infra* part III.F (discussing the White House Travel Office controversy).

5. See *infra* notes 16-30 and accompanying text (exploring the Supreme Court's principal decisions regarding Congress's investigatory power).

6. *United States v. Nixon*, 418 U.S. 683, 706 (1974). President Nixon sought to resist disclosure of tape-recorded conversations in a criminal trial related to the Watergate scandal. *Nixon* does not involve a congressional demand for information.

7. See, e.g., History of Presidential Invocations of Executive Privilege Vis-à-Vis Congress, 6 Op. Off. Legal Counsel 751-81 (1982) (Attorney General memorandum citing examples of invocation of privilege in nearly every administration). For example, deciding in 1796 to delay producing documents to the House of Representatives regarding the Jay Treaty negotiation, President Washington argued that the success of foreign negotiations "depend[s] on secrecy." *Id.* at 753. Washington did, however, produce these documents to the Senate in recognition of its constitutional authority to give advice and consent to treaties. *Id.*; see also *Nixon v. Sirica*, 487 F.2d 700, 731 (D.C. Cir. 1973) (MacKinnon, J., dissenting) (listing twenty-seven instances of presidents refusing to comply with congressional requests for information). An early judicial recognition of the privilege and its limits lies in one of John Marshall's opinions issued while he was riding circuit in 1807. Marshall upheld a sub-

Circuit Court of Appeals has twice reluctantly considered cases involving executive-congressional information disputes,⁸ the federal courts in the District of Columbia have sought to avoid these cases and have suggested that the two political branches have a constitutional obligation to negotiate.⁹ One prominent district court opinion, *United States v. House of Representatives*,¹⁰ held that the federal courts should delay adjudication of congressional-executive information disputes until the officer asserting executive privilege is criminally prosecuted for contempt of Congress, at which time such official could raise the privilege as a defense.¹¹

Most congressional requests for executive branch documents are handled informally and without controversy. The executive often produces documents over which a privilege could be asserted, and Congress often defers to the executive when the latter decides that certain documents should not be disclosed.¹² Observers have concluded that political negotiation regarding access to information is effective and preferable

poena *duces tecum* which required President Thomas Jefferson to produce certain of his personal letters to the court presiding over Aaron Burr's prosecution for treason. *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d). This decision is the historical antecedent to *United States v. Nixon*, i.e., it stands for the proposition that evidence needed by the defense in a criminal trial can outweigh a president's nondisclosure interests.

8. *United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977) (supervising a negotiated settlement that gave a House committee access to redacted FBI documents regarding wiretaps); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (declining to enforce a Senate committee's subpoena for the Watergate tapes).

9. *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (invoking prudential principles of self-restraint to avoid the merits in a suit brought by the Reagan administration that sought a declaratory judgment protecting EPA documents from disclosure by executive privilege); see also *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 395 (D.C. Cir. 1976) (initially declining to reach the merits in a case involving a congressional subpoena for documents over which President Ford asserted executive privilege). The court remanded the case with orders that the parties continue to negotiate; on appeal after remand, the court reached the merits. *Id.*

10. 556 F. Supp. 150 (D.D.C. 1983).

11. *Id.* at 153.

12. In other information disputes, the branches clash over statutory privileges. See generally Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992) [hereinafter *Negotiating for Knowledge*] (reviewing some prominent document disputes that fell short of a constitutional stalemate). This Article will focus on constitutional disputes that escalate beyond the informal negotiation stage.

to judicial adjudication.¹³ However, once this process escalates beyond the informal negotiation stage, that is, when Congress is willing to challenge the President's formal assertion of executive privilege, the President faces insurmountable disadvantages and effectively is unable to negotiate with Congress, even though legitimate justifications for nondisclosure may exist. The American public intensely distrusts government secrecy in the post-Watergate era.¹⁴ United States presidents who have formally battled Congress over access to information have lost these "negotiations" with investigating committees and have suffered political injury in the process. The media play a substantial role in chilling executive privilege, with headlines and editorials suggesting corruption and cover-up whenever executive privilege is considered or asserted. The McCarthy-era forgotten, the media fail to perceive potential congressional abuse of its investigatory power. This political climate, coupled with the judiciary's abstention from these "escalated disputes,"¹⁵ has greatly weakened the President's ability to assert executive privilege.

13. See, e.g., Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 625-31 (1991) (arguing that "the political process is superior to judicial proceedings," alleging that courts are "ill-equipped even to define clear standards," cannot discern the "political needs of Congress for particular documents," and are confined to unimaginative "either-or" solutions"); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 529 (1987) [hereinafter *Legal Disagreement*] (arguing that "negotiations might bog down if the prospect of ultimate resort to the courts pushes the branches to view their positions as preludes to litigation rather than as attempts to solve immediate problems reasonably"); Shane, *Negotiating for Knowledge*, *supra* note 12, at 228 (noting that civil suits "are both time consuming and uncertain" and predicting that courts would be overly-deferential to the executive branch on matters of national security and foreign affairs); Joel D. Bush, Note, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 744-47 (1993) (cautioning that judicial decisions "would set standards for . . . future disputes and thus create disincentives for political compromise").

14. As one state court judge succinctly stated: "Americans hate secrecy, they detest it, they got rid of a president for it." Michael G. Wagner, *Drug Tests of Racehorses Ordered Released*, SACRAMENTO BEE, Apr. 2, 1993, at A6 (statement of Sacramento Superior Court Judge James Ford).

15. I will use the phrase "escalated disputes" to refer to those instances where each branch has formally asserted a conflicting constitutional entitlement to information, i.e., when a president asserts executive privilege and a congressional committee has voted for a subpoena *duces tecum* to compel disclosure of executive branch documents.

This Article argues that *United States v. House of Representatives* was wrongly decided and advocates that federal court resolution of escalated disputes in a civil proceeding should be available to either political branch immediately following an assertion of executive privilege coupled with an issuance of a congressional subpoena. Availability of a civil proceeding in the district court is necessary to fairly safeguard the legitimate constitutional interests of both branches to access information. Part I examines Congress's implicit constitutional authority to investigate and compel production of documents. Part II discusses the constitutionally-based executive privilege doctrine to protect executive interests, including the deliberative process, state secrets, law enforcement secrets, and presidential privacy. Part III summarizes the principal constitutional battles involving executive privilege since 1973. Part IV argues that political negotiation in these escalated disputes is constitutionally insufficient and advocates earlier and more assertive judicial review. Judicial intervention in escalated information disputes is necessary to check frivolous or unwarranted assertions of executive privilege while simultaneously ensuring that executive branch functions are not stifled or sabotaged by overly-intrusive congressional investigations.

I. CONGRESSIONAL POWER TO COMPEL EXECUTIVE DISCLOSURES

The Constitution does not expressly empower Congress to compel testimony or the production of documents. In fact, the Constitution does not even allude to an investigatory function for Congress. However, as early as 1821, the Supreme Court acknowledged that Congress possesses implicit constitutional authority to coerce testimony and to punish recalcitrant witnesses for contempt of Congress.¹⁶ In *McGrain v. Daugherty*,¹⁷ the Supreme Court pronounced that Congress possessed broad constitutional authority to investigate and induce cooperation.

16. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 219 (1821) (excusing the Sergeant-at-Arms of the House of Representatives from liability for the arrest and imprisonment of a Member held in contempt).

17. 273 U.S. 135 (1927). In *McGrain*, Congress had been investigating allegations of malfeasance on the part of Attorney General Harry M. Daugherty. The Attorney General was suspected of willfully failing to enforce federal antitrust statutes. *Id.* at 151-52. The Supreme Court reversed a district court order that had discharged Daugherty's brother from responding to a Senate committee's subpoena to testify. *Id.* at 137.

The Court declared "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."¹⁸ Thirty years later, in *Watkins v. United States*,¹⁹ the Court in dicta suggested that Congress's investigation and subpoena power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."²⁰ Many of the Supreme Court's broadest assertions of congressional investigatory power occur in cases reviewing McCarthy-era congressional probes into communism such as those involved in *Wilkinson v. United States*²¹ and *Barenblatt v. United States*.²² In these cases, the Court refused to scrutinize the constitutionality of congressional subpoenas based upon allegations of First Amendment violations or improper legislative motives.²³

The Supreme Court has, however, articulated some limits to Congress's investigatory power. Congressional investiga-

18. *Id.* at 174.

19. 354 U.S. 178 (1957). In *Watkins*, the Court invalidated John Watkins's conviction for contempt of Congress. The Court held that the House Un-American Activities Committee's questions regarding the activities of Watkins's associates within the Communist party were improper because the Committee failed to explain the relevance of its inquiry and lacked the authority to "expose" individuals "for the sake of exposure." *Id.* at 200. This suggestion in *Watkins* that the Court would scrutinize congressional investigations closely, was substantially abandoned in *Barenblatt v. United States*, 360 U.S. 109 (1959). See *infra* note 22 and accompanying text.

20. *Watkins*, 354 U.S. at 187.

21. 365 U.S. 399, 414-15 (1961).

22. 360 U.S. 109, 127 (1959) (sustaining defendant's contempt of Congress conviction.) Lloyd Barenblatt refused to respond to the House Un-American Activities Committee's 1954 inquiry regarding whether he was a member of the Communist Party. He unsuccessfully argued that being compelled to answer these questions violated his constitutional right to maintain private political beliefs. *Id.*

23. See also *Braden v. United States*, 365 U.S. 431, 455 (applying *Barenblatt* to reject the First Amendment challenge), *reh'g denied*, 365 U.S. 890 (1961). Like Barenblatt, Frank Wilkinson and Carl Braden were convicted of contempt of Congress following their refusal to answer questions posed by the House Un-American Activities Committee (HUAC) regarding their alleged affiliation with the Communist Party. *Wilkinson*, 365 U.S. at 404; *Braden*, 365 U.S. at 433-34. The complaints of these witnesses similarly fell on deaf ears. See Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 895 (1993) ("Refusing to question the motives of Congress . . . and, after determining that Congress may legislate in the area of allegedly subversive activity, the Court gave witnesses little hope of sustaining an objection that questions concerning political beliefs and associations were protected under the First Amendment from legislative inquiry.").

tions must be in furtherance of a valid legislative purpose.²⁴ Congress does not possess "the general power of making inquiry into the private affairs of the citizen"²⁵ and a "mere semblance of legislative purpose would not justify an inquiry."²⁶ However, as many commentators have observed, it is virtually impossible to successfully challenge the scope of a congressional investigation.²⁷ Therefore, although the subject of an investigation must be one "on which legislation could be had,"²⁸ congressional power is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."²⁹

None of the Supreme Court's cases regarding congressional power to investigate and to compel testimony and the production of documents involved an assertion of executive privilege. Hence, the Court's delineation of Congress's investigatory authority may be subject to refinement if an investigation is shown to conflict with the executive branch's legitimate constitutional powers. In *Barenblatt*, the Supreme Court expressly acknowledged that Congress's power to investigate is limited by separation of powers considerations. That is, the power may not be exercised in a way that would prevent a coordinate branch from fulfilling its constitutional functions. Legislation must be the goal. Therefore, Congress may neither "inquire into matters which are within the exclusive province" of the executive branch nor "supplant the executive in what exclusively belongs to the Executive."³⁰ Congress's investigatory power, therefore, is not absolute. Rather, as with most instances of governmental power, it must be balanced against competing constitutional values.

24. *McGrain v. Daugherty*, 273 U.S. 135, 172 (1927).

25. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).

26. *Watkins v. United States*, 354 U.S. 178, 198 (1957).

27. See, e.g., 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, 75 n.28 (1986) ("[I]t safely may be said that a modern-day witness challenging the legitimacy of the congressional objective engages in what is essentially a 'fruitless task.'" (citing *Arvo Van Alstyne, Congressional Investigations*, 15 F.R.D. 471, 478 (1954)).

28. *McGrain*, 273 U.S. at 177.

29. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); see also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) (finding that "the power to investigate is inherent in the power to make laws").

30. *Barenblatt*, 360 U.S. at 111-12.

II. EXECUTIVE PRIVILEGE

In *United States v. Nixon*, the Supreme Court acknowledged, for the first time, that executive privilege is a constitutionally-based prerogative.³¹ The landmark decision, which recognized this important executive power, simultaneously delivered a fatal blow to the presidency of Richard M. Nixon. In a unanimous decision, the Court sustained the district court's order requiring President Nixon to comply with a subpoena *duces tecum* and produce tapes containing the President's oval office conversations with his close advisers. In so doing, the Court held that President Nixon's general interest in the confidentiality of oval office communications was outweighed by a "demonstrated, specific need for evidence in a pending criminal trial."³² The tapes that President Nixon fought so hard to shield from disclosure proved to contain evidence of the President's cover-up, substantiating his personal culpability in the Watergate scandal.³³ With impeachment looming, the President resigned his office in disgrace on August 8, 1974.³⁴

Over the past two decades mention of executive privilege has rarely been uttered without simultaneous reference to Watergate. The American culture's distrust of government and blood thirst for scandal has contributed to a perceived equivalence between secrecy and camouflage of corruption. The linking of executive privilege and Watergate are nowhere more prevalent than on Capitol Hill. A document dispute between the Clinton administration and a Senate Committee in 1995 is illustrative. The Special Senate Committee investigating Whitewater subpoenaed notes taken by a White House attorney during a November 3, 1993 meeting with three other White

31. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

32. *Id.* at 713.

33. See, e.g., LEON JAWORSKI, *THE RIGHT AND THE POWER* 45-46 (1976) (describing the Watergate special prosecutor's thoughts upon hearing the tapes for the first time).

34. The infamous Watergate scandal stemmed from the 1972 break-in and bugging of the Democratic National Committee's headquarters in Washington, D.C.'s Watergate Hotel by individuals associated with President Nixon's reelection campaign. The scandal included the subsequent conspiracy to conceal the break-in and obstruct the investigation, a conspiracy which included President Nixon and some of his top advisors. Of the numerous accounts of Watergate, see, for example, STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990); THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* (1975); BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974); BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* (1976).

House aides and three of President Clinton's personal attorneys.³⁵ President Clinton initially asserted attorney-client privilege, but later produced the documents after Committee Chairman Alfonse D'Amato threatened to bring a contempt of Congress resolution to a Committee vote.³⁶ President Clinton's mere consideration of executive privilege prompted several Senators to draw comparisons to the Nixon administration, imputing the Watergate stigma to President Clinton.³⁷

35. Susan Schmidt, *White House Rejects Subpoena*, WASH. POST, Dec. 13, 1995, at A1. The notes were taken by former White House lawyer William Kennedy III. The Committee purportedly sought to assure that confidential law enforcement information was not improperly passed on to the President's personal lawyers. I will refer to this dispute as the "Whitewater Notes controversy."

36. Susan Schmidt, *Whitewater Notes Being Surrendered*, WASH. POST, Dec. 22, 1995, at A1.

37. The following statements provide examples of the Senators' comments:

[There] is an increasing similarity between this White House and the Nixon White House.

. . . I compared some of the arguments that Mr. Clinton has made with the arguments that Mr. Nixon made in support of Executive privilege in 1973 and 1974. Now, some have suggested that this is purely a political exercise. But the fact is, Mr. President, that this is the first time that such a defense . . . has been raised since the Nixon administration.

Furthermore, this same defense of privilege has been tried and tested in the courts, and it has failed. The comparison is, therefore, self-evident, Mr. President, and the exercise rather instructive, giving all of us an opportunity to examine the reasonableness of the White House's claim of attorney-client and possibly Executive privilege.

141 CONG. REC. S18,953 (daily ed. Dec. 20, 1995) (statement of Sen. Shelby).

President Nixon . . . claimed Executive privilege with regard to the White House tapes and, of course, ultimately saw his claim of privilege defeated So if [President Clinton] is going to assert greater privilege protection than any of his predecessors, perhaps he is doing it solely for the purpose of protecting a legal principle. But the President must understand that the people are going to assume that there may be other reasons, in light of this country's history.

141 CONG. REC. S18,972 (daily ed. Dec. 20, 1995) (statement of Sen. Thompson).

President Nixon's assertion of executive privilege precipitated a constitutional crisis that ultimately played a major role in forcing his resignation. Since that time, Presidents have been extremely cautious in using privilege as a basis for withholding materials from legitimate Congressional inquiries. They have been especially cautious when this withholding of information might suggest to a reasonable person that privilege might be being asserted to cloak Presidential or other high level wrongdoing.

