

**EXECUTIVE PRIVILEGE DISPUTES
BETWEEN CONGRESS AND THE
PRESIDENT: A LEGISLATIVE PROPOSAL**

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INTRODUCTION

In the last half-century, the executive branch and the legislators on Capitol Hill have frequently clashed over information that Congress feels it needs to effectuate its lawmaking or oversight functions, but that the administration feels the need to keep confidential. As a result, congressional investigations have been stymied and, in a number of instances, harmful or improper presidential actions have continued without appropriate scrutiny or constraint.

Consider the stalemate from 2007–2009 between Congress and the Executive over allegations of politicization at the Department of Justice (DOJ). In the course of seeking to determine why several U.S. Attorneys were forced to resign *en masse*, Congress uncovered credible evidence that the DOJ had been commandeered by partisan operatives aiming to entrench their political allies by manipulating prosecutions.¹ These revelations called into question the integrity of the federal criminal justice system and indicated that crucial decisions were made inside the White House. But the President blocked the ensuing congressional investigations at the White House door. He ordered Karl Rove, former White House Aide; Harriet Miers, former White House Counsel; and Joshua Bolten, White House Chief of Staff, not to honor valid congressional subpoenas—claiming executive privilege over testimony Rove and Miers would provide and documents in Bolten’s possession as well as immunity from congressional subpoenas for his aides.²

Congress did not sit idle in the face of this defiance. In fact, the House of Representatives held Miers and Bolten in contempt for their failure to comply with subpoenas,³ and when the Attorney General refused to pursue contempt prosecutions against them,⁴ the House Judiciary Committee—after obtaining the approval of a majority of the House—filed suit against Miers

¹ H.R. REP. NO. 110-423, at 15 (2007).

² Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (discussing Miers & Bolten); Carrie Johnson, *House Panel Subpoenas Rove Over Role in Justice Dept. Actions*, WASH. POST, May 23, 2008, at A03 (discussing Rove); Paul Kane, *Senate Panel Approves Subpoenas for 3 Top Bush Aides*, WASH. POST, Mar. 23, 2007, at A04.

³ Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES, Feb. 15, 2008, at A17.

⁴ Letter from Michael B. Mukasey, Attorney Gen., to Congresswoman Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008), <http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf>.

and Bolten, seeking to enforce the subpoenas in the federal courts.⁵ A federal judge ordered both that Miers appear before Congress and give testimony and that Bolten provide a detailed list of withheld documents, explaining why each was privileged.⁶ Miers and Bolten appealed the decision, obtaining an order from the appeals court absolving them of any obligation to comply with the lower court's opinion pending the outcome of the appeal.⁷ The U.S. Court of Appeals, expressing hope that a new Congress and new President would be able to resolve the dispute without the aid of the courts,⁸ delayed calendaring the appeal. The Bush Administration left office without resolving the dispute. Only after the Obama Administration took office, when the parties faced a looming appeals court deadline which pressured them to reach a negotiated settlement, did Congress obtain at least some of the information it had sought.⁹ Thus, despite the exercise of its subpoena power, a contempt citation, and enlisting the federal courts to aid its efforts, Congress was unable, for years, to access information it needed to investigate effectively grave charges that the White House misused the federal criminal justice system to influence prosecutions for partisan purposes and to disadvantage political opponents.

This case, standing alone, is sufficient to illustrate that something is severely awry with the current system of resolving executive privilege disputes. But it is not the only time executive privilege has been used to deny Congress access to information with troubling consequences. The most famous assertion of executive privilege, of course, is President Nixon's during the Watergate scandal. In that case, the President had conspired with close aides to commit campaign fraud, political espionage and sabotage, illegal break-ins, improper tax audits, and illegal wiretapping—all secretly funded with laundered money. Invoking executive privilege, President Nixon refused to comply with subpoenas from both a congressional committee and a special prosecutor for tapes of his Oval Office conversations about the cover-up.¹⁰ This cover-up succeeded in concealing unlawful

⁵ *Miers*, 558 F. Supp. 2d at 55.

⁶ *See id.* at 108.

⁷ *Id.* at 910–12 (D.C. Cir. 2008).

⁸ *Id.* at 911–12.

⁹ Carrie Johnson, *Deal Clears Rove, Miers to Discuss Prosecutor Firings*, WASH. POST, Mar. 5, 2009, at A08.

¹⁰ For a discussion of the events behind the Watergate Scandal of the 1970s, see generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). *See* *United States v. Nixon*, 418 U.S. 683, 687–89, 710 (1974).

conduct for months, and eventually resulted in a historic political showdown that changed the face of American politics. Ultimately, the Supreme Court ordered disclosure, and the President acceded.¹¹ But Watergate remains the paradigmatic example of the abuse of executive privilege.

A less well-known incident arose just before the start of Operation Desert Storm in Iraq, when a member of Congress introduced a resolution seeking specific sensitive information about the proposed operation—including casualty estimates, information about biological and chemical weapons, and the financial assistance that other countries would provide.¹² The President initially declined to share the information, citing its sensitive and deliberative nature.¹³ Congress pushed back, asking for “a more responsive answer than [this] initial reply.”¹⁴ Eventually—but only after Operation Desert Storm had been launched—the President abandoned his privilege assertion and provided much of the requested information to Congress in summarized form.¹⁵ If Congress had wanted to use the information to determine whether to fund the proposed operation, the President’s delay had rendered the information useless. The widespread public support of the first President Bush’s military action created a political environment in which congressional insistence on timely information-sharing—even with respect to information to which it was entitled—was fruitless.¹⁶ Still another example arose when the Defense Department canceled a contract with the McDonnell Douglas and General Dynamics (McDonnell Douglas) corporation to build the A-12 attack jet.¹⁷ The company owed the federal government \$1.3 billion in prepayment it had received, and when that repayment was deferred for two years, a House subcommittee wanted to know why.¹⁸ Reports regarding McDonnell Douglas’s financial stability had led some to wonder whether the repayment deferral amounted to a secret billion-dollar “bailout” for the defense

¹¹ *Nixon*, 418 U.S. at 713.

¹² LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 156 (2004).

¹³ Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1108 (1999).

¹⁴ *Id.*

¹⁵ *Id.* at 1108–09.

¹⁶ *Id.* at 1109.

¹⁷ See Ralph Vartabedian, *Bush Withholds Defense Memo from Congress*, L.A. TIMES, Aug. 13, 1991, at F1.

¹⁸ *Id.*

contractor.¹⁹ As part of its inquiry, the subcommittee subpoenaed then-Secretary of Defense Richard Cheney to produce a memorandum that reportedly set forth the reasons for permitting the repayment deferral.²⁰ On the basis of the need for candor among senior department officials and recommendations to him as Commander in Chief, President George H.W. Bush asserted executive privilege.²¹

As part of its responsibility to investigate waste and mismanagement within the executive branch, Congress is entitled to information regarding the Defense Department's financial decisions. Yet because the members of the President's party on the House committee supported the President's privilege claim, the committee chair could not muster enough support to challenge the privilege claim or to issue a contempt citation against then-Secretary Cheney. As a consequence of this invalid privilege claim, the document was never divulged and Congress never was able to determine whether the Defense Department shielded a contractor at the American taxpayers' expense.²²

These examples illustrate the perils of improper or overly expansive use of executive privilege—the President's power to assert the right to withhold documents or information, even from a co-equal branch. Executive privilege is intended to give Presidents a zone of confidentiality and ensure advisors' candor. But these cases—and many others—show it can have pernicious effects as well. Sometimes it delays release of information until after harmful or unwise policies have been implemented. And sometimes Congress simply cannot obtain the information at all. As a consequence, executive privilege provides a temptation to conceal illegal or improper conduct and to evade accountability in ways that can lead to grievous consequences.

Our democratic government is based on a fundamental norm of "presumptive openness"²³ and a free flow of information.²⁴ But

¹⁹ *Id.*

²⁰ *Id.*

²¹ Rozell, *supra* note 13, at 1111.

²² *See id.*

²³ *See generally* Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 515–27 (2007) (arguing that openness is a norm embedded in various elements of the Constitution).