The reason for this caution is clear: relations between the branches and the people's confidence in their Government suffer

In the rush to raise the specter of Watergate when executive privilege is mentioned, the constitutional values that led the Court in *Nixon* to acknowledge the doctrine's "constitutional underpinnings"³⁸ tend to be ignored. As a practical matter, without some degree of executive secrecy, executive functions would be undermined. For example, if the discharge of an executive duty depends on secrecy, the President's political opponents in Congress with access to secret information could scuttle an operation by a telephone call to the *Washington Post*. If the President requires frank advice or confidential information to make informed decisions, a theory of information sharing that entitles Congress to every scrap of paper in the White House would chill sources of information, consequently disabling the President's decision-making process. Unbounded congressional oversight would stifle, consume, and, ultimately, supplant executive functions. To micromanage is to aggrandize. In a democratic system, members of the executive branch are accountable, but having to explain to oversight committees every thought process and utterance has the effect of transferring executive power to Congress. In fact, Congress's entitlement to information is limited by competing constitutional principles related to the nature of executive power. The following sections will examine four principal interests which executive privilege may safeguard: (a) the deliberative process; (b) military and state secrets; (c) law enforcement strategies and informants; and (d) the President's private affairs.

A. CANDOR AND THE DELIBERATIVE PROCESS

A basic rationale for executive privilege is that the President requires accurate, frank, and robust advice and information from his subordinates, particularly from his close advisers, in order to perform his constitutional functions. Executive privilege is a necessary prerequisite to securing that advice and information. As the Court stated in *Nixon*: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for ap-

greatly when the President gives the appearance of withholding information in order to protect himself or others close to him from public scrutiny of potential wrongdoing.

141 CONG. REC. S18,980 (daily ed. Dec. 20, 1995) (statement of Sen. Abraham).

38. *United States v. Nixon* 418 U.S. 683, 706 (1974); see also *Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (discussing the President's "Article II right to confidential communications").

pearances and for their own interests to the detriment of the decision-making process."³⁹ This utilitarian rationale combines with separation of powers concerns when the communication at issue involves the President's top advisors.⁴⁰ In a recent D.C. Circuit Court of Appeals opinion regarding First Lady Hillary Rodham Clinton's Task Force on Health Care, the court observed that the Constitution's Framers contemplated confidentiality as indispensable to the exercise of executive power.⁴¹ According to the court, the Framers vested the power of the presidency in a solitary person "for the very reason that he might maintain secrecy in executive operations."⁴² Secrecy enables a president to "deliberate in confidence," which in turn enables a president to "decide and to act quickly—a quality lacking in the government established by the Articles of Confederation."⁴³ Some degree of executive privilege also enables high executive branch officials to maintain the appropriate level of "fearlessness" that is expected of them⁴⁴ and avoid the inclination to consult an attorney each time the President solicits their opinion.⁴⁵

B. MILITARY AND STATE SECRETS

In *Nixon*, the Court stated that when claims of executive privilege are based upon a "need to protect military, diplomatic, or sensitive national security secrets"⁴⁶ the claim of

39. *Nixon*, 418 U.S. at 705.

40. "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *Id.*

41. *Clinton*, 997 F.2d at 909.

42. *Id.*

43. *Id.*

44. See *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982) (recognizing the "public interest in providing an official 'the maximum ability to deal fearlessly . . . with' the duties of his office" (citations omitted)); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (noting dangers inherent in public officials fearing lawsuits).

45. As the Court stated in *Harlow*: "[T]he danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties' imposes substantial social costs. *Harlow*, 457 U.S. at 814 (quoting *Gregorie v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). These costs include "the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*

46. *United States v. Nixon*, 418 U.S. 683, 706 (1974).

privilege should be given "utmost deference."⁴⁷ An assertion of executive privilege based upon military or diplomatic information is analogous to the common law state secrets doctrine,⁴⁸ which cedes to the government an absolute privilege to resist discovery of information in a civil suit if the government demonstrates "a reasonable danger that [discovery] of the evidence will expose military matters which, in the interest of national security, should not be divulged."⁴⁹ The state secrets privilege need not be asserted by the President himself. In *United States v. Reynolds*,⁵⁰ the Court stated that assertion of the state secrets doctrine merely requires "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."⁵¹ The Court further stated that "the circumstances of the case" may indicate to the judge that it would be inappropriate to insist "upon an examination of the evidence, even by the judge alone, in chambers."⁵²

In contrast to the state secrets doctrine, executive branch policy since 1969 provides that the President himself must assert executive privilege.⁵³ A presidential assertion of executive privilege, when compared with a state secrets privilege asserted by a cabinet officer, presents a stronger executive

47. *Id.* at 710.

48. See generally James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 876 (1966) (indicating that the state secrets privilege and executive privilege rest on similar policies).

49. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

50. 345 U.S. 1 (1953).

51. *Id.* at 7-8 (footnotes omitted).

52. *Id.* at 10. *Reynolds* involved the crash of an Air Force B-29 aircraft and subsequent suit by survivors of the crash victims under the Federal Tort Claims Act. The survivors sought production of an Air Force accident report and statements of surviving crew members, which the United States successfully opposed. *Id.* at 2-3.

53. Memorandum from President Nixon for the Heads of Executive Departments and Agencies, Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969), reprinted in *Executive Privilege—Secrecy in Government: Hearings on S. 2170, S. 2378, S. 2420 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 94th Cong. 207 (1975); Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies, On Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), reprinted in HOUSE JUDICIARY COMM., INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 99-435, at 1106 (1985); see Shane, *Legal Disagreement*, *supra* note 13, at 482 (outlining presidential policies regarding executive privilege).

branch plea for nondisclosure because it is buttressed by greater political accountability. At the same time, however, a congressional request for information is substantially stronger than is a request by private litigants in light of Congress's constitutional prerogatives in diplomatic and military matters.⁵⁴ The executive branch also has a long practice of providing sensitive national security information to select congressional committees such as the Senate Intelligence and Armed Service Committees.⁵⁵ Nevertheless, the executive's Article II responsibilities⁵⁶ and the Supreme Court's many acknowledgments of the executive's special role in controlling diplomatic⁵⁷ and na-

54. For examples of congressional powers in this area, see U.S. CONST. art. I, § 8, cl. 1 ("provide for the common defense"); U.S. CONST. art. I, § 8, cl. 11 ("declare war"); U.S. CONST. art. I, § 8, cl. 12, ("raise and support armies"); U.S. CONST. art. I, § 8, cl. 13 ("provide and maintain a navy"); U.S. CONST. art. I, § 8, cl. 14 ("make rules for the government and regulation of the land and naval forces"); U.S. CONST. art. I, § 8, cl. 18 ("make all laws which shall be necessary and proper for carrying into execution" Congress's enumerated powers).

55. See, e.g., Lloyd N. Cutler, *Why Not Executive Sessions?*, WASH. POST, Oct. 17, 1991, at A23 (noting that the Senate Intelligence and Armed Services committees have a good record of conducting "leakproof" hearings in executive session on sensitive diplomatic and national security topics, for example, support for the Nicaraguan contras and consent to the Intermediate Nuclear Forces Treaty).

56. See, e.g., U.S. CONST. art. II, § 2, cl. 1 (serve as "Commander in Chief"); U.S. CONST. art. II, § 2, cl. 2 (make treaties and appoint ambassadors "with the Advice and Consent of the Senate"); U.S. CONST. art. II, § 3 (receive ambassadors); U.S. CONST. art. II, § 3 ("take care that the Laws be faithfully executed").

57. The Supreme Court has firmly established that the President alone has the power to recognize foreign states. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."). The recognition power has been used as a springboard to justify the President's constitutional authority to: (1) terminate treaties, see *Goldwater v. Carter*, 444 U.S. 996, 1006-07 (1979) (Brennan, J., dissenting) (stating "[a]brogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government"); and (2) enter into unilateral executive agreements, especially in the context of claims settlements with foreign states., see, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981) ("The President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."). See also *United States v. Pink*, 315 U.S. 203, 207-08 (1942) (same); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (same).

Avoiding premature disclosure of diplomatic secrets (unrelated to military matters) also serves important executive interests. One can imagine scenarios where a foreign government would be unwilling to negotiate with the United States unless that state could be assured that its secrets would not be aired on Capitol Hill or, derivatively, in the U.S. media.

tional security information⁵⁸ suggest that some level of executive secrecy in this area, free from congressional oversight, is constitutionally required. Premature disclosure to Congress may compromise ongoing military operations or nullify secrecy agreements with foreign governments necessary to pursue national interests.⁵⁹ Presidents have, with impunity, claimed constitutional authority to ignore statutory disclosure requirements if "national security" so requires.⁶⁰ Members of Congress have been most deferential to claims of executive privilege in this area.⁶¹ The executive branch has the institu-

58. See, e.g., *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security . . . flows primarily from [the Commander-in-Chief Clause] and exists quite apart from any explicit congressional grant."); *New York Times v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) ("[I]t is the constitutional duty of the executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

59. In 1980, for example, President Carter enlisted the assistance of Canada in smuggling six U.S. hostages out of Iran. Canada conditioned its assistance on President Carter's promise that he would not inform Congress of Canada's participation. See Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575, 614 (1990) (suggesting that the operation was clearly to our nation's benefit and that Canada rationally "feared having its own Embassy in Tehran laid siege, as our own had been, if its assistance became known") (citation omitted).

60. For example, in signing the Intelligence Authorization Act for Fiscal Year 1991, President George Bush stated:

Several provisions in the Act requiring the disclosure of certain information to the Congress raise constitutional concerns. These provisions cannot be construed to detract from the President's constitutional authority to withhold information the disclosure of which could significantly impair foreign relations, the national security, the deliberative processes of the executive, or the performance of the executive's constitutional duties.

Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, 27 WEEKLY COMP. PRES. DOC. 1137 (Aug. 14, 1991).

61. For example, after some initial grumbling, Congress did not challenge President Clinton's April 16, 1996 assertion of privilege to shield a White House report regarding weapons shipments from Iran to the Bosnian Muslims during the 1992-95 Balkans war. For background and analysis of this matter, see, for example, John Stewart, *Defusing Bosnian Time Bombs*, S.F. CHRON., May 12, 1996, at 20; Tim Weiner, *Congress Is Denied Report on Bosnia*, N.Y.

tional advantages of "decision, activity, secrecy, and dispatch,"⁶² which have enabled it, in practice, to take the leading role in diplomatic and military matters.⁶³ The ability to keep some secrets, even from congressional intelligence committees, at times may be indispensable to the executive's performance of these functions.

C. LAW ENFORCEMENT STRATEGIES AND SECRETS

Attorney General William French Smith and other Justice Department officials thoughtfully articulated many of the theories of executive privilege as it relates to protecting the executive branch's law enforcement functions during the Ann Gorsuch/Burford information dispute.⁶⁴ Permitting expansive congressional access to law enforcement materials, particularly active files, threatens to compromise ongoing criminal investigations and would advantage criminal defendants by revealing the prosecution's strategies, legal analysis, potential witnesses, and settlement considerations.⁶⁵ Broad congressional authority to compel disclosure of investigation files would chill the government's sources of information.⁶⁶ Disclosure of certain

TIMES, Apr. 17, 1996, at A1; Richard Whittle, *Clinton Aide Admits U.S. Let Iran Send Bosnia Arms*, DALL. MORN. NEWS, Apr. 24, 1996, at 1A.

62. THE FEDERALIST No. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

63. As the Court stated in *Curtiss-Wright*:

[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

Curtiss-Wright, 299 U.S. at 320.

64. See *infra* Part III.D (discussing the Anne Gorsuch/Burford controversy).

65. See Letter from Attorney General William French Smith to John D. Dingell, Chairman, House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (Nov. 30, 1982), reprinted in COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, CONTEMPT OF CONGRESS, H.R. REP. NO. 97-968, attach. A, at 78 (1982) (expressing the view that the House Subcommittee on Oversight and Investigations should cease actions to compel the EPA to produce sensitive documents contained in open law enforcement files) [hereinafter HOUSE REPORT ON THE BURFORD CONTROVERSY].

66. *Id.* at 79.

documents threatens to reveal sensitive law enforcement techniques, compromise the privacy rights of innocent parties whom law enforcement materials may reference, and bias a subsequent prosecution with pre-prosecution publicity.⁶⁷ After a case is closed, many of these interests diminish, but concerns regarding innocent parties and informants persist.⁶⁸ Hence, some level of secrecy is necessary to enable the executive branch to prosecute crimes against the United States effectively, a central component of the President's constitutional duty to faithfully execute the laws.⁶⁹

D. PRESIDENTIAL PRIVACY

Quite apart from the executive prerogative to resist demands for information in order to protect institutional interests, presidents may claim privileges to protect a sphere of personal privacy regarding diaries, private letters, and other intimate communications. In *Nixon v. Administrator of General Services*,⁷⁰ the Supreme Court expressly acknowledged that presidents, like all citizens, have a constitutionally-based right to privacy.⁷¹ The Court upheld a provision of the Presidential Recordings and Materials Preservation Act which authorized the Administrator of General Services, an executive officer, to review President Nixon's presidential materials "for the purpose of returning to [him] such of them as are personal and private in nature," and establishing procedures to allow public access to the rest.⁷² "Private" information includes personal and family finances⁷³ and "communications between [the President] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files."⁷⁴

67. Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 366 (1993).

68. *Id.* at 367.

69. U.S. CONST. art. II, § 3.

70. 433 U.S. 425 (1977).

71. The Court stated: "[P]ublic officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Id.* at 457.

72. *Id.* at 436. In the case of former President Nixon, this document collection constituted some "42 million pages of documents and 880 tape recordings" of which only a tiny fraction, President Nixon conceded, were private. *Id.* at 459.

73. *Id.* at 457.

74. *Id.* at 459.

The Court recognized that even a single document may "intermingle" private and public communications.⁷⁵ The Court upheld the statute because of its sensitivity to the President's "legitimate privacy interests" and the "limited intrusion of the screening process."⁷⁶ The Court's acknowledgment that the President retains this constitutional right to privacy suggests that Congress's ability to regulate and access the President's purely private materials is not absolute; it must be balanced against the President's legitimate expectation of privacy.⁷⁷

The Court's opinion in *Nixon v. Administrator of General Service* also suggests that a president may be entitled to assert various common law relationship-based privileges, such as attorney-client, spousal, physician-patient, or priest-penitent, to resist congressional demands for information. In a few district court cases involving the assertion of such privileges to resist congressional inquiries, the courts have held that congres-

75. The difficulty of discerning the boundary between the private and public President was illustrated during the Whitewater Notes controversy where critics of the President argued that he could not claim attorney-client privilege regarding the meeting notes because government-paid lawyers/aides attended the meeting. Susan Schmidt, *White House Eases Stance on Notes: Whitewater Panel Acts to Enforce Subpoena*, WASH. POST, Dec. 16, 1995, at A1.

In letters to the Whitewater Committee, White House counsel and the Clintons' personal attorneys argued that because Whitewater affected the President's personal and official persona simultaneously, attorney-client confidentiality applied to communications between government and personal lawyers to share information and allocate responsibilities. Additionally, the attorneys asserted "common interest privilege," which permits counsel for clients with a common interest to exchange information without waiver of attorney-client privilege. Without these protections, counsel concluded, President and Mrs. Clinton would be denied effective assistance of counsel. See generally Letter from Jane C. Sherburne, Special Counsel to the President, to Alfonso M. D'Amato, Chairman, Senate Special Committee Investigating Whitewater (Dec. 12, 1995) (on file with author); Submission of David E. Kendall, et al. of Williams & Connelly, Attorneys for the President and Mrs. Clinton, to Senate Special Committee Investigating Whitewater (December 12, 1995) (on file with author).

76. *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 465 (1977).

77. In *United States v. Poindexter*, 732 F. Supp. 135 (D.D.C. 1990), district judge Harold H. Greene reviewed *in camera* portions of President Ronald Reagan's diary and ordered certain of them to be produced. President Reagan did not formally assert a privilege in the case. The court, anticipating the potential claim, implied that it would balance the President's interests against the need for information in a criminal trial as did the Supreme Court in *Nixon*, stating, "If at or prior to the deadline specified above, the former President asserts the doctrine of executive privilege as a method of opposing the disclosure of these diary entries, or any of them, the Court will follow the procedures employed in *United States v. Nixon*." *Id.* at 141.

sional investigations must respect these privileges.⁷⁸ Congress has not attempted, by statute, to proscribe the assertion of these privileges to investigating committees. The statute closest to this question provides that no person may assert a privilege to resist a congressional subpoena on the grounds that cooperation with Congress might "disgrace" the person "or otherwise render him infamous."⁷⁹ Commentators have suggested that the nature of the traditional privileges requires absolute protection and that courts should not subject them to a balancing test, as they do other claims of executive privilege.⁸⁰ Other commentators have observed that, in reality, congressional investigatory power effectively trumps such privileges when the President asserts them.⁸¹

It is unclear whether privileges related to presidential privacy should be viewed as a subset of executive privilege or evaluated separately. The very unique and public nature of the presidency suggests that presidents have a diminished expectation of privacy compared to private citizens and, perhaps, non-absolute protection for special relationship-based communications. Nevertheless, these interests may not be ignored. As with the executive's institutional interests in secrecy, the

78. *United States v. Tobin*, 195 F. Supp. 588, 610 (D.D.C.), *rev'd on other grounds*, 306 F.2d 270 (D.C. Cir. 1962); *United States v. Keeney*, 111 F. Supp. 233, 234-35 (D.D.C. 1953), *rev'd on other grounds*, 218 F.2d 843 (D.C. Cir. 1954); see also Jonathan P. Rich, Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 167 nn.159-60 (1988).