²⁴ A plethora of judges, scholars, and legal philosophers have noted that open government is essential to the democratic political process. *E.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) ("Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."); Letter to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON: HIS BASIC

the recent growth of the federal executive branch²⁵ means that it generates significantly more information than it did even just fifty years ago, and it uses that information to wield ever more power. As the size and power of the Executive have expanded, the misuse of executive privilege has become both more problematic and difficult for Congress to combat.

And not only is excessive secrecy dangerous, it is all too pervasive. Government officials' tendency to err on the side of secrecy is well-documented.²⁶ Secrecy confers power to act according to one's own preferences and to avoid accountability.²⁷ While no one was ever demoted for keeping something secret, revealing information can be costly to a person's career. The incentives inside the executive branch, in short, generally point away from full disclosure. The result is a pattern of systemic over-classification²⁸ and under-disclosure.

Congress's oversight role, rooted in the Constitution and

WRITINGS 346 (Saul K. Padover ed., 1973) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."). See generally HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (1953); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Lawbook Exch., Ltd. 2000) (1948).

²⁵ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006) (noting the dramatic increase in size of the federal bureaucracy).

²⁶ See Kitrosser, *supra* note 23, at 491 ("[T]he very tendency toward executive secrecy is nothing new. As Arthur Schlesinger, Jr. has written, a 'religion of secrecy' has been ascendant in the American Presidency since roughly World War II, serving as an 'all-purpose means by which the American Presidency [may] dissemble its purposes, bury its mistakes, manipulate its citizens, and maximize its power.'" (quoting ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 345 (1973))).

²⁷ See ROBERT M. PALLITTO & WILLIAM G. WEAVER, *PRESIDENTIAL SECRECY AND THE LAW* 9 (2007) ("In the choice between accountability, political danger, and interference with policy desires on the one hand and total secrecy, efficiency, and virtually unimpeded policy action on the other, it is not difficult for a president to choose secrecy over politics. And the choice *is* between secrecy and politics, for every policy, initiative, or event withdrawn from public scrutiny is a circumvention of political processes.").

²⁸ E.g., *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H.R. Comm. on Government Reform*, 108th Cong. 23 (2004) (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) ("It is no secret that the Government classifies too much information. Many senior officials will candidly acknowledge the problem of excessive classification.").

repeatedly confirmed by the Supreme Court,²⁹ is an important, if imperfect, corrective to these pathologies of secrecy.³⁰ Absent Congress's oversight activities, the executive branch could operate without check by essentially determining unilaterally the bounds of its own secrecy.³¹ But for Congress to carry out its oversight role effectively, it must have access to sufficient information.

And while each post-Watergate President has asserted just a few executive privilege claims in response to congressional information requests, these small numbers do not indicate a small problem. As evidenced by the above examples, use of executive privilege can prevent or limit disclosure to Congress—even information it urgently needs. The Miers and Bolten controversy, in which Congress possessed evidence that the Executive engaged in partisan manipulation of prosecutions but was still unable to obtain disclosure of essential information until a new President took office, is a spectacular example of the phenomenon. But while the Miers and Bolten saga provides the starkest example of executive privilege dysfunction, as discussed above, it is certainly not the only example. Moreover, the problem is worse even than these examples suggest. Though the number of explicit “executive privilege” disputes that develop may be small, the number of information disputes between Congress

²⁹ See generally *NY Times Co.*, 403 U.S. at 724 (Douglas, J., concurring).

³⁰ See Heidi Kitrosser, *Congressional Oversight of National Security Archives: Improving Information Funnels*, 29 *CARDOZO L. REV.* 1049, 1062–63 (2008) (noting “there is a negative correlation between the relative openness of each political branch and the relative control that each branch has over the other. Congress is a relatively transparent and dialogue-driven branch, and its core tasks are to pass laws that the executive branch executes and to oversee such execution. The executive branch, in contrast, is capable of much secrecy, but also is largely beholden to legislative directives in order to act. This creates a rather brilliant structure in which the executive branch can be given vast leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.”); see also Heidi Kitrosser, “*Macro-Transparency*” *As Structural Directive: A Look at the NSA Surveillance Controversy*, 91 *MINN. L. REV.* 1163, 1165 (2007) (noting that the Constitution balances powers between the legislative and executive branches in a way that gives the executive control over information and gives Congress control over oversight. “An important reason for this balance’s very existence, as evidenced by constitutional history, text, and structure, is to reconcile the democratic virtues of government transparency with the occasional need for government secrecy.”).

³¹ See Rahul Sagar, *On Combating the Abuse of State Secrecy*, 15 *J. POL. PHIL.* 404, 408 (2007); see also PALLITTO & WEAVER, *supra* note 27, at 200–01 (“A system that relies on the executive to police and constrain itself—to be, in short, ‘judge in his own cause’—encourages executive overreaching.”).

and the Executive that never reach the stage where the President explicitly asserts executive privilege is much larger. An example came during a House committee's inquiry into President Carter's unpopular decision to impose an import fee on crude oil and gasoline in 1980. The House requested documents from the Department of Energy, which delayed compliance with the request on the grounds that the President needed time to consider whether to interpose an executive privilege assertion.³² Despite a subpoena and a contempt citation, executive officials continued to refuse to turn over the documents, even though the President never asserted executive privilege.³³ Ultimately, a federal court voided President Carter's import fee and the administration agreed to allow the subcommittee to view the documents in executive session.³⁴ In this and each similar dispute where executive privilege is not asserted but looms on the horizon, Congress must decide whether and how aggressively to pursue its information requests—should it issue a subpoena? Should it agree to a compromise that results in partial disclosure? Or should it use its time and resources on other matters?³⁵

So we know that some information disputes culminate in an executive privilege assertion, at which point Congress may or may not succeed in obtaining some or all of the information it requests in a manner that is or is not timely. And we know that many more disputes never rise to the level of executive privilege assertions yet still interfere with Congress's legitimate pursuit of information. And we can infer that still more information requests, deterred by this dynamic, are never even made.

Thus, the numbers of executive privilege assertions represent just the tip of the iceberg. Nor should the existence of the iceberg itself come as a great surprise. This paper argues that structural flaws inherent in the way executive privilege now functions prevent those disputes from being resolved by the most important question—whether disclosure is warranted. These structural flaws include the lack of clear standards governing the use of executive privilege, which leads to over-reliance on political factors; bias toward the Executive stemming from its monopoly

³² MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 91 (2d ed. 2002) [hereinafter ROZELL, PRESIDENTIAL POWER].

³³ *See id.*

³⁴ *Id.*

³⁵ Recent examples of this phenomenon were cataloged in STAFF OF H. COMM. ON THE JUDICIARY, 110TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 242–45 (2009), <http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf>.

on information and the inadequacy of Congress's tools to overcome that information monopoly; the political branches' differing understandings of the scope of executive privilege; and the Executive's tendency to expand its zone of secrecy. The result is systemic under-disclosure of information.

This paper proposes a draft statute designed to stem this government dysfunction: The Executive Privilege Codification Act—reproduced in the Appendix—would establish standards governing the scope of executive privilege; strengthen the position of Congress relative to the Executive in executive privilege disputes; and secure the role of the federal courts as the final arbiter of such disputes.³⁶ By reducing uncertainty, the statute will also promote the informal resolution of disputes without resort to the courts.³⁷ The result will be a better flow of information between the branches, a Congress better equipped to carry out its constitutional obligations, and a reduction in the risk of uncorrected fraud, abuse, and error in the executive branch.

I. EXECUTIVE PRIVILEGE: THE STATUS QUO AND ITS FLAWS

From the Republic's early days, Congresses and Presidents have assumed the existence of some kind of executive privilege, though they have frequently disagreed with respect to its application.³⁸ Only with the Watergate crisis of the 1970s did the

³⁶ See *infra* app.

³⁷ Others have emphasized the need for more certainty in executive privilege doctrine. *E.g.*, Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1186–87 (1999); 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, 541–42 (1987).