79. 2 U.S.C. § 193 (1995) provides in full:

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

80. According to one commentator:

While the attorney-client privilege is often justified on utilitarian grounds, courts seldom engage in particularized balancing of the interests involved in a specific case The requirement of unimpaired access to legal counsel is no less compelling for parties summoned before congressional committees, whose investigatory powers are often directed at potentially criminal activities

Rich, *supra* note 78, at 168 n.162.

81. Commenting on the Whitewater notes controversy in December 1995, Professor Tiefer argued that the episode "once again dramatically illustrated how congressional investigations can obliterate legal privilege claims." Charles Tiefer, *Oversight; Privilege Pushover; Congressional Investigations Can Obliterate Legal Privilege Claims*, TEX. LAW., Jan. 15, 1996, at 28.

President's privacy interests must, at a minimum, be balanced against countervailing public interests in disclosure.

III. CASE STUDIES

Below are summaries of the significant information disputes between the executive and Congress since 1973 in which Congress challenged an assertion of executive privilege. These were the exceptional cases where Congress and the President locked horns at the constitutional level over access to information. Each summary provides (i) the purported congressional interest in its investigation, (ii) the executive's justification for its claim of privilege, and (iii) the final resolution. The case studies show that a sufficiently motivated Congress may intensify the controversy by taking a series of actions to obtain executive branch documents notwithstanding a claim of executive privilege. The Gorsuch/Burford controversy,⁸² for example, proceeded through each of these stages: (1) informal demand; (2) informal negotiation; (3) subcommittee votes to subpoena; (4) subcommittee delivers the subpoena; (5) subcommittee votes to hold in contempt; (6) subcommittee recommends contempt citation to full committee; (7) full committee votes to hold in contempt; (8) full committee recommends contempt citation to full House; (9) full House votes for contempt; (10) the President of the Senate or the Speaker of the House certifies the contempt citation to the appropriate U.S. attorney "whose duty it shall be to bring the matter before the grand jury" to obtain criminal indictment.⁸³

As Congress escalates the confrontation, executive officials often will produce more of the sought-after information or will propose secured viewing procedures. For example, officials might propose that members of Congress may examine representative documents, but may not remove the documents from executive branch offices, photocopy them, or take notes, etcetera.⁸⁴ Simultaneously with or alternatively to the actions

82. See *infra* Part III.D (discussing the Anne Gorsuch/Burford controversy).

83. 2 U.S.C. § 194 (1995). See *infra* notes 220-234 and accompanying text for an expanded discussion of the statutory mechanism for contempt of Congress.

84. See Philip Shabecoff, *Data That Caused Citing of Watt Will Be Provided to House Group*, N.Y. TIMES, Mar. 17, 1982, at A21 (summarizing security measures imposed on subcommittee members viewing Department of Interior documents which President Reagan believed contained sensitive diplomatic information); see also Peterson, *supra* note 13, at 626-28

listed above, Congress may employ its other, more draconian, powers to induce executive compliance: it can fail to fund programs which are the subject of an investigation, it can fail to act on an executive nominee, or it can expand the level of congressional attention (and, hence, public visibility) over an inquiry, for example, by establishing a special investigating committee. Members of Congress can call for an Independent Counsel to probe the underlying matter or to investigate the propriety of the executive privilege assertion itself. Ultimately, Congress can threaten, or actually initiate, impeachment proceedings.⁸⁵

A. RICHARD NIXON AND THE WATERGATE TAPES (1973-1974)

In 1973, the Senate Select Committee on Presidential Campaign Activities sought to compel disclosure of the Watergate tapes.⁸⁶ The Committee was created to investigate allegations of illegal and unethical conduct during the 1972 presidential election and to determine whether new legislation to safeguard the presidential election process was necessary.⁸⁷ The Committee first made an informal request and subsequently issued two subpoenas *duces tecum*, both of which President Nixon rebuffed.⁸⁸ Rather than seeking a contempt citation or ordering the "Sergeant-at-Arms to forcibly secure attendance of the offending party,"⁸⁹ which the Committee thought was "inappropriate and unseemly,"⁹⁰ the Committee brought suit in the district court for a declaration that the subpoena was valid. The Committee also asked the district court

(describing the progression of the accommodation process); Shane, *Legal Disagreement*, *supra* note 13, at 515 (same).

85. Impeachment is Congress's ultimate and unreviewable check against the other branches of national government. See *infra* note 207 and accompanying text (discussing congressional authority to impeach executive and judicial officers).

86. These were the same tape recordings of President Nixon with his aides sought by the grand jury in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), and by the House Watergate Committee.

87. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974).

88. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 54 (D.D.C. 1973). "[President Nixon]'s sole response consisted of a letter to Select Committee Chairman Senator Sam J. Ervin, Jr., expressing the President's intention not to comply with the subpoenas" *Id.*

89. *Id.*

90. *Id.*

for a writ of mandamus ordering President Nixon to comply.⁹¹ The district court dismissed the case for want of subject-matter jurisdiction.⁹²

Congress then passed a statute "placing special jurisdiction in [the district court] to enforce the Committee's subpoenas."⁹³ President Nixon sent a letter to the district court arguing that the case was not justiciable and, in the alternative, that "publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities," and would also adversely affect "ongoing and forthcoming criminal proceedings."⁹⁴ The district court employed a balancing test which sought to "weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance."⁹⁵ The district court struck the balance in President Nixon's favor, in part because of the potential risk of prejudicial pretrial publicity. The court stated:

The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.⁹⁶

91. *Id.*

92. *Id.* at 61.

93. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 522 (D.D.C.), *aff'd*, 498 F.2d 725 (1974). President Nixon did not attempt to veto this resolution. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974).

94. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. at 524-25.

95. *Id.* at 522.

96. *Id.* at 524; cf. Sinclair v. United States, 279 U.S. 263, 291-92, 295 (1929) (holding that Congress may require pertinent disclosures even if the sought-after information could be used in pending litigation), *overruled by* United States v. Gaudin, 115 S. Ct. 2310 (1995).

The D.C. Circuit Court of Appeals affirmed the district court's ruling.⁹⁷ The court reaffirmed its prior ruling that "presidential communications are 'presumptively privileged.'"⁹⁸ The presumption could be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations."⁹⁹ In concluding that the Committee failed to demonstrate that the sought-after information was "critical" to the Committee's function, the Court emphasized that the Committee's investigation substantially overlapped that of the House impeachment committee which already had access to the sought-after tapes.¹⁰⁰

The court also justified its decision on the basis of the difference between Congress and a grand jury; the former "frequently legislates on the basis of conflicting information," whereas the latter must "determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes."¹⁰¹ Because the Committee could point "to no specific legislative decisions that cannot responsibly be made without access to materials," the court concluded that the Committee's claim was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena."¹⁰² President Nixon won this battle; however, he lost the presidency, resigning from office less than three months later.

B. AT&T AND FBI WIRETAPS (1976-1977)

In 1976, the Investigations and Oversight Subcommittee of the House Committee on Interstate and Foreign Commerce issued a subpoena to AT&T to produce Federal Bureau of Investigation (FBI) "request letters" (letters from the FBI to AT&T

97. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974).

98. *Id.* at 730.

99. *Id.*

100. *Id.* at 732.

101. *Id.*

102. *Id.* at 733. This decision suggests that the authority of a congressional committee to subpoena information may be somewhat curtailed if an Independent Counsel is concurrently conducting an overlapping investigation. See *infra* notes 264-279 and accompanying text (discussing the impact of an Independent Counsel investigation on the scope of congressional power to subpoena executive branch documents).

requesting wiretapping assistance). The Subcommittee's purported legislative interest was to determine the "extent of warrantless wiretapping in the United States for asserted national security purposes" and contemplate limiting legislation to safeguard individual privacy.¹⁰³ The Justice Department and, later, President Ford opposed AT&T's compliance with the Committee's subpoena.¹⁰⁴ The President was concerned that disclosure of surveillance targets outside of Congress would harm diplomatic relations with nations whose nationals have been monitored, disclose U.S. intelligence secrets, and potentially threaten the lives of U.S. intelligence agents.¹⁰⁵

The executive branch offered to produce "expurgated copies of the backup memo pertaining to foreign intelligence taps, with all information which would identify the target replaced by generic description."¹⁰⁶ Negotiations between the Committee and the President broke down over verification procedures.¹⁰⁷ The Justice Department brought suit to enjoin AT&T's compliance with the subpoena. The district court enjoined AT&T's compliance.¹⁰⁸ Purporting to balance the respective interests of the political branches, the district court ultimately ceded to the executive branch authority to make the "final determination" since the Constitution entrusts the executive with the "primary role" in areas of national security.¹⁰⁹ The D.C. Circuit reversed and remanded, ordering the parties to continue to negotiate.¹¹⁰ The court characterized the case as a "clash of absolutes,"¹¹¹ both parties had asserted "patently conflicting assertions of absolute authority" and complete immunity from judicial review.¹¹²

103. *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976).

104. *Id.* at 387.

105. *Id.* at 388.

106. *Id.* at 386.

107. *Id.* at 387.

108. *United States v. American Tel. & Tel. Co.*, 419 F. Supp. 454 (D.D.C. 1976).

109. *Id.* at 461.

110. *American Tel. & Tel. Co.*, 551 F.2d at 395.

111. *Id.* at 391.

112. *Id.* Congress based its absolute claim upon the Speech or Debate Clause. *Id.* The executive's absolute claim was grounded on its inherent constitutional authority "to assure secrecy of sensitive national security information." *Id.* at 393.

After rejecting the absolute nature of the claims, the court recognized that it would face "severe problems" if it attempted to resolve "such nerve center constitutional questions."¹¹³ In remanding the case, the court offered some of its "own reflections" which it hoped would "be of some assistance" to continued negotiations, including an offer to review documents *in camera* to verify the accuracy of the executive's generic descriptions, and an expression of concern that security problems would be magnified if the documents were made available to all 435 members of the House.¹¹⁴ The circuit court ordered the district court to report on progress of negotiations within three months. On appeal after remand,¹¹⁵ the court ordered a verification procedure similar to the Justice Department's final offer that would allow Subcommittee members to examine ten unexpurgated documents selected at random.¹¹⁶ The court observed that the additional negotiation period "narrow[ed] the gap between the parties and provide[d] a more informed basis" for the now necessary judicial resolution of the dispute.¹¹⁷ The D.C. Circuit in *AT&T* seems to have devined a constitutional requirement for the branches to negotiate and a role for the federal courts to facilitate the negotiation process and, if necessary, order the final compromise.

C. JAMES WATT AND CANADIAN LAND LEASES (1981-1982)

The House Committee on Energy and Commerce's Oversight and Investigations Subcommittee sought to compel the production of documents from the Department of the Interior under then Secretary James Watt.¹¹⁸ The documents related to

113. *Id.* at 394.

114. *Id.* at 394-95.

115. *United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

116. Shane, *Legal Disagreement*, *supra* note 13, at 474-75.

117. 567 F.2d at 130. The court explained:

The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution Where the dispute consists of a clash of authority between two branches . . . judicial abstention does not lead to orderly resolution of the dispute If negotiation fails . . . a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government.

Id. at 126.

118. William Chapman, *Hill Panel Votes to Cite Watt for Contempt*, WASH. POST, Feb. 26, 1982, at A1. See generally *Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations [of] the House Comm. on*

Canada's energy policy, which was alleged to discriminate against oil companies in the United States.¹¹⁹ The Committee wanted to know whether Watt should invoke the reciprocity provisions under the Mineral Lands Leasing Act, which would deny federal oil and gas leases to Canada if it was not providing equal opportunities to American companies.¹²⁰ Watt was called to testify before the Committee and asked to produce relevant documents.¹²¹ He produced approximately 200 documents but withheld others, which Watt said he would not produce pursuant to an order from President Reagan, who asserted executive privilege.¹²²

President Reagan purportedly sought to protect sensitive cabinet level deliberations and avoid premature disclosure of foreign policy deliberations which could compromise ongoing diplomatic relations with Canada. In a letter to Watt, President Reagan stated: "It is my decision that you should not release these documents, since they either deal with sensitive foreign policy negotiations now in process or constitute materials prepared for the Cabinet as part of the Executive Branch deliberative process through which recommendations are made to me."¹²³ In a letter to President Reagan recommending the assertion of executive privilege, Attorney General William French Smith emphasized the "deliberative, predecisional" character of the documents, which included preliminary drafts of Secretary Watt's congressional testimony.¹²⁴ The Attorney General cautioned that disclosure to Congress would threaten the executive branch's decision-making process by causing "officials to modify policy positions that they would otherwise espouse because of actual, threatened, or anticipated congressional reaction."¹²⁵ Negotiation between the branches, Smith concluded, should be "a principled effort to acknowledge, and if

Energy and Commerce, 97th Cong. 104 (1981-1982) (detailing the Subcommittee's hearings and efforts to force Secretary Watt's compliance); Shane, *Legal Disagreement*, *supra* note 13, at 501-08 (same).

119. Martha M. Hamilton, *Executive Privilege Invoked to Back Watt*, WASH. POST, Oct. 15, 1981, at D12.

120. *Id.*

121. William Chapman, *House Subcommittee Votes to Cite Watt for Contempt*, WASH. POST, Feb. 10, 1982, at A1.

122. *Id.*

123. Hamilton, *supra* note 119, at D12.

124. Letter from Attorney General William French Smith to President Ronald Reagan (Oct. 13, 1981), *reprinted in* H.R. REP. NO. 97-898, at 42-56 (1982).

125. *Id.*

possible to meet, the legitimate needs of the other Branch" rather than "an exchange of concessions or a test of political strength."¹²⁶ Stanley M. Brand, General Counsel to the Clerk of the House of Representatives, characterized Smith's letter as containing "baseless conclusions," "unsup-ported by any citation of authority," which, if taken to their logical conclusions, would shelter from Congress all materials in the executive branch.¹²⁷

Members of the media perceived that President Reagan lacked any viable justification for his claim of executive privilege.¹²⁸ Legal experts who testified before the Committee compared President Reagan's assertion of executive privilege to that of President Nixon during Watergate.¹²⁹ After negotiations failed, the Subcommittee subpoenaed the remaining documents.¹³⁰ Subsequently, the Subcommittee,¹³¹ then the full Committee,¹³² voted to hold Watt in contempt. One day before the full House vote, the White House surrendered its claim of executive privilege and allowed Subcommittee members to review the remaining documents with restrictions: the documents were made available for four hours during which members of the Subcommittee (not staff) could review them and take notes, but executive officials retained custody.¹³³ Notwithstanding the security procedures, Representative Marc L. Marks, the ranking Republican on the Subcommittee, described the agreement as a "capitulation."¹³⁴ The Watt episode

126. *Id.*

127. Memorandum from Stanley Brand, General Counsel to the Clerk, U.S. House of Representatives, to John Dingell, Chairman, Subcommittee on Oversight and Investigation, U.S. House of Representatives (Nov. 10, 1981), reprinted in H.R. REP. NO. 97-898, at 48-56 (1982).

128. For example, the *New York Times* stated:

Judging from some of the documents initially withheld but later released, the executive claims seem overblown. One legal memo turned out to be by a summer clerk. No documents ever reached the President's desk. Their compromise hardly impairs the ability of the White House to function, but Congress will be stymied if such sweeping executive privilege claims prevail.

Editorial, *Privilege and Secretary Watt*, N.Y. TIMES, Feb. 22, 1982, at A16.

129. REUTERS LTD. INT'L NEWS, Nov. 13, 1981.

130. *House Panel Subpoenas Watt for Data on Leasing Policy Toward Canada*, PLATT'S OILGRAM NEWS, Oct. 6, 1981, at 4.

131. Chapman, *supra* note 121, at A1.

132. Chapman, *supra* note 118, at A1.

133. Philip Shabecoff, *Data That Caused Citing of Watt will be Provided to House Group*, N.Y. TIMES, Mar. 17, 1982, at A21.

134. *Id.*

is the first of a modern trend in which Presidents assert executive privilege and, subsequently, are forced to capitulate under political pressure.