³⁸ The Executive always has held the position that there is some information which he may withhold from Congress. *See, e.g.*, FISHER, *supra* note 12, at 10–11 (noting that in 1792 when President Washington asked his Cabinet to consider the extent to which the House committee investigating heavy military losses suffered by Maj. Gen. Arthur St. Clair at the hands of Indian tribes could call for papers and testimony, the Cabinet determined “that the Executive . . . ought to refuse [to provide papers], the disclosure of which would injure the public”). But the examples often cited from the founding era do not definitively establish the contours of executive privilege. In these early examples, congressional practice usually was to specify that the President should provide requested information but should withhold any information which “in the public interest” should be kept secret; even when Congress failed to make that condition explicit, the President sometimes declined to share information on that basis nonetheless, assuming it to be implicit in all congressional information requests. *E.g.*, Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1320 (1975) (explaining that President

issue reach the Supreme Court. The high Court ultimately ruled against the President's efforts to resist disclosure but recognized his right to assert executive privilege over communications with his advisors as a prerogative rooted in the Constitution.³⁹

More specifically, the Supreme Court's decision had two crucial elements. First, the Court rejected President Nixon's argument that executive privilege for presidential communications is absolute.⁴⁰ Instead, the Court said, the privilege is a "qualified" one.⁴¹ The President can invoke it in some appropriate circumstances, but he must nonetheless disclose the information at issue if the party seeking it can make an adequate showing of need.⁴² Thus, a claim of privilege could not serve to impair a coordinate branch's ability to perform its constitutional functions.

Second, the Court spurned President Nixon's suggestion that the determination of when disclosure is necessary lies with the President, holding instead that final determinations about disclosure rest with the federal courts. Echoing age-old precedent, the Supreme Court reaffirmed that "it is the province and duty of this Court 'to say what the law is' with respect to [a]

Washington adopted the position, with respect to a congressional request for diplomatic correspondence, that "it could scarcely be supposed . . . that the Senate intended to include any letters, the disclosure of which might endanger national honor or individual safety"). *But see* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) (arguing that there is no such thing as executive privilege rooted in the Constitution).

³⁹ *United States v. Nixon*, 418 U.S. 683, 707 (1974). *United States v. Nixon* purports to apply only to its own context—executive privilege assertions in the face of subpoenas issued during criminal proceedings. But other decisions have applied its analysis in other contexts. *E.g.*, *Nixon v. Adm'r. of Gen. Servs.*, 433 U.S. 425, 442–43 (1977) (access to presidential papers); *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (Freedom of Information Act request); *In re Sealed Case*, 121 F.3d 729, 735–36 (D.C. Cir. 1997) (grand jury subpoena); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974) (congressional subpoena).

⁴⁰ *Nixon*, 418 U.S. at 703–07; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974) (congressional subpoena). The Nixon Administration had taken a similar position, arguing that there was executive privilege with respect to requests for the tapes from a grand jury and from a congressional committee. *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 727 (regarding the congressional committee); *Nixon v. Sirica*, 487 F.2d 700, 712 (D.C. Cir. 1973) (en banc) (per curiam) (regarding the grand jury).

⁴¹ *See Nixon*, 418 U.S. at 706–13; *Senate Select Comm. on Presidential Campaign Activities*, 498 F.2d at 729 (citing *Nixon v. Sirica*, 487 F.2d at 716) ("[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.").

⁴² *Nixon*, 418 U.S. at 713–14; *In re Sealed Case*, 121 F.3d at 746.

claim of privilege.”⁴³

But after Watergate, only a handful of executive privilege disputes have reached and been resolved by the courts. More frequently, congressional-executive fights over information have continued to be resolved much the same way they had been for more than 200 years: by political negotiations. Usually these negotiations—in which each side expends political capital and threatens to escalate the conflict to exert pressure on the other—result in a compromise of some kind.⁴⁴ These negotiations are often relatively uneventful and without rancor.

While the negotiations that take place between Congress and the Executive are an important product of our constitutional structure and often lead to a compromise, we currently have no way to ensure that these compromises include adequate consideration of the question most important to the public: whether Congress’s need for the information outweighs the President’s need for secrecy. In fact, as the Miers and Bolten example shows, even overwhelming congressional need can be insufficient to enable Congress to obtain information from a sufficiently stubborn Executive.

To be sure, the current scheme has endured for many years and has its champions,⁴⁵ but it frequently fails to produce timely

⁴³ *Nixon*, 418 U.S. at 705 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

⁴⁴ Sometimes this compromise includes congressional acquiescence in limiting the scope of the request. For example, negotiations over President Reagan’s assertion of executive privilege over documents drafted by then-nominee for Chief Justice of the Supreme Court William H. Rehnquist and requested by the Senate Judiciary Committee as part of its preparation for confirmation hearings, led to a deal in which the President waived his assertion of executive privilege when Congress agreed that only certain requested documents would be provided to the Committee. ROZELL, *PRESIDENTIAL POWER*, *supra* note 32, at 102–03. Or the Executive might agree to make certain documents that it considers privileged available either on a limited basis or to a limited group of members of Congress. The Clinton White House and the House of Representatives struck a deal whereby requested documents related to the firing of several employees of the White House Travel Office were made available to Committee members and staff for review and note-taking, but not photocopying. *Id.* at 126; *see FISHER*, *supra* note 12, at 117 (describing how a request for documents relating to State Department recommendations for covert actions resulted in an oral briefing on the contents of the documents for committee members and staff); Shane, *supra* note 37, at 505 (noting that documents relating to the Interior Secretary’s exercise of statutorily-granted discretion regarding treatment of Canadian investors in mineral leases on U.S. public lands were made available to committee members for four hours during which they could take notes, but no staff personnel could review the documents and they could not be photocopied).

⁴⁵ *E.g.*, FISHER, *supra* note 12, at 258 (“Untidy as they are, political battles between Congress and the executive branch are generally effective in resolving

and appropriate resolutions. The interests underlying the privilege on both the congressional and executive sides of the ledger are analyzed below, followed by an examination of how the current tools for resolving disputes over executive privilege ill-serve those interests.

A. Congress's Right To Information

On one side of the ledger is Congress's interest in information. The Supreme Court has held that Congress's power to acquire information is part and parcel of the power to legislate,⁴⁶ and is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."⁴⁷ Congress's right to investigate in pursuit of its oversight role is similarly broad. As the Court noted in *Watkins v. United States*, "[i]t encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . [and] probes into departments of the Federal Government to expose corruption, inefficiency or waste."⁴⁸ Hence, the Constitution has been interpreted to authorize Congress to conduct investigations, to issue subpoenas for documents and testimony, and to hold in contempt witnesses that fail to cooperate in legitimate inquiries.⁴⁹

executive privilege disputes."); ROZELL, PRESIDENTIAL POWER, *supra* note 32, at 6 ("[D]isputes over the withholding of information can best be resolved by the political ebb and flow of the separation of powers system."); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110 (1996) (arguing that negotiation enables Congress to get the information it wants and that judicial involvement "risks more harm than good"); Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999) ("The accommodation process effectively takes account of the institutional, partisan and personal interests that may arise in disputes between Congress and the President over executive branch information."); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 421 (2002) ("There is no need for a legislatively or judicially imposed solution to prevent . . . misuses of executive privilege when these branches already possess the constitutional powers needed to successfully challenge presidents.").

⁴⁶ See *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) ("In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate.").

⁴⁷ *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

⁴⁸ *Watkins v. United States*, 354 U.S. 178, 187 (1957).

⁴⁹ These powers are rooted deep in the history of English common law and American practice. Committees of the British Parliament regularly inquired into government activity as early as 1689. William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 785 (2005) (citing James M. Landis, *Constitutional Limits on the Congressional*

These interpretations recognize that Congress cannot legislate wisely absent information; nor can it effectively oversee, much less “check,” executive efforts to take care that the laws are faithfully executed without the ability to scrutinize those efforts.

This authority is vital. If Congress is unable to obtain sufficient information from the Executive, Congress’s exercise of its constitutional role is compromised: public officials may engage in or hide misconduct, manipulate policy-making and public opinion through incomplete disclosure, evade accountability for their decisions, or simply implement—with the best of intentions—unwise or ineffective policies. Impediments to Congress’s efforts to secure information relevant to its legislative and oversight investigations—such as unjustified claims of executive privilege—can thwart Congress’s efforts to root out wrongdoing and error, to correct flawed or failing policies, and to ensure proper accountability.

B. The Executive’s Interest in Confidentiality

On the other side of the balance lies the executive branch’s interest in confidentiality, including the President’s interest in preserving a zone of confidentiality to ensure that advisors provide candid advice. “Unless he can give his advisers some assurance of confidentiality,” the Supreme Court has said, “a

Power of Investigation, 40 HARV. L. REV. 153, 169 (1926)). This widespread practice came to the colonies with the British settlers, and many state legislatures in the 1700s exercised investigatory power, *id.* at 785–86 (citing Landis, *supra*, at 166–67); Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044, 1058–59 (1965), as did the early United States Congresses. *McGrain*, 273 U.S. at 174–75 (recognizing that the understanding that congressional power includes the power of inquiry predates the Constitution); Berger, *supra*, at 1059; *see also* Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 504 (1975); *Watkins*, 354 U.S. at 187; *McGrain*, 273 U.S. at 174 (holding that Congress’s investigatory powers are so essential to its function as to be necessarily implied constitutional powers). Congress’s power to issue and enforce subpoenas in aid of its investigations was confirmed in *In re Chapman*, 166 U.S. 661, 671 (1897) and *McGrain*, 273 U.S. at 175. Congressional investigatory power and the concomitant power to subpoena may be exercised only in the course of investigations with a legitimate congressional purpose. *See McGrain*, 273 U.S. at 173–74; MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 48 (2008), <http://www.fas.org/sgp/crs/misc/RL34097.pdf>. And the information requested must be pertinent to that legitimate purpose. *Id.* at 50–51; 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, 74–75 (1986).

President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends”⁵⁰ because the Court theorized that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”⁵¹ Executive privilege so conceived, the Court has argued, is “inextricably rooted in the separation of powers” and “flow[s] from the nature of [the President’s] enumerated powers.”⁵² And when this executive interest in confidentiality outweighs Congress’s need for particular information, the courts have held that executive privilege can shield presidential communications from disclosure.⁵³

In addition to this “generalized interest in confidentiality”⁵⁴ of presidential communications, the executive branch has invoked other interests to assert executive privilege over categories of information unrelated to presidential communications. In fact, the Executive regularly asserts executive privilege over “intragovernmental deliberations”; information regarding “law enforcement actions”; and “diplomatic, military, or sensitive national security secrets.”⁵⁵ And, in certain contexts, the courts

⁵⁰ *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 448–49 (1977). Note that the proposition in *United States v. Nixon* that confidentiality actually promotes greater candor has been subject to debate. See Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 202 (2008) (arguing that the candor-based justification for maintaining executive confidentiality is an incomplete assumption that overstates the strength of the President’s confidentiality interest as well as the “likelihood that confidentiality-induced candor will lead to better [presidential] decisions”); see Eric Lane, Frederick A.O. Schwarz & Emily Berman, *Too Big A Canon in the President’s Arsenal: Another Look at United States v. Nixon*, 17 Geo. Mason L. Rev. 737, 778 (2010).

⁵¹ *Nixon*, 418 U.S. at 705.

⁵² *Id.* at 708, 705 & n.16 (justifying executive privilege as necessary for the executive branch to perform its constitutional functions effectively).

⁵³ See *id.* at 711–13; see also *In re Sealed Case*, 121 F.3d 729, 744–45 (D.C. Cir. 1997); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725, 729–33 (D.C. Cir. 1974).

⁵⁴ *Nixon*, 418 U.S. at 713.

⁵⁵ In 1971, then-Assistant Attorney General William Rehnquist identified four categories to which “[t]he doctrine of executive privilege has historically been pretty well confined to . . . foreign relations, military affairs, pending investigations, and intragovernmental discussions.” *Executive Privilege: The Withholding of Information by the Executive: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 420, 422 (1971) [hereinafter *Executive Privilege Hearing*] (statement of William Rehnquist, Assistant Att’y Gen. of the United States); see, e.g., 10 Op. Off. Legal Counsel 68, 75–76 (1986) (discussing law enforcement files); 1 Op. Off. Legal

have recognized these areas as components of executive privilege.

The proposed statute recognizes that valid interests do justify the extension of executive privilege to information requested by Congress in certain law enforcement and diplomatic contexts. Disclosing information about pending law enforcement action raises two distinct concerns. First, disclosure risks unfairly implicating individuals in wrongdoing because the relevant allegations of criminal conduct might ultimately be disproved.⁵⁶ Second, responsibility for making and enforcing the laws is allocated to distinct governmental branches for good reason. “When the legislative and executive powers are united in the same person or body,” James Madison explained, “there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.”⁵⁷ The impartial enforcement of laws thus requires some insulation from legislative pressures.⁵⁸ Accordingly, “the policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files.”⁵⁹

Disclosure of sensitive diplomatic information may risk undermining the confidence other nations have in the United States and impairing U.S. diplomatic efforts. Information shared in confidence in the course of diplomacy must be guarded. Hence, diplomatic material, like law enforcement files, is sometimes withheld from Congress, at least until such time as negotiations about a relevant transaction are complete and sometimes beyond.⁶⁰ The concern here is not that Congress cannot be

Counsel 269, 271 (1977) (discussing diplomatic secrets and intra-governmental deliberations). These same categories are historically the types of information that, when requested by Congress, have most frequently been denied by the Executive. *See generally* 6 Op. Off. Legal Counsel 751 (1982) (cataloging executive refusals to provide information to Congress).

⁵⁶ 10 Op. Off. Legal Counsel at 77.

⁵⁷ THE FEDERALIST NO. 47, at 304–05 (James Madison) (Isaac Kramnick ed., 1987) (quoting Montesquieu). If Congress is fully apprised of the details of an investigation, “there is a substantial danger that congressional pressures will influence the course of the investigation.” 10 Op. Off. Legal Counsel at 76.

⁵⁸ Both of these concerns lose some force once an investigation is closed, as the prosecutorial decisions have already been made and the individuals named in the files likely will have been either prosecuted or exonerated. However, the personal information about individuals contained in even closed investigatory files should be shared judiciously.

⁵⁹ 10 Op. Off. Legal Counsel at 76.

⁶⁰ *E.g.*, 6 Op. Off. Legal Counsel at 755–56, 759, 762–65 (providing examples of withholding information involving diplomatic relations).

trusted to keep the information confidential—it can—but that some countries may insist that certain negotiations not be shared beyond the immediate negotiators.

This paper rejects the premise, espoused by some commentators, that secrets concerning national security issues somehow fall outside the legislature’s bailiwick, or alternatively, that concerns that military or intelligence plans will be compromised render the Executive’s need for confidentiality in this area absolute.⁶¹ This is a fundamental misreading of the Constitution’s text. Neither of these arguments licenses nondisclosure of national security information to *Congress*. Under our Constitution, Congress and the Executive *share* responsibility for most national security matters.⁶² The need for *absolute* confidentiality within government is, at best, overstated.

The need for an informed legislature, moreover, is fully consistent with the “state secrets” doctrine established by the Supreme Court in *United States v. Reynolds*.⁶³ In *Reynolds*, the Supreme Court determined that when a court determines that there is a “reasonable danger” that certain evidence will, *if exposed to the public*, harm national security, the government has an absolute right to refuse to provide that evidence.⁶⁴ But disclosure to Congress is not the equivalent of public disclosure.⁶⁵

⁶¹ *E.g.*, Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182–83 (1999).

⁶² U.S. CONST. art. I, § 8 (conferring on Congress the powers to declare war, to raise and support armed forces and, in the case of the Senate, to consent to treaties and the appointment of ambassadors); *Id.* art. II, § 2, cl. 2; *accord* Hamdan v. Rumsfeld, 548 U.S. 557, 636–37 (2006) (Kennedy, J., concurring); *Rumsfeld*, 548 U.S. at 593 n.23 (majority opinion) (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”); *see* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion) (noting that the Constitution “envisions a role for all three branches” even in times of conflict); *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977) (citing *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (“While the Constitution assigns to the President a number of powers relating to national security, . . . it confers upon Congress other powers equally inseparable from the national security More significant, perhaps, is the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security. These powers have been viewed as falling within a ‘zone of twilight’ in which the President and Congress share authority or in which its distribution is uncertain.”).