D. ANN GORSUCH/BURFORD AND EPA ENFORCEMENT OF SUPERFUND (1982-1983)

The Gorsuch/Burford controversy produced the most protracted and bitter executive privilege-congressional investigation battle to date.¹³⁵ The controversy had at its center then EPA Administrator Anne M. Gorsuch (who, in the midst of this controversy married, and changed her last name to Burford).¹³⁶ In the fall of 1982, several separate House subcommittees sought information regarding the Environmental Protection Agency's (EPA) enforcement of Superfund violations.¹³⁷ The investigations were initially prompted by concerns that the new Reagan administration was soft on environmental enforcement.¹³⁸ As the controversy progressed, the committees probed allegations that the \$1.6 billion Superfund program (to abate hazardous waste), under the direction of Rita M. Lavelle, had been mismanaged and politically manipulated.¹³⁹ Subcommittees of both the House Public Works and Transportation Committee and the Energy and Commerce Committee requested, then subpoenaed, EPA enforcement documents.¹⁴⁰ Ms. Burford, on orders from President Reagan, invoked executive privilege to resist disclosure of fewer than a hundred responsive documents.¹⁴¹ The White House argued that disclo-

135. For an overview of this dispute, see Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333.

136. Gorsuch married Robert Burford, then Director of the Interior Department's Bureau of Land Management, in February 1982. *EPA Head Becomes Anne McGill Burford*, N.Y. TIMES, Feb. 22, 1983, at A12. I will refer to her as Ms. Burford.

137. *The EPA Dispute in Brief*, N.Y. TIMES, Mar. 10, 1983, at B12.

138. Dale Russakoff, *President Bends on EPA Data: Offers to Show Documents He Ordered Withheld*, WASH. POST, Feb. 15, 1983, at A1 ("The controversy has grown from the initial concern of House Democrats that the Reagan administration was trying to undo a decade of environmental protection policy . . .").

139. Cass Peterson, *House Panel Votes to Cite Rita Lavelle*, WASH. POST, Apr. 27, 1983, at A3.

140. Mary Thornton, *House Subcommittee Votes to Cite EPA Administrator for Contempt*, WASH. POST, Dec. 3, 1982, at A6.

141. Dale Russakoff & Mary Thornton, *Burford Fights to Save Job at EPA: Powerful Allies Abandon Her Cause*, WASH. POST, Mar. 5, 1983, at A1.

sure of "enforcement-sensitive" documents would compromise the government's strategies and advantage defendants.¹⁴²

The House Public Works Investigating Subcommittee voted to cite Ms. Burford for contempt and, on December 16, Ms. Burford became the highest executive officer to be cited for contempt by the full House.¹⁴³ The House certified the contempt citation to the U.S. attorney for the District of Columbia for presentment to the grand jury; however, the Department of Justice refused to act on the certification.¹⁴⁴ Instead, the Department of Justice filed a civil lawsuit in the district court seeking a declaratory judgment that the assertion of executive privilege trumped the congressional subpoena. In the action, controversially styled *United States v. House of Representatives*,¹⁴⁵ the district court dismissed the case as an improper exercise of judicial power, seeming to ignore the D.C. Circuit's prior adjudication of a document dispute in *Senate Select Committee* and technically distinguishing *AT&T* because the subpoena there was directed at a private party.¹⁴⁶ District Judge John Lewis Smith, Jr. rejected the administration's use of executive privilege as a sword rather than as a shield:

Judicial resolution . . . will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. The difficulties apparent in prosecuting Administrator Gorsuch 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.¹⁴⁷

Judge Smith grounded his decision on prudential principles of judicial restraint to avoid deciding constitutional ques-

142. Leslie Maitland, *House Unit to Get Subpoenaed Data*, N.Y. TIMES, Feb. 17, 1983, at B11. See generally HOUSE REPORT ON THE BURFORD CONTROVERSY, *supra* note 65, at 1-25 (outlining the factual and legal background leading to the House's citation of Burford for contempt).

143. Dale Russakoff, *House Votes EPA Chief in Contempt*, WASH. POST, Dec. 17, 1982, at A1.

144. Leslie Maitland, *Administration Battles Citation of EPA Chief*, N.Y. TIMES, Dec. 18, 1982, at A1.

145. 556 F. Supp. 150 (D.D.C. 1983); see Stanley M. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C. L. REV. 901, 904 (1987) ("When the Department of Justice brought an unprecedented and ill-fated suit against the House of Representatives to enjoin and declare illegal a House contempt citation against the EPA administrator for refusal to produce documents, it presumptuously and with no statutory authority sued in the name of the United States.")

146. 556 F. Supp. at 152.

147. *Id.* at 153 (citation omitted).

tions and intervening in executive-congressional disputes "until all possibilities for settlement have been exhausted."¹⁴⁸ Judge Smith implied that the executive branch could not invoke the federal courts to resist a congressional subpoena on the basis of executive privilege, unless the executive was to first criminally prosecute one of its officers.¹⁴⁹

Two weeks later, the Reagan administration relented and allowed Subcommittee members to view the documents in private sessions.¹⁵⁰ President Reagan confirmed that public perception, not the underlying law enforcement interests, strongly influenced his ability to maintain government secrets: "I can no longer insist on executive privilege if there is a suspicion in the minds of the American people that it is being used to cover up wrongdoing."¹⁵¹ Stanley Brand, counsel to the clerk of the House, characterized President Reagan's decision as "total capitulation."¹⁵² On March 3, the Department of Justice, having launched its own investigation into possible misconduct at the EPA, told Ms. Burford that, in order to avoid "the appearance of a conflict of interest," it could no longer represent her regarding her contempt of Congress citation.¹⁵³ On March 9, 1983, Ms. Burford resigned.¹⁵⁴

The battle over the EPA documents spawned a subsequent controversy. In 1983, at the urging of Democrats on the committees that investigated Superfund, the House Judiciary

148. *Id.* at 152.

149. *Id.* at 153.

150. Maitland, *supra* note 142, at B11.

151. Daniel Benjamin, *Mutually Assured Corruption*, WASH. MONTHLY, Jan. 1986, at 12. President Reagan also stated:

[I]t is now clear that prolonging this legal debate can only result in a slowing down of the release of information to Congress, therefore fostering suspicion in the public mind that, somehow, the important doctrine of executive privilege is being used to shield possible wrongdoing.

Philip Shabecoff, *Mrs. Burford Quits at EPA*, N.Y. TIMES, Mar. 10, 1983, at A1.

152. Shabecoff, *supra* note 151, at A1.

153. Maureen Dowd, *Lonely at the EPA Top*, TIME, Mar. 14, 1983, at 28; *Reagan Expresses Faith in EPA Head*, N.Y. TIMES, Mar. 5, 1983, at A12; Rusakoff & Thornton, *supra* note 141, at A1.

154. David Hoffman & Cass Peterson, *Burford Quits as EPA Administrator*, WASH. POST, Mar. 10, 1983, at A1. In her resignation letter, Ms. Burford stated that she hoped her departure would "terminate the controversy and confusion that has crippled my agency" and "distracted [the President] from pursuing the critical domestic and international goals" of his administration. *Id.*

Committee conducted a separate investigation into Department of Justice activities in the EPA controversy, including the Department's role in advising President Reagan to assert executive privilege. In December of 1985, the Judiciary Committee issued its report accusing Assistant Attorney General Theodore B. Olson of giving false and misleading testimony in his appearance before the Committee on March 10, 1983.¹⁵⁵ The report led to the appointment of an Independent Counsel to investigate Olson. After a three-year investigation, Independent Counsel Alexia Morrison announced that she would not seek an indictment against Olson.¹⁵⁶

In addition to validating the constitutionality of the Independent Counsel statute,¹⁵⁷ the investigation of Olson cost taxpayers more than \$1 million, did not involve any allegation that Olson acted outside his duties or for personal gain,¹⁵⁸ and promised to cause future executive branch attorneys to think twice about recommending that a president assert executive privilege. The Olson investigation suggests that a sufficiently motivated faction in Congress can effectively punish executive officers for an assertion of executive privilege by launching an investigation into the propriety of the assertion of the privilege itself.

The conventional view of this controversy is that the 1982-83 congressional investigations of the EPA revealed that the Agency improperly made enforcement decisions based upon political considerations, instead of environmental concerns,¹⁵⁹ and that Burford's aides were too closely allied with industry, creating conflicts of interest.¹⁶⁰ The political fallout seemed to confirm these suspicions. Ms. Burford and twenty of her aides

155. HOUSE JUDICIARY COMM., INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 99-435, at 612-40 (1985) [hereinafter OLSON REPORT]. The report also alleged that Deputy Attorney General Edward Schmults and Assistant Attorney General Carol Dinkins had wrongfully withheld certain documents from the committee, thus obstructing its investigation. *Id.* at 640-68.

156. Philip Shenon, *Special Prosecutor Drops EPA Case Without Indictment*, N.Y. TIMES, Aug. 27, 1988, at A1.

157. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (holding that the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599, which imposed a "for cause" limit on the President's ability to remove Independent Counsels, did not violate the Appointments Clause, U.S. CONST. art. II, § 2, or, generally, the President's ability to perform his constitutional duties).

158. Ronald J. Ostrow, *Independent Counsel Explains Why She Didn't Prosecute Figure in '83 EPA Probe*, L.A. TIMES, Mar. 21, 1989, at A17.

either resigned or were fired.¹⁶¹ President Reagan fired Superfund chief Rita Lavelle, who was later convicted for lying to Congress about an alleged conflict of interest and spent four months in federal prison.¹⁶² Unlike the Watergate tapes, however, the EPA documents which were the subject of the executive privilege assertion apparently have revealed no smoking gun. The Democratic majority of the House Judiciary Committee investigating Ted Olson alleged merely that the documents contained "signposts" of EPA misconduct which should have been investigated more carefully prior to urging President Reagan to assert executive privilege.¹⁶³ After its investigation in August 1983, the Justice Department exonerated Ms. Burford and five of her former aides at the EPA of any criminal wrongdoing.¹⁶⁴

An editorial which appeared in the *Washington Post* suggests that what began as policy differences between the Burford team and the Democrats in the House regarding the rigors of environmental enforcement turned into a major scandal because President Reagan did the unspeakable: he asserted executive privilege, a decision which guaranteed a congressional attack, media frenzy, and political defeat.¹⁶⁵ President Reagan

159. For example, Congress heard evidence that Ms. Burford had stalled a \$6.1 million federal grant to abate a toxic waste site in California so as to avoid aiding Jerry Brown's (then Democratic Governor of California) 1982 Senate campaign. Stuart Taylor, *U.S. Won't Charge Ex-EPA Officials*, N.Y. TIMES, Aug. 12, 1983, at A1.

160. See generally Editorial, *The Burford Saga Goes On*, WASH. POST, Apr. 21, 1986, at A10 (describing the EPA controversy and criticizing the actions of the Justice Department).

161. Marianne Lavelle, *Regulation: Fragile Change at Best*, NAT'L L.J., Apr. 18, 1988, at 26.

162. Lavelle was convicted of lying to two congressional committees regarding when she learned of a potential conflict of interest with her former employer, Aerojet-General, which had allegedly contributed wastes to the Stringfellow Acid Pits in Riverside, California. Lavelle maintained that the trial was about her memory of telephone calls, rather than any corruption at the EPA. See, e.g., Ralph Frammolino, *Lavelle Serving Sentence in San Diego*, L.A. TIMES, May 11, 1986, at B1.

163. OLSON REPORT, *supra* note 155, at 9.

164. U.S. DEPT OF JUSTICE, REPORT ON THE INVESTIGATION OF ALLEGED VIOLATIONS OF LAW BY PRESENT AND FORMER OFFICIALS OF THE ENVIRONMENTAL PROTECTION AGENCY 51-53 (Aug. 11, 1983). In addition, the Justice Department presented the circumstances of the dispute to the grand jury which declined unanimously to indict Ms. Burford. Peterson, *supra* note 13, at 574 (citing a letter from Stanley S. Harris, U.S. Attorney, to Hon. Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Aug. 5, 1983)).

165. Robert G. Kaiser, *EPA Fiasco*, WASH. POST, Mar. 6, 1983, at C1.

suggested that the bitter executive privilege battle was, in reality, opposition to his administration's business-friendly environmental policies which escalated to partisan bloodsport.¹⁶⁶ In the end, the executive officials who came closest to criminal liability, Lavelle and Olson, were vulnerable not for their actions in the executive branch, but for the way they responded to questions posed by the congressional investigating committees.

E. WILLIAM REHNQUIST AND OLC MEMOS (1986)

In 1986, President Reagan nominated then Associate Justice William H. Rehnquist to be Chief Justice of the Supreme Court. During the course of the subsequent confirmation hearings, the Senate Judiciary Committee asked the Reagan administration for legal and other memoranda written by Rehnquist when he headed the Office of Legal Counsel (OLC) during the Nixon administration from 1969 to 1971. Purportedly exercising its "advise and consent" function to evaluate Rehnquist's character and legal philosophy, the Senate Judiciary Committee wanted to examine Rehnquist's role in advising the Nixon administration on Watergate as well as military surveillance of civilians, the shootings at Kent State University, and the wiretapping and arrests of anti-Vietnam war demonstrators.¹⁶⁷ The Committee also was interested in allegations that Rehnquist failed to recuse himself on matters be-

[T]he administration flouted one of this city's cardinal rules. Nothing except—maybe—sexual misbehavior eggs on Washington's wolves like the appearance of a cover-up. Last September, when the Justice Department and the White House decided to claim "executive privilege" to withhold from Congress some disputed EPA documents, the administration made the uncomfortable bed in which it now tosses and turns. The appearance of cover-up put EPA on the front page.

Id.

166. The President stated:

I don't think that the people who were attacking [Ms. Burford] were concerned about the environment. I don't think they were concerned about any possible wrongdoing I think this administration and its policies were their target. And, frankly, I wonder how they manage to look at themselves in the mirror in the morning.

Interview with Forrest Sawyer of WAGA-TV in Atlanta, Ga., 19 WEEKLY COMP. PRES. DOC. 390 (Mar. 11, 1983); *see also* Remarks and a Question-and-Answer Session with Reporters, 20 WEEKLY COMP. PRES. DOC. 1103 (July 27, 1984) (defending the actions of Burford).

167. Howard Kurtz & Ruth Marcus, *Democrats Seek to Subpoena Papers*, WASH. POST, Aug. 2, 1986, at A1.

fore the Supreme Court that related to his work in the executive branch.¹⁶⁸

President Reagan asserted executive privilege to preserve the confidentiality of advice given to the President and the OLC's ability to provide frank, legal advice to the executive branch.¹⁶⁹ The assertion of executive privilege offended Democrats on the Judiciary Committee and effectively halted Rehnquist's confirmation.¹⁷⁰ This controversy was similar to the Senate Judiciary Committee's refusal to act on President Nixon's nomination of Richard Kleindienst as Attorney General in 1973 until Nixon allowed a White House aide to testify.¹⁷¹

Senator Edward M. Kennedy equated the controversy to Watergate, accusing the Reagan administration of engaging "in yet another cover-up."¹⁷² Kennedy stated: "Ironically, as assistant attorney general from 1969 to 1971, Rehnquist was advising President Nixon . . . at the very time the government was engaging in the improprieties that spawned the Watergate scandal and later drove Nixon from office."¹⁷³ Kennedy cited the Kleindienst confirmation as precedent and urged his colleagues on the Senate Judiciary Committee to send a clear message to President Reagan: "[N]o documents, no confirmation."¹⁷⁴ Realizing a Committee subpoena was inevitable and wishing to avoid a confrontation, the administration relented (just five days after President Reagan asserted executive

168. See generally Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589 (1987) (criticizing Rehnquist's failure to recuse himself in *Laird v. Tatum*, 408 U.S. 1 (1972)).

169. Stanley I. Kutler, *Executive Privilege Redux*, CHRISTIAN SCI. MONITOR, Sept. 22, 1986, at 16.

170. Ronald J. Ostrow & David Savage, *Senate Panel to Receive Rehnquist Documents*, L.A. TIMES, Aug. 6, 1986, at A1.

171. President Nixon withdrew his claim of executive privilege and allowed the aide to testify, saving Kleindienst's confirmation. Later that year, the Judiciary Committee used the same tactic to induce testimony regarding the confirmation of L. Patrick Grey as FBI director. This time, President Nixon refused to allow the testimony; consequently, Grey's nomination failed. Robert C. Randolph & Daniel C. Smith, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621, 649 (1973).

172. Senator Edward M. Kennedy, Editorial, *Rehnquist: No Documents, No Senate Confirmation*, L.A. TIMES, Aug. 5, 1986, at B5.

173. *Id.*

174. *Id.*

privilege) and agreed to give the Judiciary Committee access to all of the memoranda.¹⁷⁵

After the Rehnquist controversy, the President is on notice that if he intends to appoint a former executive official to an office requiring the Senate's advice and consent, the President should be prepared to produce all documents the nominee prepared while in office, regardless of the consequences to the institutional interests of the executive branch.