⁶³ 345 U.S. 1, 7, 10–11 (1953). *See generally* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 17, 229–30 (2006) (discussing *Reynolds* in detail).

⁶⁴ *See Reynolds*, 345 U.S. at 9–10.

⁶⁵ *Ashland Oil, Inc. v. Fed. Trade Comm’n*, 548 F.2d 977, 979 (D.C. Cir. 1976)

Congress frequently reviews classified information in pursuit of its constitutional obligations. Each House of Congress contains a standing committee on intelligence, whose responsibilities include oversight of the United States' intelligence apparatus. These committees are statutorily entitled to information about U.S. intelligence activities,⁶⁶ an obligation that necessarily requires regular disclosure of confidential state secrets. The Armed Services, Foreign Affairs, Homeland Security, and other committees also require access to highly classified information.⁶⁷ To ensure that sensitive information is adequately protected, Congress has implemented policies to protect classified information.⁶⁸ Leaks, purposive or otherwise, are more likely to come from the executive branch than from Congress.

C. Problems with the Current System for Resolving Executive Privilege Disputes

Congressional-executive negotiations over Congress's requests for information are influenced by a broad range of factors—including the relative political strength of the branches, the intensity of public opinion, the amount of media interest, or the magnitude of any alleged wrongdoing by the Executive.⁶⁹ But under our current system, there is no assurance that either branch will consider the factor potentially most important to the

(finding “[n]o substantial showing was made that the materials in the possession of the FTC will necessarily be ‘made public’ if turned over to Congress. . . . [A]bsent such a showing . . . [disclosure restrictions do] not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request.”).

⁶⁶ The National Security Act of 1947 (as amended) provides that both the President and the Director of National Intelligence (DNI) must “keep the congressional intelligence committees fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.” 50 U.S.C. § 413a(a)(1) (2006).

⁶⁷ 22 U.S.C. § 3282(d) (2006); 49 U.S.C. § 114(t)(4)(D)–(E) (2006); 50 U.S.C. § 2656(a), (e).

⁶⁸ The Senate has established an Office of Senate Security, which “set[s] and implement[s] uniform standards for handling [and safeguarding] classified information.” FREDRICK M. KAISER, CONG. RESEARCH SERV., PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 1–2 (2006), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS20748_01112006.pdf. In the House, individual committee and member offices have implemented their own procedures regarding classified information. *Id.* at 2. Congress can, of course, receive and consider information in executive session and thereby prohibit public disclosure if necessary.

⁶⁹ See generally Rozell, *supra* note 13, at 1082 (discussing the Ford Administration).

public: whether disclosure is necessary to enable Congress to achieve its constitutionally legitimate goals, including conducting lawmaking or oversight. But if Congress is *constitutionally* entitled to a particular piece of information to enable it to perform these functions, the other factors alone should not dictate whether the information is disclosed.

Structural problems that permeate *all* executive privilege disputes suggest systemic under-disclosure. *First*, the current system provides no clear standards for disclosure, creating unnecessary uncertainty about whether disclosure is required. In the absence of clear standards, the parties solely rely, and too heavily, on political factors. *Second*, the system is biased in favor of the Executive. The modern political environment—including the increase in partisanship, the rise in executive power, and the concomitant executive control over the flow of information⁷⁰—has created a systemic bias in favor of the Executive that Congress's tools for forcing disclosure are insufficient to overcome. *Third*, the branches disagree on the scope of the privilege, which makes conflict likely, if not inevitable. *Fourth*, in the absence of clear, enforceable guidelines, executive efforts to expand too far the zone of confidentiality are all too common.

1. Lack of Clear Standards Leads to Over-Reliance on Political Factors

The current system fails to confront, much less resolve, the fundamental question: whether Congress's interest in disclosure outweighs the Executive's interest in nondisclosure in any particular dispute. Congress's ability to obtain information, and the President's ability to withhold it, fluctuates depending on such factors as the relative political strength of the particular President and Congress, the prevailing political environment, the presence or absence of scandal (or the suspicion of scandal), the intensity of media interest, and the President's own (potentially idiosyncratic) view of the scope of his powers. In other words, a gap often exists between what the information is worth to Congress and the price Congress can afford to pay, in light of how much political capital it has banked at any given moment. The Executive must make an analogous assessment. Congressional oversight of enormously important matters may therefore hinge on the configuration of political forces at the time Congress seeks

⁷⁰ See *supra* notes 22–30 and accompanying text.

the relevant information.

The ability of Congress to press for information disclosure may also be distorted by the members' loyalty to their party, as contrasted with their fidelity to the institution of Congress. Too frequently, "[p]articipants in . . . [inter-branch] battles report that short-term political calculations consistently trump the constitutional interests at stake"⁷¹ and the long-term interests of the branch of government to which they belong.⁷² Legislators often decline to advance Congress's constitutional interests if they share partisan affiliation with the White House's occupant.⁷³ This problem is especially sharp when government is not divided: a House of Congress is much less likely to seek information aggressively from the Executive when the President and the majority of the members of that House hail from the same political party.

If disclosure depends on the shifting balance of partisan forces, without consideration of any substantive standard, it becomes more difficult for the players to predict accurately whether information will be released—no matter how great the congressional need, how serious the underlying allegations, or how intense the interest of the media. As a result, settlements obtained through negotiation will not necessarily reflect the constitutional balance between confidentiality and disclosure. While for some types of information there is a tentative consensus about what is privileged,⁷⁴ the boundaries of these categories remain elusive. Political considerations will inevitably play a substantial role in the resolution of information disputes between Congress and the President, but they should not dictate unilaterally the outcome of all such cases. Instead, the constitutional values underlying the respective branches' interests in disclosure or nondisclosure should factor into the calculus.

⁷¹ David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1122 (2007).

⁷² *Id.* at 1123–26.

⁷³ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2326–27 (2006); O'Neil, *supra* note 71, at 1123–24; see also Interview with Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress, in Washington, D.C. (Jan. 10, 2008).

⁷⁴ See *supra* note 55.

2. Congress's Inability to Overcome the Executive's Monopoly on Information Creates Bias in Favor of Under-Disclosure

The second problem with the current system is that Congress's tools are insufficient to overcome the Executive's information monopoly. The fact that the Executive has exclusive control over information, which includes the related power to leak information selectively, provides the Executive with a structural advantage in information disputes that Congress's tools are inadequate to overcome.

Consider first the central importance of the executive branch's monopoly on information.⁷⁵ With minor exceptions, Congress relies on the Executive for its information lifeblood. By definition, executive privilege conflicts can arise only when Congress has requested information from the Executive.⁷⁶ As a consequence, inaction in response to an information request—i.e., when Congress is unable to compel disclosure—necessarily confers victory on the Executive. The default result is nondisclosure.

Next consider the related problem of selective disclosure by the Executive.⁷⁷ Selective release of information designed to cast the President or his policies in a favorable light while simultaneously withholding any damaging information or counterarguments manipulates public opinion, spinning any dispute over further disclosure in the Executive's favor. A recent stark example is President Bush's decision to declassify select portions of the National Intelligence Estimate on Iraq to provide support for going to war in 2003.⁷⁸ This selective disclosure was designed to alter public perception and to bolster support for President Bush's

⁷⁵ See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 885 (2007) (noting that oversight would be effective "if legislators could cheaply acquire information from the president, but they cannot"). Not only is the Executive in possession of the information Congress needs, but also the volume of information contained within the executive branch is vast. See Katyal, *supra* note 25, at 2316.

⁷⁶ See Rozell, *supra* note 13, at 1069–70.

⁷⁷ See, e.g., *Restoring the Rule of Law: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 26 (2008) (statement of Sen. Whitehouse, Member, Subcomm. on the Constitution) (noting that the Executive sometimes declassified only the facts supporting its positions, leaving Congress legally barred by the classification rules from providing effective counterarguments).

⁷⁸ See, e.g., Editorial, *A Bad Leak*, N.Y. TIMES, Apr. 16, 2006, at A11 (criticizing President Bush for permitting Scooter Libby to leak "cherry-picked portions of the report").

preferred policy. Though evidence later revealed that the Bush Administration had failed to disclose the full story, Congress could not contemporaneously rebut these selective disclosures. The Executive's control over information thus provides a tool to perpetuate its monopoly by use of partial information to manipulate public opinion and stave off effective congressional inquiry.

Proponents of the current system assume that Congress can overcome these structural biases in favor of executive secrecy. To be sure, Congress does possess several political tools theoretically useful for obtaining information from the Executive: the power to investigate by committee; to appropriate (or withhold) funds; to withhold confirmation of appointed officials; to bring law suits; and, in extreme cases, to impeach.⁷⁹ While all of these tools may be applied to attempt to compel the Executive to disclose information,⁸⁰ each is problematic, either because it is ineffective or counterproductive.

First, all extract a significant toll in political capital, sometimes more than Congress possesses.⁸¹ Second, to exercise its powers, Congress must overcome the significant challenges to collective action that plague all legislative decision-making.⁸² Given the drastic nature of some of Congress's tools, those challenges prove insurmountable in all but the most extreme cases.

Third, the disclosure or nondisclosure of some information can dramatically change the very political environment upon which the current system relies to resolve disputes.⁸³ When Congress most needs information—because it possesses only hints of wrongdoing, error, or waste within the executive branch—is precisely when it lacks both political capital and incentive to

⁷⁹ See FISHER, *supra* note 12, at 27, 49, 71, 91, 168–69.

⁸⁰ See *id.* (enumerating Congress's political weapons to wield against executive privilege claims and citing examples of their use).

⁸¹ O'Neil, *supra* note 71, at 1127 (“[T]he prevailing branch will be the one that enjoys the popular support necessary to invoke and sustain the coercive collateral measures with which such disputes are fought.”).

⁸² Posner & Vermeule, *supra* note 75, at 886 (“[T]he executive can act with much greater unity, force, and dispatch than can Congress, which is chronically hampered by the need for debate and consensus among large numbers.”). For a thorough discussion of the role of collective action in politics, see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1974).

⁸³ See Sagar, *supra* note 31, at 418 (noting that, with certain classified information at their disposal, citizens might opt for some loss of security in favor of preserving civil liberties, but that, without this data, they will be unable to make that choice).

compel disclosure. Yet if additional information reveals malfeasance, public support for Congress's active pursuit of an investigation *becomes* considerably more intense. Until that information becomes public, Congress may lack sufficient support to maintain the political will necessary to pursue the issue.⁸⁴

If these problems were not enough, executives since the mid-1980s have unilaterally disabled some of Congress's most effective tools for obtaining information from executive officials—contempt of Congress resolutions, Congress's inherent contempt powers, and civil enforcement actions.

Historically, contempt of Congress resolutions have proved important to extracting information from the Executive.⁸⁵ But to have more than symbolic effect, a contempt citation requires executive branch enforcement, with a congressional contempt vote triggering a grand jury investigation into possible indictment.⁸⁶ Since 1984, the Justice Department's Office of Legal Counsel (OLC⁸⁷) has taken the position that "a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before . . . Congress."⁸⁸ Because the Justice Department will not proceed

⁸⁴ See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 175 n.34 (1993) ("Separation of powers issues are not the sort voters get exercised about.")

⁸⁵ Contempt citations, or threats of contempt citations, have succeeded in securing congressional access to disputed information. For examples, see from then-Secretary of State Henry Kissinger on CIA covert actions, ROZELL, *PRESIDENTIAL POWER*, *supra* note 32, at 80–81; from President Reagan's Secretary of the Interior James Watt on Canada's treatment of U.S. mineral investors, *id.* at 100; from President Clinton's White House Counsel Jack Quinn on the firings of several White House Travel Office employees, *id.* at 126.

⁸⁶ 2 U.S.C. §§ 192, 194 (2006). When Congress holds someone in contempt, the U.S. Attorney is required to "bring the matter before the grand jury." *Id.* § 194; see S. REP. NO. 95–170, at 6 (1977) (discussing conflict of interests inherent in expecting the Justice Department to represent Congress's interests in some legal proceedings).

⁸⁷ OLC is a division of the Justice Department that issues authoritative interpretations of federal law, which are typically binding within the executive branch. See generally Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).

⁸⁸ 8 Op. Off. Legal Counsel 101, 101 (1984). Some have assailed the quality of the OLC analysis of the issue and found it open to significant challenge. The memorandum asserts, for example, that the legislative history of the contempt statute indicates that it was not intended to be used against executive branch officials. *Id.* at 129. But the floor debate about that statute includes a statement that "[t]he bill proposes to punish equally the Cabinet officer and the

with a contempt prosecution in these circumstances—and indeed refused to proceed against Miers and Bolten when they were held in contempt in early-2008 as well as against then-EPA Chief Anne Gorsuch when she was held in contempt for failing to comply with a congressional subpoena in 1982⁸⁹—contempt citations lack the force they once had to resolve information disputes between Congress and the Executive.⁹⁰

Congress also has inherent contempt power to try a witness for contempt in the House or Senate, and—if found guilty—to imprison that witness in the Capitol's jail.⁹¹ But use of this power is as problematic as Congress's other tools.⁹² A contemnor can be held only until the end of the current session of Congress.⁹³ OLC has opined that inherent contempt suffers the same constitutional infirmities as the criminal contempt statute if used against executive officials claiming executive privilege at the President's instruction.⁹⁴ Thus any use of inherent contempt powers against executive officials likely will give rise to protracted litigation over the constitutionality of such actions. Moreover, inherent contempt is “unseemly,” “cumbersome,” and disruptive of Congress's ability to carry out its other pressing

culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people.” CONG. GLOBE, 34th Cong., 3d Sess. 429 (1857). But even if the DOJ's position is analytically flawed, the lack of mechanism to get the dispute before a neutral decision-maker means that there is no means either of exposing the analysis as faulty or of ensuring that the underlying privilege claim is considered. Brand & Connelly, *supra* note 49, at 88–89.

⁸⁹ 8 Op. Off. Legal Counsel at 101; Letter from Michael B. Mukasey, *supra* note 4. In Anne Gorsuch's case, after the district court dismissed a Justice Department suit for a declaratory judgment that the EPA Director could not be criminally liable, *United States v. House of Representatives of the U.S.*, 556 F. Supp. 150, 153 (D.D.C. 1983), the parties reached a negotiated resolution of the underlying information dispute prompted, at least in part, by further revelations of possible misconduct within the EPA. Shane, *supra* note 37, at 513.

⁹⁰ The law provides no means for challenging the Justice Department's inaction. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61–65 (2004).

⁹¹ *See ROSENBERG & TATELMAN, supra* note 49, at 12; Brand & Connelly, *supra* note 49, at 73 (describing Congress's inherent contempt power).

⁹² Because of the limitations of the inherent contempt power, in 1857 Congress enacted a statutory criminal contempt procedure. Act of Jan. 24, 1857, ch. 19, § 3, 11 Stat. 155, 156. This provision was meant as an alternative to—not a replacement for—the inherent contempt powers. ROSENBERG & TATELMAN, *supra* note 49, at 22–23.

⁹³ *Watkins v. United States*, 354 U.S. 178, 207 n.45 (1957); *see ROSENBERG & TATELMAN, supra* note 49, at 14–15.

⁹⁴ 8 Op. Off. Legal Counsel at 140 n.42. This argument could be pressed in a habeas corpus proceeding brought by the alleged contemnor.

duties,⁹⁵ and requires an inordinate expenditure of political capital.⁹⁶ A system of oversight that depends on the legislative sergeant at arms hauling off Washington bureaucrats into the well of the Capitol until they repent their taciturn ways is simply no way to run a government. Because of these drawbacks, the inherent contempt power has fallen into disuse—it was last invoked in 1935⁹⁷—and remains unwieldy.