F. THE WHITE HOUSE TRAVEL OFFICE FIRINGS (1996)

On May 19, 1993, the Clinton administration dismissed White House Travel Office¹⁷⁶ chief Billy Ray Dale and six other Travel Office employees.¹⁷⁷ The White House allegedly exaggerated reports of mismanagement in the Travel Office¹⁷⁸ and allegedly inappropriately pressured the IRS and FBI to investigate the Travel Office employees to obscure the political decision of replacing the staff with President and Mrs. Clinton's political allies.¹⁷⁹ A White House aide claimed that First Lady Hillary Rodham Clinton instigated the firings.¹⁸⁰ Both she and President Clinton have denied any substantive involvement in the decision.¹⁸¹ As a result of these allegations, the House Gov-

175. Ostrow & Savage, *supra* note 170, at A1.

176. The Travel Office coordinates travel for members of the media who cover the President. John M. Broder, *Panel Votes to Cite 3 For Contempt In Travel Office Case*, L.A. TIMES, May 10, 1996, at 17.

177. Toni Locy, *For White House Travel Office, a Two-Year Trip of Trouble*, WASH. POST, Feb. 27, 1995, at A4.

178. David Johnson, *Mrs. Clinton Responds to Travel Office Inquiry*, N.Y. TIMES, Mar. 22, 1996, at A23. Mr. Dale was tried and acquitted of embezzlement charges in 1995. *Id.*

179. Pat Griffith, *Travel Office Staff Testifies; GOP Asking if IRS, FBI were Misused to Bolster Firings*, PITTSBURGH POST-GAZETTE, Jan. 25, 1996, at A3. Travel office employees serve at the pleasure of the President.

180. David Johnson, *Ex-Employees of Travel Office Say Rumors Led to Their Ouster*, N.Y. TIMES, Jan. 25, 1996, at A15. David Watkins, a White House Administrative Aide, dismissed the Travel Office employees and replaced them with a Little Rock, Arkansas travel agency which coordinated charters for the Clintons during the 1992 presidential campaign. In an undated draft memorandum produced to the investigating committee, Watkins stated that the First Lady demanded the firings and exercised direct and indirect influence to achieve that result. Mrs. Clinton has stated that she merely expressed concern about rumors of financial mismanagement at the Travel Office and played no role in the firing decision. David Johnson, *Memo Places Hillary Clinton at Core of Travel Office Case*, N.Y. TIMES, Jan. 5, 1996, at A1.

181. Johnson, *Ex-Employees of Travel Office Say Rumors Led to Their Ouster*, *supra* note 180, at A15. The President initially stated that the White House fired the Travel Office employees to implement the President's tar-

ernment Reform & Oversight Committee launched an investigation into the circumstances surrounding the dismissals. The Committee initially requested and then, on January 5 and February 7, 1996, subpoenaed, all documents related to the firings.¹⁸² In response, the White House produced over 40,000 pages of documents.¹⁸³ On May 9, 1996, White House Counsel Jack Quinn asserted executive privilege on behalf of President Clinton to withhold disclosure of approximately 3,000 pages of documents.¹⁸⁴ The documents purportedly included confidential White House legal advice and deliberations in preparation for the White House's response to the Committee's hearings and the investigation of the firings by Independent Counsel Kenneth Starr.¹⁸⁵ That day, the Committee voted to hold Quinn and two former White House aides in contempt of Congress.¹⁸⁶ Committee Chairman William F. Clinger, Jr. criticized President Clinton's decision to assert executive privilege: "Executive privilege has only been invoked once in this decade and never by President Clinton who once claimed to [have] the most open and cooperative administration in history but has now turned to a Watergate legal loophole to prevent legitimate oversight by Congress."¹⁸⁷

Representative Clinger emphasized that the subject matter of the Travel Office firings was not sufficiently important

geted 25% reduction in White House staff and because of concerns of mismanagement at the Travel Office. Remarks in the "CBS This Morning" Town Meeting, 29 WEEKLY COMP. PRES. DOC. 957 (May 27, 1993). A report prepared by the White House Chief of Staff's office details evidence of financial mismanagement in the Travel Office, but admits that the firing decision was arrived at hastily, employees were not treated with sufficient sensitivity, and the White House failed to guard against the appearance of favoritism and inappropriate pressure on the FBI. WHITE HOUSE CHIEF OF STAFF'S OFFICE, TRAVEL OFFICE MANAGEMENT REVIEW (July 2, 1993) (on file with author). The report denies that the White House had contacts with the IRS regarding the Travel Office matter. *Id.*

182. David Johnson, *Subpoena Issued in Travel Office Inquiry*, N.Y. TIMES, Jan. 6, 1996, at A7; Charles Tiefer, *Contempt of Congress: Turf Battle Ahead*, LEGAL TIMES, May 27, 1996, at 26.

183. Susan Baer, *White House Travel Controversy: House Panel Recommends Contempt Charges*, ATLANTA J. & CONST., May 10, 1996, at A14.

184. David Johnson, *Panel Moves to Gain Travel Office Files*, N.Y. TIMES, May 10, 1996, at A26.

185. *Id.*

186. *Id.*

187. *Committee to Vote on Contempt of Congress Resolution in Travel Office Matter*, Government Press Releases, Federal Document Clearing House, Inc., May 8, 1996, available in WESTLAW, GOVPR database, 1996 WL 8786618.

(compared to, for example, national security matters) to warrant an assertion of executive privilege.¹⁸⁸ Representative Clinger delayed a vote on the contempt resolution by the full House "to provide the White House with a reasonable last opportunity to produce the records."¹⁸⁹

To avert a full House vote on the contempt resolution against Quinn, the White House produced approximately 1,000 pages of the previously withheld documents and a privilege log which indexed the remaining withheld documents.¹⁹⁰ The produced documents revealed that the Clinton administration requested a confidential FBI report¹⁹¹ on Mr. Dale seven months after he had been fired.¹⁹² The White House later admitted that similar FBI reports were requested for over 400 former Reagan and Bush White House employees. After investigating these requests, FBI Director Louis J. Freeh stated that the administration's requests for these records were unjustified and constituted "egregious violations of privacy."¹⁹³ The White

188. Representative Clinger stated:

How in the world, I have to ask myself, could Travelgate documents rise to the level of executive privilege. This is not a DEA . . . CIA, or any other kind of national security matter that we're dealing with. This has nothing to do with foreign relations. This is the Travel Office, for Heaven's sakes. In the past, executive privilege has been reserved for only the most important and sensitive and critical administration activities. This may be sensitive, but it certainly is not critical or important. While I believe in the doctrine of executive privilege, I oppose its use when allegations of wrongdoing are at hand, as they are in this case.

News Conference to Discuss the Investigation into the Firings at the White House Travel Office, Political Transcripts, Federal Document Clearing House, Inc., May 29, 1996, available in WESTLAW, USPOLTRANS database, 1996 WL 283709 (F.D.C.H.).

189. Al Kamen, *White House Travel Probers Set to Vote on Contempt*, WASH. POST, May 9, 1996, at A10.

190. Eric Schmitt, *White House Gives Committee More Papers in Dismissal Case*, N.Y. TIMES, May 31, 1996, at A20.

191. These reports contain summaries of the FBI fitness investigations. The summaries include statements from an applicant's neighbors, acquaintances, etc. Many of these reports contain derogatory statements about an applicant's character which may be hearsay and are often unsubstantiated and inaccurate. Mary Jacoby, *House Panel Probes White House Handling of FBI Files*, CHIC. TRIB., June 20, 1996, at 10.

192. The request form contained the name (typed) of former White House counsel Bernard Nussbaum. Mr. Nussbaum has denied sending the request or knowing of its existence. Neil A. Lewis, *Panel Chairman Demands White House Security Records*, N.Y. TIMES, June 25, 1996, at A15.

193. George Lardner & John F. Harris, *FBI Chief Says Request for Files was Unjustified*, WASH. POST, June 15, 1996, at A1.

House explained that the files were requested by mistake by aides processing security clearances for White House access. President Clinton apologized for the FBI requests, describing them as "an innocent bureaucratic snafu."¹⁹⁴ The President immediately ordered changes in White House procedures to assure that similar acquisitions of FBI files would not occur again.¹⁹⁵

Nevertheless, this embarrassing revelation fueled congressional pressure for the White House to abandon its claim of privilege over the remaining documents. For example, House Speaker Newt Gingrich stated: "[I]f the President has a shred of sincerity and any sadness about this [he should] release the other 2,000 pages."¹⁹⁶ The rhetoric employed by both sides immediately escalated to advocacy of polar positions at the constitutional level. Representative Clinger asserted:

[W]e cannot allow the White House or the executive branch to dictate to a committee of Congress what we can or cannot have to conduct legitimate oversight of activities in the executive branch. We just can't permit that. So I think I am holding up the prerogatives of the House of Representatives in pursuing this.¹⁹⁷

White House Press Secretary Mike McCurry said that the House of Representatives "can avoid a constitutional confrontation by sitting down, being reasonable and recognizing that the Constitution of the United States does grant the President the right to formulate his policy and have a separate branch of government."¹⁹⁸ Vice President Al Gore portrayed the House Republicans as "determined to provoke a confrontation by going for the kinds of memos directly to the President that no president has or ever would say are legitimate for the Congress to ask for."¹⁹⁹ Notwithstanding the imploring rhetoric, the White House ultimately was forced to capitulate as to its re-

194. Brian McGrory, *Clinton Apologizes for FBI Files Error*, BOSTON GLOBE, June 13, 1996, at A14; Paul Richter & Ronald J. Ostrow, *Clinton Apologizes for FBI Files on GOP*, L.A. TIMES, June 13, 1996, at A15.

195. McGrory, *supra* note 194, at A14.

196. Nancy E. Roman, *Gingrich Slams Clinton's Ethics*, WASH. TIMES, June 14, 1996, at A1.

197. *Larry King Live* (CNN television broadcast, June 19, 1996), available in LEXIS, News Library, Script File, Transcript #1778 (interview of Rep. Clinger).

198. *White House Scrambles to Provide Papers*, UPI, June 24, 1996, available in LEXIS, Nexis Library, UPI file.

199. *The Late Edition* (CNN television broadcast, June 23, 1996), available in LEXIS, News Library, Script File, Transcript #141 (interview of Vice President Gore).

maining claim of executive privilege. On June 25, 1996, the White House agreed to provide Committee members and their staff with security access to the remaining documents. The access was limited to note taking during the review process, although documents could be copied if they related to the FBI files.²⁰⁰

The Travel Office dispute parallels previous conflicts. A president's assertion of executive privilege was met with swift condemnation by the requesting committee, which held the asserting executive officer in contempt of Congress. Consequently, the President curtailed his claim of privilege only a short time after the initial claim. In this case, the Clinton administration was forced to partially relent in its claim of executive privilege only twenty-one days after Counsel Quinn made the assertion and the Government Reform Committee instantly found him to be in contempt of Congress. The administration agreed to provide access to the remaining documents after an additional twenty-five days of congressional and media pressure. The participants' rhetoric suggested that they viewed the document dispute as a zero-sum adversarial contest.²⁰¹ Members of Congress employed analogies to Watergate.²⁰² Once the White House admitted that the documents

200. Jessica Lee, *White House to Let Panel See Documents*, USA TODAY, June 26, 1996, at 8A; see Associated Press, *Travelgate Documents Released*, NEWSDAY, June 26, 1996, at A47.

201. See *supra* notes 196-199 and accompanying text (citing examples of the verbal sparring in this dispute). Representative Clinger characterized the White House May 30, 1996 decision to produce 1,000 of the 3,000 documents as the "beginning of a victory for the House." 142 CONG. REC. H5655 (daily ed. May 30, 1996) (statement of Rep. Clinger). After the FBI files revelation, Senator Charles Grassley congratulated Clinger on his "dogged pursuit" of documents notwithstanding the assertion of executive privilege. Hearings Before the Senate Judiciary Committee Regarding the FBI Files Controversy (C-Span television broadcast, June 20, 1996).

From a purely political perspective, Representative Clinger's "dogged pursuit" scored political points by embarrassing the White House. It was a "win" for Republicans in Congress and a "loss" for the Democrats in the White House, an example sure to be noted by members of future Congresses who have little incentive to negotiate with or to defer to the next president asserting executive privilege. To the contrary, the President's political opponents in Congress potentially may achieve a political victory by pursuit of an uncompromising demand for full disclosure, either by uncovering embarrassing documents or by portraying the President as a philosopher-king unwilling to share his secrets with the electorate.

202. See *supra* note 188 and accompanying text (statement of Rep. Clinger analogizing the executive withholding of documents to Watergate). The in-

originally withheld under a claim of executive privilege evidenced at least an "administrative snafu," it was impossible to maintain its claim of privilege. Rightly or wrongly, the revelation confirmed the popular perception that presidents use executive privilege to cloak embarrassing information, or possibly, evidence of corruption. Because documents, initially withheld, suggested evidence of incompetence or wrongdoing, and because 1996 was an election year in which the opposition had seized upon the document conflict as reflecting negatively on the integrity of the White House,²⁰³ the typical suspicion regarding executive privilege was exacerbated. President Clinton simply lacked the practical ability to protect, by executive privilege, plausible executive branch interests in confidentiality of legal advice and strategic deliberations.²⁰⁴

IV. EVALUATION OF THE BATTLE

While commentators have hailed "functional accommodation" as a panacea and preferable to litigation and federal courts meddling in the working negotiation process between the political branches,²⁰⁵ this presupposes that the accommo-

vestigation was dubbed "Travelgate" by conservative media and Republican members of Congress.

203. In a June 22, 1996 radio broadcast, Republican presidential candidate Bob Dole urged the White House to abandon its claim of executive privilege and fully cooperate with the House committee. Melissa Healy, *Dole Assails White House over FBI Files: The GOP Candidate Questions the Administration's Ethics*, L.A. TIMES, June 23, 1996, at A21.

204. Prior to this Article's publication, and in the waning days of the 104th Congress, President Clinton invoked executive privilege twice to prevent disclosure of subpoenaed executive branch documents to congressional investigating committees: (1) An April 1995 memorandum written by FBI Director Louis J. Freeh and DEA Chief Thomas A. Constantine, which criticized the fragmentation of drug enforcement efforts among various executive branch entities, and (2) documents potentially probative of whether the administration knew that members of a U.S.-trained Haitian security force were involved in political assassinations in Haiti. President Clinton withheld the drug policy memo on October 1, 1996 to protect the deliberative process and withheld the Haiti documents on September 23, 1996 to protect diplomatic/national security secrets. Adjournment of Congress averted an election year constitutional battle. Charles Tiefer argues that these disputes demonstrate that "the two political branches of government no longer fear the stigma once associated with escalation to a subpoena/presidential privilege dispute," preferring "a dramatic subpoena/privilege fight" to compromise. Charles Tiefer, *The Fight's the Thing; Why Congress and Clinton Rush to Battles With Subpoena and Executive Privilege*, LEGAL TIMES, Oct. 14, 1996, at 25.

205. See *supra* note 13 and accompanying text (citing commentators who view political accommodation as effective and who doubt the effectiveness of federal court intervention in these disputes).

dation process is working. A fair assessment of the battles between Congress and the executive branch over access to documents, however, reveals that, without access to a civil proceeding, the President cannot effectively assert executive privilege to resist disclosure once a dispute with Congress escalates beyond the subpoena stage. This section (a) summarizes the obstacles facing presidents (including political coercion by Congress and the media and an ill-suited criminal contempt process); (b) advocates the availability of federal court review in a civil proceeding to resolve escalated disputes; and (c) examines the impact of an Independent Counsel investigation which overlaps a congressional investigation.

A. A PRIVILEGE PRESUMED ILLICIT

The case studies suggest that, in escalated information battles, a claim of executive privilege is insufficient to resist disclosure, regardless of legitimate executive interests. A president who asserts the privilege will suffer political damage by relying on a tool which the American political culture presumes is intended to cloak corruption. The consequence is that modern presidents, seeking to avoid the perception of stonewalling and believing that they will have to produce the documents in the long run, may become too cooperative with Congress, releasing documents and information in a way that will damage the personal, institutional, and national interests identified in Part II of this Article.

The arsenal of weapons Congress can use to win these escalated battles (and induce over-cooperation by administrations) is overwhelming. The process allows several opportunities for votes on whether to subpoena documents and testimony and, later, whether to hold executive officers in contempt. Congress can purportedly insist that a U.S. attorney seek a criminal indictment against executive officials found in contempt of Congress.²⁰⁶ Congress may also threaten to withhold appropriations for executive programs, fail to act on the President's initiatives and nominees, and call for an Independent Counsel (implying that executive privilege is being used to conceal unlawful activities and that the assertion of the privilege is, itself, unlawful). Ultimately, members of Congress can

206. See *infra* notes 220-234 and accompanying text (discussing the statutory process, and constitutional questions raised by, the Contempt of Congress statute, 2 U.S.C. §§ 192-194).

threaten impeachment of executive officers, including the President, who seek to resist a congressional subpoena on the grounds of executive privilege.²⁰⁷ Congressional action at each stage of the battle guarantees front page stories in the national press, with headlines suggesting executive branch wrongdoing.²⁰⁸ Moreover, any attempt by the executive branch to compromise or accommodate the congressional investigation is conventionally interpreted as a capitulation and concession by the executive that its assertion of executive privilege was baseless from the start. For example, Brand and Connelly argue that "[t]he illegitimacy of the underlying privilege claim in the [Burford] case is perhaps best illustrated by the executive's eventual capitulation to the legislative demands."²⁰⁹

Editorials about recent assertions of executive privilege reveal that many in the media perceive all claims of executive privilege as spurious.²¹⁰ Many editorials regarding the White-

207. Congress has plenary authority to impeach executive and judicial officers for "political" (i.e., not necessarily criminal) offenses. See U.S. CONST. art. I, § 2, cl. 5 (giving the House of Representatives the "sole power" to impeach); U.S. CONST. art. I, § 3, cl. 6 (giving the Senate the "sole power" to conduct impeachment trials); THE FEDERALIST NO. 65, at 439 (Alexander Hamilton) (Jacob E. Cooke ed., 1961 (describing impeachable offenses as "political"). The Constitution does not precisely define impeachable offenses; they may be whatever Congress "considers [them] to be at a given moment of history." 116 CONG. REC. 11,913 (1970) (statement of then Congressman Gerald Ford).

One of the House Judiciary Committee's Articles of Impeachment against President Nixon was directed toward his failure to comply with the Committee's subpoena. HOUSE JUDICIARY COMM., IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 192-96 (1974). Some members of the Committee believed that it was more appropriate for federal courts to adjudge the sufficiency of President Nixon's assertion of executive privilege than to express congressional disagreement by impeachment. See Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 36-38 (1974).

Congress's definition of impeachable offenses is probably unreviewable. See *Nixon v. United States*, 506 U.S. 224, 233-34 (1993) ("[T]he Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have any role in impeachments."). For an overview of the process, see Randall K. Miller, *The Collateral Matter Doctrine: The Justiciability of Cases Regarding the Impeachment Process*, 22 OHIO N.U. L. REV. 777 (1996).

208. For examples of such headlines, see Chapman, *Hill Panel Votes to Cite Watt for Contempt*, *supra* note 118, at A1; Editorial, *A Whiff of Watergate?*, WASH. POST, Nov. 12, 1986, at A19; *Mrs. Gorsuch to Jail?*, WASH. POST, Dec. 18, 1982, at A18; Susan Schmidt, *White House Eases Stance on Notes: Whitewater Panel Acts to Enforce Subpoena*, WASH. POST, Dec. 16, 1995, at A1.

209. Brand & Connelly, *supra* note 27, at 82 n.85.

210. See Peterson, *supra* note 13, at 628-29. Peterson states:

water notes controversy reiterate the presumption that executive privilege is an illicit tool to conceal wrongdoing.²¹¹ An editorial appearing in the *San Francisco Examiner* underscores the political consequences to presidents presumptuous enough to consider a claim of executive privilege. The editorial stated that the Clinton administration's "Nixonian" suggestion that it may assert executive privilege ensures "a series of unflattering news stories focusing on his claim of executive privilege during the 1996 presidential election year, and nightmares for his campaign handlers."²¹² In the post-Watergate era where the mere allegation of official wrongdoing is equivalent to guilt, and where resistance to disclosure is tantamount to a cover-up

Once a dispute reaches the subpoena level, the press becomes a major factor in the political conflict. Past experience suggests that Congress can use the press as a substantial weapon to obtain requested documents. As long as the need to uncover information within the executive branch has appeared legitimate, the press has been sympathetic to Congress's interests and quite skeptical of claims of executive privilege.

211. The following are examples of such editorials.

While I will admit the term "executive privilege" sounds authentic, I remember President Nixon's attempt to invoke it in his attempt to cover up the Watergate burglary proved it to be bogus . . . [T]he only types of information I could envision that would impair the President's ability to do his job would be evidence of wrongdoing. That would require the House to draw up and pass articles of impeachment requiring the President to defend himself before the Senate.

Harry F. Armstrong III, *Executive Privilege Is Not a Constitutional Right*, TIMES UNION, Dec. 26, 1995, at A8.

Whether the Clinton administration did anything improper after obtaining confidential information about the Whitewater investigations remains to be seen, but the president's foot-dragging on Senate committee requests for documents certainly magnifies suspicions. Attorney-client privilege? Executive privilege? Hogwash . . . The longer this administration stalls, the more people will conclude that Whitewater is sending up some of the same disgusting odors as Watergate did a couple of decades ago. What is it about Washington that clouds the minds of politicians? Ultimately, the decline and fall of the Nixon presidency had little to do with the initial wrongdoing—the underlings' burglary of the Democratic Party's national headquarters—and a lot to do with the president's personal role in the idiotic cover-up.

Whitewatergate? "Executive Privilege" Rears its Ugly Head, COLUMBUS DISPATCH, Dec. 17, 1995, at 2B; see also *Whitewater; Senate Should Ratify Panel's Subpoena Vote*, DALLAS MORNING NEWS, Dec. 16, 1995, at 34A ("Mr. Clinton harms himself by refusing to surrender the notes. Increasingly people wonder what he's hiding.").

212. Editorial, *Building A Stonewall; The Clinton Administration's Claim of "Executive Privilege" Only Creates Suspicion of a Watergate-Style Coverup*, S.F. EXAMINER, Dec. 17, 1995, at C22.

regardless of legitimate motives, functional accommodation has vitiated the President's prerogative of executive privilege.

The reaction of the media mirrors the response of Capitol Hill to assertions of executive privilege. Members of Congress presume that the privilege is not justified. The more civil members of Congress assert merely that congressional entitlement to the sought-after information outweighs any interest protected by privilege. A more common congressional observation is to deny any legitimate executive interest in nondisclosure. Partisans allege that the assertion of privilege is tantamount to a cover-up of unethical, wasteful, or illegal conduct in the executive branch. Rather than protecting the President's deliberative process or shielding state, military, or law enforcement secrets from improvident disclosure, members of Congress allege that the President must be hiding something. Ultimately, many members of Congress are offended when the privilege is asserted.²¹³ Every assertion of executive privilege since the Nixon administration has been widely perceived on Capitol Hill as the opening shot of an institutional battle. Members of Congress will frequently allude to Watergate, as they did in response to the Whitewater Notes controversy. Senator Richard Shelby stated: "Wholesale memory loss, evasive answers and claims of privilege against document production. Sounds strangely familiar, doesn't it?"²¹⁴ Senator Alfonse D'Amato was less obtuse in his Watergate analogy. "We don't know what they are hiding. But the American people are entitled to know what it is. . . . It didn't work in Watergate, it is not

213. See Statement of Representative Stephen Horn, May 9, 1996, House Government Reform & Oversight Committee, Transcript of Congressional Testimony, Federal Document Clearing House, Inc., May 9, 1996, available in WESTLAW, CONGTM database, 1996 WL 1016325 (voting to hold in contempt executive officers for failure to comply with the Committee's subpoena for documents related to the Travel Office firings on the basis of executive privilege).

When the White House ignores that subpoena, as it has done for the last three months, the White House insults not just the Republicans on this panel, but rather it insults the Republicans and the Democrats who supported that subpoena. In fact, the White House's action insults the entire House of Representatives and our rights under Article I of the Constitution. As a student and scholar of this institution, I am outraged at the culture of secrecy which exists in this White House.

Id.

214. Jan Crawford Greenburg, *Senate Aims at Clinton on Whitewater; Amid Echoes of Watergate, Vote Sets Up a Court Battle*, CHIC. TRIB., Dec. 21, 1995, at 1.

going to work now."²¹⁵ An officer who asserts executive privilege is "contumacious,"²¹⁶ a term which conjures a recreant who wantonly disregards authority, not a public servant who implements the President's constitutional prerogative.

Some commentators have suggested that Congress is institutionally capable of deferring to legitimate assertions of executive privilege. Brand and Connelly argue that "[a]ny assumption that Congress will not take seriously a bona fide assertion of executive privilege is simply unwarranted."²¹⁷ The partisan clashing and polar arguments revealed in the case studies suggest this theory is implausible. Because Congress's interests are adverse to those of the executive when a committee request is met with an assertion of executive privilege, Congress's institutional objectives and ego extinguish objectivity vis-à-vis executive interests. Even if particular members of Congress could be objective, the members do not have access to the disputed documents and therefore would possess only the most generalized basis upon which to defer to the President.

With the prevalence of divided government and the tendency of officeholders to devote substantial time and effort to inflict or defend against political injury, strategies of good faith negotiation are unlikely to be pursued genuinely once battle lines have been drawn by a formal assertion of executive privilege coupled with a committee's vote to subpoena executive branch documents.²¹⁸ In fact, information battles are a

215. Gretchen Cook, *Clinton, Republicans Headed for Courtroom Showdown Over Whitewater*, AGENCE FRANCE PRESSE, Dec. 15, 1995. Strident congressional challenge to executive privilege is only one manifestation of "Watergate backlash," i.e., congressional attempts to arrest claims of expansive presidential power claimed by President Nixon. Statutory manifestations include the War Powers Resolution (1973), Impoundment Control Act (1974), the Foreign Assistance Act (1974), and the Ethics in Government Act (1978). Since Watergate, Congress has generally increased the scope and aggressiveness of its executive branch oversight. See, e.g., Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 409-10 (1989) (describing acts of Congress increasing its oversight of the executive branch).

216. Congressional contempt resolutions cite the offending individual's "contumacious conduct." See, e.g., 128 CONG. REC. 10,040 (reporting Ms. Burford's citation).

217. Brand & Connelly, *supra* note 27, at 85. As noted earlier, one of the authors of this article, Stanley M. Brand, is former General Counsel to the Clerk of the House of Representatives and participated in a lead counsel role during the Watt and Burford controversies.

218. For example, in suggesting strategies to enable the branches to achieve a win-win negotiation in these disputes, Dean Shane concedes that if

useful political weapon for opponents of the President in Congress. If issues of character and credibility dominate national politics (and policy differences among political leaders are too subtle to command popular interest) it becomes convenient for investigating committees in Congress to make unreasonable information demands on administrations and, after resistance is encountered, accuse the administration of "stonewalling" or "hiding something." Negotiation is also unavailable because of the need to avoid institutional concessions. Attorneys for both Congress and the White House prefer to argue that a proposed course of action has been consistently followed by all controlling political parties in their institutions. An adverse precedent undermines the ability to so argue and provides ammunition for the other side.²¹⁹

The statute that criminalizes contempt of Congress itself presumes that an assertion of executive privilege in response to a congressional request for documents is illegitimate. The statute makes it unlawful for any person to willfully refuse to produce documents subpoenaed by a congressional committee.²²⁰ Section 194 of the statute further provides that the Speaker of the House or President of the Senate shall certify a contempt of Congress "to the appropriate U.S. attorney, whose duty it shall be to bring the matter before the grand jury for its

"congressional antagonists think it in their interest to harass or discredit a cabinet member on partisan grounds, amicable negotiations may be impossible." Shane, *Legal Disagreement*, *supra* note 13, at 521. Similarly, Shane acknowledges that if "the executive branch wants chiefly to discredit a particular legislator with that member's constituents, good faith negotiations will obviously be more difficult." *Id.* at 522. Shane's comments imply that partisan bloodsport is the rare case. Given the current realities of national politics, these exceptions seem to swallow the rule.

219. Dean Shane's thoughtful and eloquent advocacy of negotiation and formal agreements between the political branches "aimed at steering negotiations away from categorical questions of prerogative—who is entitled to what?—and toward the pragmatic resolution of immediate disputes," Shane, *Negotiating for Knowledge*, *supra* note 12, at 231, presumes a level of civility and an ethic of cooperation not present in national politics today.

220. 2 U.S.C. § 192 (1995). The statute provides in full:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

action."²²¹ Members of Congress have interpreted this statute as imposing a ministerial obligation upon the U.S. attorney to seek a grand jury indictment.²²² As such, the statute arguably constitutes an unconstitutional abrogation of prosecutorial discretion.²²³ Congress may not direct a U.S. attorney to seek a criminal indictment—a U.S. attorney, a purely executive officer, may not be converted into a congressional agent by statute.²²⁴ Moreover, the Act arguably "contravenes the constitu-

221. 2 U.S.C. § 194 (1995). The statute provides in full:

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

222. See *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 129, 139 (1984) [hereinafter *Olson Opinion*] (stating the opinion of the Speaker of the House that the U. S. Attorney must refer the matter to a grand jury).

223. Cf. *id.* at 149-64 (finding that if the statute was interpreted to divest the U. S. Attorney of discretion, the statute would create unconstitutional separation of powers problems).

224. Cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (invalidating portions of the Gramm-Rudman-Hollings Deficit Reduction Act which invested executive authority in the Comptroller, who was deemed a congressional agent because he or she was removable by Congress). The Court stated: "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 722.

Moreover, none of the historic cases involving Congress's inherent contempt power bolsters the constitutionality of the statute as applied to an officer asserting executive privilege. Aside from the fact that Congress has "practically abandoned" its inherent power (last using it in 1934), see Shane, *Negotiating for Knowledge*, *supra* note 12, at 228, the power is directed at coercion, not punishment (i.e., it is not a power to impose criminal sanction). More importantly, Congress has never attempted to invoke this procedure in a case involving executive privilege. In addition to the political hazards of attempting to incarcerate an executive branch official within the bowels of the Capitol, the separation of powers may substantially restrict, if not extinguish, the ability of Congress to use its inherent powers to try a cabinet officer or U.S. President at the bar of the House or Senate, especially if the power is exercised in response to the officer asserting a presumptively valid privilege.

tional requirement that all three branches must participate before a person is incarcerated for a federal crime."²²⁵ The concentration of lawmaking and prosecutorial discretion in one branch is inconsistent with the constitutional scheme of dispersed powers.²²⁶

This separation of powers concern is exacerbated when the individual held in contempt of Congress is an executive officer who is asserting executive privilege. As in the Burford controversy, a literal application of the contempt statute to executive officers asserting privilege would place the Department of Justice in an awkward position: While championing the President's assertion of executive privilege, the Department would simultaneously prosecute, or at least seek an indictment against,²²⁷ the executive officer who is asserting the privilege on the President's behalf. This officer is, in fact, a "pawn" who would be prosecuted only to obtain judicial resolution of an interbranch stalemate.²²⁸ A criminal prosecution for contempt of Congress punishes the executive officer and cannot lead to an order requiring the executive to produce the subpoenaed documents. The proceeding would castigate individuals whose only crimes were to obey their President's order to assert a constitutional prerogative; it does nothing (directly) to advance Congress's interest in access to the files.²²⁹ In his extensive analysis of this issue, then-Assistant Attorney General Ted Olson concluded that insofar as section 194 mandates prosecution in these cases, the statute would unconstitutionally vitiate prose-

225. Peterson, *supra* note 13, at 593 (suggesting that, although prosecutorial discretion is not unlimited, neither Congress nor the judiciary may compel the prosecution of a particular individual or class of individuals).

226. The notion that Congress may unilaterally adjudge contempt of Congress violations raises Bill of Attainder concerns. *Id.* at 607-08. The United States Constitution prohibits Congress from passing Bills of Attainder. U.S. CONST. art. I, § 9, cl. 3.

227. Even if a U.S. attorney was required to make the grand jury presentation, a further issue is whether the attorney would be required to then pursue the prosecution if an indictment were returned. The statute mentions only the former. Either requirement impairs prosecutorial discretion and probably breaches the separation of powers. If the attorney was required to seek the indictment but was free to refuse to prosecute in these cases, the statute would compel the attorney to perform a "useless act," a requirement which the law abhors.

228. Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 259.

229. *Olson Opinion*, *supra* note 222, at 173-74.

cutorial discretion and chill the President's ability to assert executive privilege.²³⁰

The statute is controversial and elicits sharp views from members of the executive and Congress. For example, during the Burford controversy, Representative Elliott H. Levitas, chairman of one of the House committees seeking EPA documents, argued that by refusing to seek a criminal indictment against Burford, officials in the Justice Department were coming "perilously close to committing impeachable offenses."²³¹ Testifying to a House committee during the Burford controversy, U.S. Attorney Stanley S. Harris suggested that if he was required to seek an indictment against Burford, his presentment to the grand jury would be a "charade" in which he would withhold key information and take other actions to assure the indictment would not be returned.²³² Executive branch policy provides that a U.S. attorney should not prosecute an officer for contempt of Congress if the citation is based upon a valid assertion of executive privilege.²³³ Notwithstanding this policy and the fact that Congress has no prosecutorial authority, many journalists and commentators who discuss contempt of Congress omit from their discussion the prosecution and adjudication stages which are prerequisites to criminal sanction. The lumping together of the congressional subpoena and criminal punishment gives the absolutely false impression that a vote to approve a contempt resolution in Congress is sufficient to adjudge an individual guilty of a

230. *Id.* at 180-81. Olson argued that congressional interests could be protected via a civil proceeding of the type rejected in *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). See *supra* notes 135-154 and accompanying text (summarizing the District of Columbia court's finding that the executive branch could not use the judiciary through a civil suit to resist a congressional subpoena).