Civil legal actions are also an insufficient remedy given the procedural barriers that they currently face.⁹⁸ Courts, in an effort to avoid confronting the momentous constitutional questions that they present, have evinced reluctance to adjudicate congressional-executive information disputes.⁹⁹ Moreover, even when courts are willing to weigh in, civil suits often involve extended litigation over threshold issues of standing and jurisdiction, permitting the Executive to significantly delay any ruling on the merits. By the time a ruling is obtained, the information sought may no longer

⁹⁵ ROSENBERG & TATELMAN, *supra* note 49, at 15.

⁹⁶ An unwillingness to initiate inherent contempt proceedings is not necessarily an indication that Congress does not feel strongly about the issue. It may simply have other pressing items on its agenda, and given the existence of a parallel means of pursuing contempt, 2 U.S.C. §§ 192, 194 (2006), it believes the parallel means better serves the people to pursue.

⁹⁷ ROSENBERG & TATELMAN, *supra* note 49, at 15.

⁹⁸ The Executive has adopted inconsistent positions regarding whether Congress may bring a civil action to enforce subpoenas against executive officials. According to OLC, “Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.” 8 Op. Off. Legal Counsel at 137; *see* 10 Op. Off. Legal Counsel 68, 87 (1986) (“The most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoena. . . . There are, however, at least two precedents for bringing such civil suits under the grant of federal question jurisdiction in 28 U.S.C. § 1331.”). And the Justice Department itself also has sought out the courts’ aid in resolving one of these disputes. *See* *United States v. House of Representatives of the U.S.*, 556 F. Supp 150, 152 (D.D.C. 1983). But in *Committee on the Judiciary, U.S. House of Representatives v. Miers*, the Justice Department argued that Congress lacks standing for such an action. 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008).

⁹⁹ *United States v. AT&T*, 567 F.2d 121, 123 (D.C. Cir. 1977); *United States v. AT&T*, 551 F.2d 384, 385 (D.C. Cir. 1976) (remanding executive action to enjoin compliance with a congressional subpoena for further congressional-executive negotiations); *House of Representatives of the U.S.*, 556 F. Supp. at 152–53 (dismissing as premature an executive request for a declaratory judgment that an executive official cannot be prosecuted for failure to comply with congressional subpoena at the President’s instruction); *see* *Walker v. Cheney*, 230 F. Supp. 2d 51, 52 (D.D.C. 2002). *But cf.* Transcript of Hearing on Defendant’s Motion to Dismiss at 108, *Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409), 2008 WL 5686574 (Statement of Judge Bates) (“I didn’t volunteer for this responsibility.”).

be useful. There is thus no guarantee of a satisfactory judicial resolution even were Congress to seek one.

In sum, Congress's powers to secure information from the Executive often fail in the face of executive intransigence. Congress's failed efforts to obtain information about alleged politicization of the Justice Department until a new President took office both illustrate this reality and compound the problems it represents. Now that the Executive has made it vividly evident that it can essentially ignore congressional subpoenas and contempt citations and delay judicial resolution through the use of stays and appeals, as it did in the Miers and Bolten case, each subsequent Executive realizes that Congress is toothless in the face of an Executive unwilling to compromise. Congress's available tools are thus likely to prove all the more fruitless in the future.

3. The Branches' Differing Understandings of the Scope of Executive Privilege Creates Conflict

Congress and the Executive's differing understandings of what constitutes a valid assertion of executive privilege exacerbate the likelihood of conflict. Over the years, both Congress and the Executive have developed internal policies, understandings, and guidelines governing their treatment of information disputes. These folkways of the political branches determine expectations and mindsets: the inherited institutional cultures; the ways in which the members or staffs of congressional committees and executive agencies have understood the rules; and how particular situations have been handled in the past, have occupied the gap created by the absence of clear standards. But because each branch's position on whether disclosure is required in any given instance has developed independently, they often conflict in fundamental ways.¹⁰⁰ So while each branch, internally, may

¹⁰⁰ For example, to provide the Executive with guidance during an executive privilege controversy in the 1980s, OLC attempted to compile in one memorandum all instances in which the Executive has withheld information from the Congress. 6 Op. Off. Legal Counsel 751, 751-52 (1982). This memorandum continues to serve as institutional memory within the Justice Department. Interview with Former Justice Department Official, in Washington, D.C. (Feb. 28, 2008). Career bureaucrats—people who have served across administrations and recall the ways that particular types of information requests have been handled in the past—also serve as valuable repositories of information that are relied upon in determining how to respond to information requests. *Id.* *But cf.* Moss, *supra* note 87, at 1323-24 (noting that executive branch past practice and precedent can serve as markers of the scope of

possess a relatively well-developed position regarding when executive privilege assertions are valid, the other branch may not agree. Conflict thus becomes inevitable.

The gap between each branch's understanding of past practice leads to conflict in part because past practice is treated akin to judicial precedent. Both sides point to past resolutions—as lawyers do to binding case law—when arguing whether disclosure is warranted.¹⁰¹ In the absence of a significant judicial role, the practice of bygone legislatures and Executives is deployed to form the basis of legalistic or rhetorical arguments over the proper outcome. This practice is then echoed outside the government. During the debate over whether President Clinton should release information surrounding certain pardons that he issued,

presidential authority).

Similarly, Congress and its individual committees and subcommittees have both written and unwritten precedents. In the course of disputes over information, committees often develop views regarding the relevant governing principles. See, e.g., Memorandum from Stanley M. Brand, Gen. Counsel to the Clerk, U.S. House of Representatives, to John Dingell, Chairman, Subcommittee on Oversight and Investigations, U.S. House of Representatives (Nov. 10, 1981), in HOUSE SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS, HOUSE COMMITTEE ON ENERGY & COMMERCE, 97TH CONG., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 5–14 (1981) (expressing legal views regarding President Reagan's assertion of executive privilege over material generated within the Department of the Interior regarding the Secretary's statutorily created duties). Individual legislators themselves also might have ideas about what the rules are or should be regarding Congress's right to information and executive privilege. For example, in response to testimony regarding then-Assistant Attorney General Antonin Scalia's opinion of the broad scope of executive privilege, one Senator remarked, "if the law which I understand you have articulated . . . that the limitations on the Congress' right to information from the executive branch could somehow be imposed upon the Congress, I think we destroy the Congress as an effective legislative force." *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 94th Cong. 94 (1975) [hereinafter *Secrecy in Government Hearing*] (Statement of Sen. Muskie); see *Government Secrecy: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 93d Cong. 41 (1974) (Statement of Sen. Ervin) ("I would define executive privilege in these words: 'Executive privilege is the power of the President to keep secret confidential communications between the President and an adviser or even among the advisers of the President which are made for the purpose of enabling the President, of assisting the President, to exercise in a lawful manner some constitutional or legal obligation resting upon him in his official capacity.'").

¹⁰¹ See Interview with Former Justice Department Official, in Washington, D.C. (Feb. 28, 2008); Interview with Stanley M. Brand, Former General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Mar. 24, 2008).

reporters and commentators cited President Ford's waiver of executive privilege with respect to his pardon of President Nixon as a reason that President Clinton, too, should divulge the requested information.¹⁰²

This formalistic treatment of past practice impedes timely resolution of disputes. Because historical examples can be used to argue for a similar outcome in the course of later disputes, parties avoid compromises for fear that such reasonableness may be turned against them, or other similarly situated parties, later.¹⁰³ Indeed, the Justice Department uses this very concern to suggest that Presidents not permit presidential aides to testify before Congress.¹⁰⁴

Conflicting visions of the branches' right to information abound. For example, the Supreme Court has recognized both legislation and oversight as legitimate congressional activities and has endorsed Congress's power to seek out information in both contexts.¹⁰⁵ But while Congress views its right to information as equal in either circumstance,¹⁰⁶ the executive branch believes that Congress's interest "in obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question."¹⁰⁷ The Attorney General's determination that an assertion of executive privilege was appropriate in response to Congress's inquiry into Reagan-era Interior Secretary James Watt's determination

¹⁰² James V. Grimaldi & Dan Eggen, *Criminal Probe of Pardon Begins; Gifts from Ex-Wife of Rich Are Focus*, WASH. POST, Feb. 15, 2001, at A01; Jonathan Turley, *Nothing Bars Questioning President's Bad Ideas; Executive Privilege: The Right To Refuse To Divulge How FALN Clemency Decision Was Made Is Not Absolute, or Warranted Here*, L.A. TIMES, Sept. 27, 1999, at B7.