231. Maitland, *supra* note 144, at A14.

232. *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearings Before the House Comm. on Public Works and Transp.*, 98th Cong. 50, at 36 (1984) (testimony of Stanley S. Harris, United States Attorney).

233. See Department of Justice Memorandum, May 30, 1984, reprinted in OLSON REPORT, *supra* note 155, at 2,584 (stating the testimony of Assistant Attorney General Rex Lee that the Department of Justice would not present the matter to a grand jury if it found the claim of executive privilege was rightfully made).

crime.²³⁴ This common tendency reinforces popular skepticism regarding executive privilege. Whatever the requirements or constitutionality of section 194, the existing process is unlikely to result in vigorous assertions of executive privilege. If executive privilege is a constitutional prerogative that is presumptively valid, as the Court ruled in *Nixon*, then an executive officer should not have to become a criminal defendant, being prosecuted by fellow executive officers, in order to successfully assert the privilege against Congress.

B. A JUDICIAL ROLE IN POST-SUBPOENA DISPUTES

Prompt judicial resolution of an escalated document stalemate in a civil proceeding could clarify and safeguard the constitutional status of executive privilege. The case studies reveal that the executive is in a weaker bargaining position than is Congress in these escalated document battles. Because federal courts have avoided the issue, the executive has been forced to surrender a legitimate constitutional prerogative in order to avoid the crippling effects of a perceived cover-up. Federal courts should be available to remedy the failure of the political negotiation process to adequately safeguard the separation of national powers and national interests protected by executive secrecy.²³⁵ The federal judiciary, unlike Congress,

234. See Paul Bedard, *Executive Privilege Cited to Guard "Travelgate" Papers*, WASH. TIMES, May 9, 1996, at A3 (commenting on a threatened House committee contempt vote): "[I]t would be the first contempt charge filed by Congress against the White House since 1982 and would be punishable by a \$1,000 fine and up to a year in jail." *Id.*; see also William Safire, Editorial, *Shame on the FBI*, N.Y. TIMES, June 10, 1996, at A17 (commenting on the Travel Office investigation: "Congress threatened White House Counsel Jack Quinn with criminal contempt. To avoid jail, he forked over a thousand of the least damning documents"); *The NewsHour with Jim Lehrer* (PBS television broadcast, June 6, 1996), available in LEXIS, News library, Script file, Transcript #5544 (reporting on the Travel Office inquiry: "Clinger's committee then voted to push for contempt of Congress charges against White House Counsel Jack Quinn and two former White House aides. That citation carries a \$1,000 fine and up to a year in prison").

235. This process failure is analogous to a "market failure" in economic settings which justifies the imposition of corrective legal structure, judicial or legislative, to safeguard values otherwise vulnerable in an uninhibited market. Cf. Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 16 (1988) (describing the rationales for legal intervention in labor as "guaranteeing such minimal protections and entitlements as are necessary to assure the basic dignity, well-being, and associational liberties of employees" which the bargaining process, among participants of unequal power, fails to provide).

has no stake in the document dispute. A federal court is a neutral forum in which these separation of powers battles may be resolved fairly.

While a federal court could likely assert subject matter jurisdiction over an escalated document dispute without much difficulty,²³⁶ a court considering such a dispute would face substantial threshold issues related to ripeness and justiciability. Pursuant to the "case or controversy" requirement of Article III²³⁷ and prudential principles of judicial self-restraint, a federal court must not intervene in a congressional-executive document dispute until the controversy is ripe. In *Goldwater v. Carter*, Justice Powell articulated a standard by which to adjudicate ripeness that applies sensibly to document disputes.²³⁸

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and

236. Federal courts have subject matter jurisdiction over escalated information disputes pursuant to 28 U.S.C. § 1331, which confers federal question jurisdiction. See, e.g., *United States v. American Tel. & Tel.*, 551 F.2d 384, 389 (D.C. Cir. 1976). In *AT&T*, the court found that the action arose under the Constitution and the jurisdictional amount (\$10,000) was inferred from the potential damage to U.S. intelligence operations which the executive claimed would ensue if AT&T complied with the House subpoena. *Id.*

A corollary issue not explored here is whether Congress would have authority pursuant to its Article III powers over federal jurisdiction to extinguish all federal court review of congressional-executive information disputes prior to the criminal contempt proceeding. Theoretically, a court could invalidate such a statute on the premise that earlier Article III review of these disputes is indispensable to the executive branch's ability to exercise its constitutional duties. Nevertheless, notwithstanding the premises advanced in this Article, it is highly unlikely that a court would challenge Congress in the face of a jurisdiction-stripping statute. Considering that the Supreme Court has never considered a congressional-executive information dispute and only a few lower court decisions have addressed the issue, it would be difficult to argue that, for example, adjudicating such disputes is a core function of the federal courts or is so necessary to preserve the structure of government that invalidating a jurisdiction-stripping statute is required.

The Senate's civil contempt power under the Ethics in Government Act of 1978, 28 U.S.C. § 1365, which gives the U.S. District Court for the District of Columbia jurisdiction "over any civil action brought by the Senate, or any authorized committee or subcommittee," to enforce Senate subpoenas, exempts disputes involving executive officers. Thus, while this statute cannot establish district court jurisdiction over an escalated dispute, neither does it remove these controversies from federal courts' jurisdiction. This Article argues that the federal courts can simply assert jurisdiction pursuant to the federal question jurisdiction statute. Alternatively, Congress could expressly confer jurisdiction in a new statute or through broader application of the Ethics in Government Act.

237. U.S. CONST. art. III, § 2, cl. 1.

238. 444 U.S. 996 (1979).

until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.²³⁹

In these cases, a federal court must wait until each branch has officially asserted conflicting constitutional claims, that is, when the President has asserted executive privilege and a congressional committee has voted to subpoena the disputed materials. As a practical matter, the political branches will continue to engage in a process of negotiation and accommodation in the vast majority of cases in which neither of these events occur. Once the controversy is ripe, however, either branch²⁴⁰ could seek judicial resolution of the competing constitutional claims in a civil proceeding. This would allow federal court adjudication of the dispute prior to a criminal contempt proceeding which, in the case of executive privilege, creates conflicts of interest in the Justice Department and requires an executive officer to endure exposure to criminal liability in order to test an assertion of executive privilege.²⁴¹

A plausible argument could be made that federal court intervention should await completion of all stages of the statutorily prescribed political process, that is, after a contempt vote by a full house of Congress. This argument is based upon principles of comity and the desire to avoid judicial review of "moving targets" or disputes which could be mooted by a capitulation by either branch.²⁴² For example, in dismissing suits

239. *Id.* at 997 (Powell, J., concurring). Justice Powell argued that a challenge by a few members of Congress to President Carter's unilateral termination of a treaty with Taiwan was not ripe for adjudication. *Id.* at 997-98.

240. In *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726 (D.C. Cir. 1974), it was the congressional committee, not the executive branch, which petitioned the district court to adjudge the sufficiency of its subpoena *duces tecum* as against President Nixon's assertion of executive privilege.

241. As suggested previously, a criminal contempt proceeding is inconsistent with the Court's constitutional ruling in *United States v. Nixon*, 418 U.S. 683, 713 (1973), that executive privilege is a constitutional prerogative which is presumptively valid. "Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged . . ." *Id.*

242. See Legal Memorandum from Lloyd N. Cutler of Wilmer, Cutler & Pickering to Asst. Attorney General Antonin Scalia, Dec. 12, 1975, reprinted in OLSON REPORT, *supra* note 155, at 816.

brought by private citizens to enjoin congressional investigations based upon First Amendment concerns, the D.C. Circuit was persuaded that petitioners would have sufficient opportunity to present their constitutional objections, if any, to the subcommittee, full committee, full House, and, ultimately, as a defense in the criminal contempt process.²⁴³ In these cases, the petitioners could not demonstrate to the court facts "sufficiently concrete and compelling to warrant judicial interruption" of the legislative process.²⁴⁴

In escalated information disputes between Congress and the President, by contrast, earlier judicial intervention is warranted. The Court in *Nixon* held that ordinary mechanisms delaying judicial review should not be followed where the mechanisms "present an unnecessary occasion for constitutional confrontation between two branches of the Government."²⁴⁵ Moreover, a committee subpoena is a sufficiently institutional assertion of constitutional authority under Justice Powell's formulation in *Goldwater*.²⁴⁶ Congress delegates to its committees legal authority to act. A committee subpoena has a legal and binding effect on recipients. The subpoena is in every sense a legislative act which can be distinguished from a mere expression of opinion by some members of Congress, as was the case in *Goldwater*. If a committee subpoena was some informal or preliminary action, then the executive branch would be free to ignore it. Of course, the opposite is intended. Congress cannot have it both ways: the ability to escalate an information

243. *Sanders v. McClellan*, 463 F.2d 894, 899-900 (D.C. Cir. 1972) (holding that a publisher's claim of First Amendment protection [to resist disclosing to Congress the identity of anonymous authors] was insufficiently "concrete and compelling" to allow the publisher to invoke equity jurisdiction and, thereby, circumvent the "regular procedure for testing witness's claims"); *Ansara v. Eastland*, 442 F.2d 751, 752 (D.C. Cir. 1971) (per curiam) (declining to invalidate the Senate Subcommittee on Internal Security's subpoena *duces tecum* directed to opponents of the Vietnam War, noting plaintiffs' potential to vindicate their claims without resort to the courts). In *Ansara*, the court based its refusal to "interject" itself into the process, prior to a criminal contempt proceeding, upon plaintiffs' opportunities to make their case in legislative fora and the prudential advantages of avoiding "needless friction" between Congress and the judiciary. *Id.* at 753-54.

244. *Sanders*, 463 F.2d at 900.

245. *Nixon*, 418 U.S. at 691-92. The Court permitted President Nixon to challenge the subpoena *duces tecum* via immediate appeal rather than imposing the typical procedure requiring the President to disobey the subpoena and, subsequently, assert his constitutional arguments as a defense in a criminal contempt proceeding. *Id.* at 686-87.

246. 444 U.S. 996, 997 (1979) (Powell, J., concurring).

dispute by holding an executive officer in contempt and, at the same time, bar judicial review by indefinitely delaying a full House vote.²⁴⁷ Courts have and should apply principles of prudence in deciding whether a dispute has ripened to the point where the issues are crystallized and the procedure poses an imminent threat to the constitutional structure of power.²⁴⁸

Judicial participation in resolving document disputes will not result in a proliferation of illegitimate executive privilege claims. The executive still will have to anticipate that any resistance to full disclosure will be perceived by many individuals in government, the media, and the public as inherently suspect. Furthermore, if the executive loses in federal court and must produce the documents, the executive would prefer that the materials be viewed by an objective observer as plausibly privileged in hindsight, rather than suffer the embarrassment and political injury that is sure to accompany a bogus assertion of privilege. However, at least the executive's claim of privilege will be taken seriously in a federal court, which, theoretically, decides cases according to rules of law and constitutional values rather than popular perceptions. National interests in secrecy will be more carefully considered by a federal court than by the media (bloodthirsty for scandal)²⁴⁹ or

247. If a vote from the full House triggered Article III jurisdiction, Congress could subject the executive branch to the first eight stages of coercive legislative acts identified at the outset of Part III of this Article, all the while eliminating the possibility of judicial arbitration. The effect would be to substantially diminish the political viability of maintaining an effective assertion of executive privilege.

248. See, e.g., *Davis v. Ichord*, 442 F.2d 1207, 1220 (D.C. Cir. 1970) (Leventhal, J., concurring) (noting the wisdom "in avoiding 'needless friction' with" Congress and "the importance of awaiting a specific impairment or threatened impairment in order to assure a sure-footed judicial disposition").

Dean Shane doubts that courts would be willing to entertain a declaratory judgment action prior to a full House vote, which Dean Shane believes is "an earlier point than the effective operation of government absolutely requires." Letter from Dean Peter M. Shane to Randall K. Miller (Oct. 1, 1996) (on file with author). I agree with Dean Shane's standard, but would suggest that, in light of the legal and practical force of a committee subpoena, the effective operation of government may necessitate adjudication of the information dispute prior to a full House vote. Unless Congress were willing to impose a fast-track procedure in cases of executive privilege, requiring a vote of the full house to occur within a set, short time frame (for example, ten calendar days) after approval of the initial contempt resolution, Congress can allow the subpoena and committee contempt resolutions to dangle indefinitely, exacting overly-coercive political pressure on the President.

249. The ability to unmask a national scandal can make a journalist's career. Two pioneers of modern investigative journalism, Bob Woodward and

members of Congress (the executive's opponent in the zero-sum game of document disputes). The federal judiciary, whose judges enjoy qualities of independence (life tenure and salary protection),²⁵⁰ is the institution of national government most capable of standing above partisan warfare and the retributive ethic of national politics to engage in the admittedly difficult, subjective, and philosophical task of balancing competing and legitimate constitutional interests.

The standard of review as first developed in the Water-gate²⁵¹ and *AT&T*²⁵² cases, a functional balancing test, has

Carl Bernstein (or their images as portrayed by Robert Redford and Dustin Hoffman in the motion picture *All the President's Men* (Warner Bros., 1976)) are likely to be role models (at least on a subconscious level) to many journalists who cover national politics today. This is not to suggest that journalists pursue scandal in an unethical fashion or do not believe in uncovering the truth. It is merely to acknowledge that the Woodward and Bernstein story is a pop-culture legend, has undoubtedly influenced modern journalism (some journalists may have decided on their profession partly because of Woodward and Bernstein), and affects the way journalists (as opposed to constitutional lawyers) react to executive privilege.

250. U.S. CONST. art. III, § 1.

251. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 522 (D.D.C.) (ruling that courts must "weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance"), *aff'd* by 498 F.2d 725 (D.C. Cir. 1974); Nixon v. Sirica, 487 F.2d 700, 716 (D.C. Cir. 1973) (per curiam) (en banc) ("[A]pplication of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.").

In *United States v. Nixon*, the Court suggested in dicta that a balancing test would be appropriate in executive-congressional information disputes: "We are not here concerned with the *balance* between the President's generalized interest in confidentiality . . . and congressional demands for information," but only with "the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." 418 U.S. 683, 712 n.19 (1974) (emphasis added).

252. See *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976).

To decide this case on the merits, we would be called on to balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information in the request letters, the likelihood of a leak of the information in the Subcommittee's hands, and the seriousness of the harm to national security from such a release.

Id.; cf. *State ex rel. Joint Comm. on Gov't & Fin. of W. Va. Legislature v. Bonar*, 230 S.E.2d 629, 632-33 (W. Va. 1976) (applying West Virginia law) (refusing to enforce a legislative subpoena *duces tecum* against the Department of Public Safety because the state legislature had failed to demonstrate that the documents were material and relevant to this purpose, and that the information was not otherwise practically available).

been reinforced by modern separation of powers jurisprudence which tends to favor functionalism in the absence of a clear answer from the Constitution's text.²⁵³ The court would essentially ask whether disclosure of the disputed information harms the President's ability to perform his constitutional duties more than nondisclosure would harm Congress's ability to perform its constitutional functions. A court can anticipate that the parties, having failed to negotiate and desiring to avoid institutional concessions, will present polar arguments.²⁵⁴ Achieving an "optimal" balance between these interests unavoidably will involve some level of subjectivity. A federal judge will likely have to consider documents, affidavits, and testimony *in camera*, a method approved in *Nixon*.²⁵⁵ In fashioning the remedy, the federal judge should be flexible and avoid overly-broad assertions which may unduly influence future information negotiations by narrowly tailoring the remedy to the unique circumstances of the dispute.²⁵⁶ The judge should facilitate negotiations and settlement as did the court in *AT&T*.²⁵⁷ Federal judges are familiar and skilled at urging settlement²⁵⁸ and avoiding pronouncement of constitutional

253. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 384-97 (1989) (upholding the Sentencing Guidelines promulgated by the United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (upholding provisions of the Ethics in Government Act); *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 441-46 (1977) (upholding the Presidential Records and Materials Preservation Act because the Act is not "unduly disruptive of the Executive Branch"); cf. *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (suggesting that formalism should be applied "[w]here a power has been committed to a particular branch of the Government in the text of the Constitution . . . [i.e.,] where the Constitution draws a clear line").

254. See, e.g., HOUSE REPORT ON THE BURFORD CONTROVERSY, *supra* note 65, at 27-82 (documenting broad assertions by Congress that it was entitled to review EPA documents relating to environmental enforcement litigation, and similarly broad assertions by the executive branch that it was privileged to withhold such documents, in correspondence between the two branches).

255. *Nixon*, 418 U.S. at 706.

256. *Miller*, *supra* note 207, at 801-02. It is neither possible nor desirable for federal courts to establish rules of law with an eye toward future disputes. For example, in a close case, should a court defer to Congress as the (arguably) more democratic institution? Or should it defer to the executive branch's "expertise" or the fact that the President represents a national constituency? These abstractions cannot be liberated from the specific factual context.

257. See *supra* notes 113-117 and accompanying text (discussing steps taken by the court in *AT&T* to nudge the parties toward resolution).

258. See *Bank of America Nat'l Trust v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 350 (3d Cir. 1986) (recognizing "the value and necessity of a vigorous

rules beyond that required by the particular facts before the court.²⁵⁹ If a decision is necessary, the judge is not required to pronounce total victory for either side; rather, the judge should consider intermediate positions, such as allowing the executive to delay production of documents pending an executive branch decision or ordering the executive to produce document summaries and/or indices, representative samples, redacted documents, or a combination of these. The court could also allow committee members to view the documents but forbid members from obtaining physical custody of materials or taking notes.²⁶⁰ While this last option ostensibly accommodates executive branch interests, in reality it fails to keep the "cat in the bag."²⁶¹ Members of Congress will know the contents of the documents and cannot be prevented, consistent with the Speech or Debate Clause,²⁶² from reporting their knowledge be-

policy of encouraging fair and reasonable settlement of civil claims whenever possible" and that "an activist role for judges in managing cases—and encouraging their settlement—has expressly been provided for under the federal rules"); Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1370 (1983-1984) (describing tactics judges use to settle cases).

259. See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (stating that the Court will neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied").

260. Cf. *American Tel. & Tel. Co.*, 551 F.2d at 386 (describing the agreement between the branches using redacted documents and random-sample verification procedures); Shane, *Negotiating for Knowledge*, *supra* note 12, at 218-19 ("The Executive may release the material requested, but under protective conditions ranging from Congress's promise to maintain confidentiality for the information it obtains to congressional inspection of material while it remains in executive custody."). Shane also outlines three other intermediate options: (1) delay production pending completion of the executive process; (2) release redacted documents; and (3) release summaries. *Id.*

261. As suggested earlier, allowing access to the requested documents via a secured viewing procedure is generally interpreted as a victory for Congress. Commenting on the secured viewing procedures agreed upon after the EPA document dispute, Rep. James H. Scheuer, chair of one of the investigating committees, stated: "This charade was designed as a face-saver for the president to get him off the sticky wicket of insisting on executive privilege. We have to go through this little dog-and-pony show to get to the unexpurgated, unedited documents." Howard Kurtz, *Levitas Pact on EPA Documents Faulted By Panel Chairman*, WASH. POST, Feb. 20, 1983, at A1.

262. U.S. CONST. art. I, § 6, cl. 2. In a series of cases, the Supreme Court has held that the Speech or Debate Clause provides absolute immunity to members of Congress and their aids for legislative acts. *Hutchinson v. Proxmire*, 443 U.S. 111, 112 (1979); *Gravel v. United States*, 408 U.S. 606, 606 (1972); *United States v. Brewster*, 408 U.S. 501, 528 (1972).

fore the C-Span cameras. Once a secret has escaped, damage to national interests may be irreparable.

Executive privilege can and has been abused. However, the executive branch does not have a monopoly on the abuse of power. Neither of the political branches is immune from corruption. Both branches have legitimate constitutional interests to champion. It is unfair to compare members of congressional investigating committees to the worst image of Joseph McCarthy; however, it is equally unfair to compare every president who asserts executive privilege to the worst image of Richard Nixon. To assure that the national powers are appropriately balanced, a fair and neutral mechanism to police the boundaries of power must be followed. Judicial abdication and political negotiation have failed to safeguard important executive prerogatives. Federal courts must therefore intervene to reestablish the equilibrium required by the Constitution between the President and Congress and check excesses that potentially emanate from both ends of Pennsylvania Avenue. The potential for vindication in federal court may liberate presidents from the popular presumption of Watergate guilt and enable them to assert executive privilege without penalty when the national interest so requires.²⁶³

C. IMPACT OF INDEPENDENT COUNSEL INVESTIGATION

Should a federal court assert jurisdiction over an executive privilege-congressional oversight battle the court may confront the ever-increasing presence of the Independent Counsel. In such cases, the court should ask, to what extent does an Independent Counsel investigation limit the scope of overlapping congressional inquiry? In 1957, the Supreme Court stated that one of Congress's constitutional functions, which substantiates its investigation and subpoena authority, is to expose "corruption, inefficiency or waste" in government.²⁶⁴ However, since the enactment of the Ethics in Government Act,²⁶⁵ Inde-

263. To be fair, there is much truth to Raoul Berger's observation that the executive branch is institutionally infatuated with secrecy. Raoul Berger, *Executive Privilege v. Congressional Inquiry (Part II)*, 12 UCLA L. REV. 1288, 1295 n.414 (1965). One can imagine the theoretical dangers of a politically strong president cloaking in privilege far more information than the execution of his duties require, rendering Congress too ill-informed to craft wise legislation or guard against autocracy. This Article has focused on an imbalance of power in favor of Congress, which has characterized the post-Watergate era.

264. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

265. 28 U.S.C. § 49 (1994).

pendent Counsel have been probing "corruption, inefficiency or waste" and possible criminal conduct through investigations that overlap and duplicate congressional investigations. The purposes of the investigations are ostensibly distinct: an Independent Counsel is investigating criminal conduct and seeking grand jury indictments and prosecutions if necessary; a congressional committee theoretically has a legislative goal. While some commentators are optimistic that the two processes can work well together,²⁶⁶ simultaneous investigations pose potential problems.²⁶⁷

First, it may be unfair to the subject of an investigation to respond to duplicative inquiries. As Lloyd Cutler has argued, "[O]ne inevitable consequence of the appointment of a Special Prosecutor or Independent Counsel is a repetition of going over ground that has already been gone over, and a very substantial increase in the amount of time the target and his lawyer must spend on the matter."²⁶⁸ Second, as the *North*²⁶⁹ and *Poindexter*²⁷⁰ cases demonstrate, a congressional committee which bestows immunity on a witness in order to overcome the Fifth Amendment's protection against self-incrimination and coerce testimony may effectively nullify any possible criminal prosecution of that witness.²⁷¹ Third, duplicative investigations

266. See, e.g., John Van Loben Sels, Note, *From Watergate to Whitewater: Congressional Use Immunity and Its Impact on the Independent Counsel*, 83 GEO. L.J. 2385, 2388 (1995) ("Through diligent efforts and policies of reasonable accommodation, Congress and the Independent Counsel can resolve most conflicts between them without the high social costs of lost prosecutions and without undue delays in informing the American public about the conduct of its government officials.").

267. See, e.g., Lawrence E. Walsh, *Political Oversight, The Rule of Law, and Iran-Contra*, 42 CLEV. ST. L. REV. 587, 593-94 (1994) (describing how the grant of congressional immunity to Lieutenant Colonel Oliver North and Admiral John Poindexter prevented successful prosecution of those two figures by the Independent Counsel).

268. S. REP. NO. 97-496, at 18-19 (1982), reprinted in 1982 U.S.C.A.N. 3537, 3554-55 (statement of Lloyd Cutler).

269. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam), cert. denied, 500 U.S. 941 (1991).

270. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992).

271. The *North* and *Poindexter* cases placed a heavy burden on the government to show that its evidence was not tainted by the immunized testimony, but that the case in chief stands on sources independent of the testimony. *Poindexter*, 951 F.2d at 373-77; *North*, 920 F.2d at 942-47. As one commentator noted: "Practical considerations of cost, scarce resources, and the strict prosecutorial requirements of the [*North* and *Poindexter*] opinions dictate that an Independent Counsel will almost never be able to prosecute a

could thwart the fact-finding process itself. Public testimony elicited by Congress from one witness "would allow other witnesses to revise their own testimony in light of the new information."²⁷² In addition, congressional interaction with witnesses threatens to distort the witnesses' recollections.²⁷³ Fourth, as the court held in *Senate Select Committee v. Nixon*,²⁷⁴ Congress may not subpoena materials if disclosure of

witness successfully after he testifies publicly under immunity before Congress." Van Loben Sels, *supra* note 266, at 2387.

An argument could be made that Congress has the prerogative to choose to forego a criminal prosecution in order to pursue a congressional investigation that Congress knows will taint the subsequent prosecution. In the *North* and *Poindexter* cases, however, this was an unintended consequence, not a conscious choice. Moreover, deciding which laws to enforce and which individuals to prosecute is an executive function and this allocation of power may limit Congress's ability to unilaterally decide to scuttle a prosecution. Similarly, Congress may not, consistent with the Fifth Amendment, damage the defense of a criminal prosecution by undermining the fact-finding process and generating undue pre-trial publicity.

On June 12, 1996, Democrats on the Senate Whitewater Committee blocked Republican attempts to give David Hale immunity for his testimony. Senate Whitewater Hearings (C-Span television broadcast, June 12, 1996). Mr. Hale is a former Arkansas judge who allegedly was pressured by then-Governor Clinton into making an illegal loan. *Id.* He was subpoenaed to appear before the Committee but indicated in a letter to the Committee that he would assert his Fifth Amendment rights and would not testify unless he was given immunity. On the surface, the debate regarding Hale's immunity posed the issue of whether those who face criminal liability should be able to escape justice by offering testimony to Congress. For example, Senator John F. Kerry said he was "not willing to reward a scum bag [Hale] who has already violated the law and admitted he's a liar." *Id.* Senator Kerry viewed Mr. Hale's quest for immunity as an attempt to manipulate the Committee into aiding his escape from judgment for other crimes he may have committed in Arkansas. *Id.*

Political realism suggests that Senator Kerry's position may have had as much to do with protecting President Clinton from further political embarrassment as with assuring that Mr. Hale was brought to justice. Similarly, the Republicans, motivated at least in part by a desire to injure President Clinton politically, wanted Mr. Hale to appear before the television cameras to repeat his allegations of wrongdoing against President Clinton. The rhetoric focused on the American public's right to justice (Democrats) and right to the truth (Republicans). The simultaneous partisan intentions of the participants were transparent. The result: a straight party line vote failing to achieve the supermajority necessary to grant immunity. *Id.* I make these observations to highlight again the partisan ethic of congressional investigations which target administrations of the other party.

272. Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407, 410 (1995).

273. *Id.*

274. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521, 522-24 (D.D.C.), *aff'd on other grounds*, 498 F.2d 725 (D.C. Cir. 1974).

information to a congressional committee would bias an ongoing criminal prosecution.²⁷⁵ Once a criminal investigation has been initiated and a target's Fifth and Sixth Amendment rights are potentially implicated, a congressional investigation may not proceed in a way that would dilute an individual's right to due process or a fair trial. Finally, duplicative investigations are wasteful of scarce public resources.

Because a federal court will employ a functional balancing test in resolving executive privilege-congressional subpoena disputes, the above factors tend to militate in favor of sustaining a claim of executive privilege in cases where an Independent Counsel has been appointed and the objective of a congressional committee is to expose executive branch wrongdoing. In such cases, the legislative and Independent Counsel objectives are parallel. A congressional committee may have to wait at least until the Independent Counsel has had an opportunity to make its initial determination of whether an indictment will be pursued. This is not to suggest a *per se* rule but merely a factor in the balance. A congressional committee may still be able to require disclosure notwithstanding the appointment of an Independent Counsel if, for example, the sought-after documents were needed to achieve a legislative objective unrelated to exposing misconduct.²⁷⁶ The President lacks the constitu-

275. *Id.* at 524. The district court stated:

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

Id.

276. As always, a functional balancing test treats competing constitutional interests as equivalent, striking the balance based upon the facts and circumstances of each case. One can imagine a federal court ordering the production of documents critical to an urgent legislative objective, for example, to respond to an outbreak of "mad cow" disease, over the objections of a president's generalized interest in executive-department candor or generalized concern regarding diplomatic relations with England. At the other extreme, oval office deliberations regarding a weapons technology breakthrough or troop movements in an ongoing military endeavor should not be disclosed pursuant to a general subpoena to produce documents upon which legislation might be had.

tional authority to cloak misconduct by asserting executive privilege. However, Congress may not argue that rumors or suspicion of wrongdoing abrogates or dilutes the President's authority to assert executive privilege. The function of the Independent Counsel is to investigate and separate partisan rumors from indictable offenses. Unless and until such a determination is made, the executive powers, including executive privilege, remain potent and enforceable in federal court.²⁷⁷

When the Supreme Court in *Morrison v. Olson*²⁷⁸ applied a functional separation of powers balancing test and sustained the Ethics in Government Act, the Court denied that the Act impermissibly intruded upon executive power by restricting removal of an Independent Counsel for cause.²⁷⁹ Based on the same reasoning, a federal court could conclude that some restrictions upon congressional access to materials relating to an ongoing Independent Counsel investigation would not impermissibly intrude on congressional power to investigate. The Ethics in Government Act can be seen, in part, as a delegation of congressional power to expose corruption in government.²⁸⁰

The ability of either side to articulate urgency or need in particularized terms will greatly influence the outcome. Competing claims can be tested by *in camera* review of the disputed documents.

277. Commentators have suggested that plausible evidence of executive branch wrongdoing dilutes or eliminates a president's authority to assert executive privilege. See, e.g., Shane, *Legal Disagreement*, *supra* note 13, at 484 (stating that executive branch policy requires disclosure if the information is "probative of official wrongdoing in the executive branch"). However, if pundits or members of Congress determine the existence of such wrongdoing, this exception would swallow the rule. Presidents face no shortage of partisan enemies and those who would make unsubstantiated allegations to inflict political injury.

278. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

279. *Id.* at 691-93.

280. The Ethics in Government Act has, to some extent, obviated the need for congressional investigation to counterbalance the executive's inability to rigorously investigate itself. Unlike Archibald Cox and Leon Jaworski during Watergate, modern Independent Counsels do not bear the structural pressures of being presidential appendages. They are, for example, appointed by a Special Division of the D.C. Circuit and removable by the Attorney General only for cause and "not for what led to Archibald Cox's firing, aggressively doing his job." Address by Kenneth Starr to Oklahoma Bar Ass'n (C-Span television broadcast, Nov. 28, 1996). Furthermore, like many of their predecessors, Independent Counsels are usually selected from the other political party to enhance the credibility of the investigation. *Id.*

Starr's address, in part, was a response to criticisms that partisan motivations have fueled his two-year Whitewater investigation (which has expanded to include the Travel Office firings and the FBI files controversy). As

This would imply that, at a minimum, congressional entitlement to subpoena documents is weaker when the underlying legislative purpose overlaps the objectives of an Independent Counsel's investigation. Whitewater and the Travel Office controversy are appropriate examples. Of course, if Congress disagrees strongly enough with a federal court order sustaining an assertion of executive privilege, it may always turn to its ultimate check on executive branch officials: impeachment.

CONCLUSION

Article II requires that the executive branch enjoy a certain level of secrecy to ensure that advice to presidents is candid and to safeguard military, diplomatic, and law enforcement endeavors which premature disclosure would compromise. Article I requires that Congress have broad access to executive branch information in order to legislate effectively, oversee federal programs, and expose corruption and waste in government. While political accommodation enables each branch to carry out these constitutional duties in most cases, resolute conflicts over information are inevitable. When the information disputes escalate beyond a subpoena vote and an assertion of privilege, negotiation and politics cannot adequately safeguard the institutional interests at stake, and federal court intervention is warranted.

A ripe, justiciable controversy exists when a congressional committee has voted to subpoena documents which the executive branch refuses to produce based on a claim of executive privilege. In such circumstances, the federal courts must not abstain and allow Congress effectively to adjudicate the dispute on Capitol Hill or in the media, or label as criminal an assertion of a privilege which the Supreme Court in *United States v. Nixon* held to be presumptively valid. These disputes are appropriately resolved by application in the district court of a functional balancing test that asks whether the executive interest in secrecy outweighs the congressional interest in disclosure, in terms of fulfilling each branch's constitutional duties. By asserting the judicial power to strike this delicate balance, federal courts will preserve those legitimate constitutional interests that post-Watergate presidents cannot preserve for themselves.

of March 31, 1996, the cost of Mr. Starr's investigation has exceeded \$23 million. *Whitewater Tab Tops \$23 Million*, CHL. TRIB, Oct. 2, 1996, at 4.