¹⁰³ Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 GEO. WASH. L. REV. 570, 572-99 (2002) (citing examples).

¹⁰⁴ See generally 6 Op. Off. Legal Counsel at 751-52.

¹⁰⁵ *Watkins v. United States*, 354 U.S. 178, 187 (1956) ("[Congress's oversight power] comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (holding that Congress's investigatory powers are so essential to its function as to be necessarily implied constitutional powers); see *supra* Part I.A.

¹⁰⁶ Memorandum from Stanley M. Brand, *supra* note 100, at 8-12 (describing the Executive's position as "baseless" and contrary to Supreme Court precedent); see HOUSE SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS, *supra* note 100, at iv (statement of Rep. John D. Dingell) (labeling the Justice Department's assertion that Congress's interest in obtaining information for oversight purposes is weaker than its interest when specific legislative proposals are in question as "unfounded and unprecedented").

¹⁰⁷ 5 Op. Off. Legal Counsel 27, 30 (1981). This position appears to be based on dicta from the District of Columbia Appeals Court, which in fact hardly supports such a rule. See *infra* notes 168-180 and accompanying text.

whether Canada was entitled to reciprocity under the Mineral Lands Leasing Act was founded, at least in part, on the conclusion that the inquiry was based solely on Congress's oversight powers.¹⁰⁸ Another example is the divergent views on the obligation of presidential aides to testify at congressional invitation or subpoena. As Miers' and Rove's refusals to comply with congressional subpoenas for their testimony show, an executive understanding says that "the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee,"¹⁰⁹ and the President may direct those advisors who "are an extension of the President. . . . 'not even to appear before the committee.'"¹¹⁰ Congress, unsurprisingly, disagrees. It maintains that close presidential advisors must appear and may invoke a President's claim of executive privilege only in response to questions that require answers involving privileged information.¹¹¹ In the past, presidential aides have acquiesced in some congressional requests for testimony while resisting others.¹¹² Absent an impartial adjudicator to determine which branch has the better argument, such polarized positions guarantee disputes will continue to arise.

4. Lack of Clear Guidelines and Effective Checks Encourage the Executive's Tendency to Expand Secrecy

It is apparent that those who control information will try to expand their power by expanding their information control. Past executive actions reveal that the Executive—if unchecked—finds ways to expand the scope of what is kept secret. This can occur in two different ways. First, the Executive often attempts to swell the sphere of communications shielded by executive privilege.¹¹³ The White House's recent assertion of executive privilege over

¹⁰⁸ Op. Off. Legal Counsel at 29–31.

¹⁰⁹ *E.g.*, Letter from Janet Reno, Attorney Gen., to William J. Clinton, President of the U.S. (Sept. 16, 1999) (citing Memorandum from John M. Harmon, Assistant Attorney Gen., Office of Legal Counsel, to All Heads of Offices, Divs., Bureaus and Bds. of the Dep't of Justice (May 23, 1977)).

¹¹⁰ *E.g.*, *id.* (citing Memorandum from John M. Harmon, Assistant Attorney Gen., Office of Legal Counsel (Aug. 11, 1977)); *see* Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel (Feb. 5, 1971).

¹¹¹ *See* H.R. REP. NO. 110-423, at 3 (2007) (noting committee's rejection of Harriet Miers' claims of immunity from testifying).

¹¹² Louis Fisher, *White House Aides Testifying Before Congress*, 27 PRESIDENTIAL STUD. Q. 139, 139 (1997).

¹¹³ MORTON ROSENBERG, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE 15 (2008).

documents related to the EPA's decision to deny California permission to regulate emissions provides an example.¹¹⁴ The EPA Administrator refused to provide the documents to Congress despite a subpoena and, on the verge of a congressional contempt vote, the White House endorsed his refusal with an assertion of executive privilege over the documents.¹¹⁵ Despite the lack of any indication of presidential involvement, documents regarding the EPA's implementation of its statutory mandate are being withheld on the basis of the presidential communications privilege.¹¹⁶ This seems to be an attempt to expand inappropriately the scope of the privilege's application beyond the walls of the White House. Absent effective checks on unjustified assertions of executive privilege, the Executive's ability to expand the privilege's scope in this way goes unchallenged.

The second form that this "creep" can take is the Executive's reliance on methods that achieve the same goal as executive privilege, but that avoid using that term. Negative connotations associated with the term "executive privilege" still linger from Watergate.¹¹⁷ As a result, Presidents sometimes attempt to achieve the same results by other means¹¹⁸—instead of asserting executive privilege, they refer to "internal deliberations" to withhold communications between officials, or to a "secret opinions" policy to avoid disclosure of OLC opinions justifying executive policies.¹¹⁹ When Congress requested an OLC memorandum regarding the FBI's authority to apprehend

¹¹⁴ Richard Simon, *White House Says No to Congress' EPA Subpoena*, L.A. TIMES, June 21, 2008, at A11.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; Felicity Barringer, *White House Refused to Open E-Mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15.

¹¹⁷ See MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 140 (1994) [hereinafter ROZELL, DILEMMA OF SECRECY]; Mark J. Rozell, *Executive Privilege in the Ford Administration: Prudence in the Exercise of Presidential Power*, 28 PRESIDENTIAL STUD. Q. 286, 290 (1998) ("To many in the public and in Congress, executive privilege and Watergate were intertwined.").

¹¹⁸ ROZELL, DILEMMA OF SECRECY, *supra* note 117, at 85–107 (describing how Presidents Ford and Carter avoided committing to any formal executive privilege policy—breaking with the tradition of recent Presidents who had done so—and instead attempted to avoid disclosing information on the basis of statutory justifications whenever possible); Interview with Patricia Wald, Former Judge on the Fed. Court of Appeals for the D.C. Circuit, in Washington, D.C. (Feb. 28, 2008).

¹¹⁹ ROZELL, DILEMMA OF SECRECY, *supra* note 117, at 107, 118, 137. According to one commentator, President George H.W. Bush was the most prolific in devising new ways to describe what were, at bottom, claims of executive privilege. *Id.* at 107.

fugitives abroad without the permission of the host country, President George H.W. Bush denied access on the basis of a “secret opinions policy” and “attorney-client privilege.”¹²⁰ Since that time, other Presidents have done the same with potentially controversial OLC memoranda.¹²¹ More recently, this approach has been used to shield from disclosure memoranda regarding the treatment of military detainees, the use of wiretapping and extraordinary rendition. By avoiding explicit assertions of executive privilege, the executive is able to shield from disclosure information properly in Congress’s possession without paying the political cost associated with the term “executive privilege.”

With no clear guidelines or effective checks on the use of executive privilege in place, a President who attempts to resist disclosure without asserting executive privilege is rarely forced to justify that nondisclosure. There is thus no transparency regarding the use of means other than executive privilege to shield executive material from disclosure, and Congress is unable to judge whether the reasons for employing those means are valid. Subjecting the use of executive privilege to a regularized procedure will thus go far in making certain not only that executive privilege is used appropriately, but also that other forms of secrecy become both less prevalent and more transparent.

II. ADDRESSING EXECUTIVE PRIVILEGE’S SHORTCOMINGS

The policy proposal advanced in this paper was developed with Congress’s need for information and the structural features of the status quo in mind. It recommends a legislative remedy intended to create a better means of resolving executive privilege disputes. The proposed statute would articulate a clear standard governing the use of executive privilege, recognize the primacy of Congress’s need to secure information, and guarantee judicial review of executive privilege disputes.

A. *An Executive Privilege Statute is Constitutional*

As an initial matter, Congress clearly has power to create rules governing the settlement of inter-branch informational disputes, just as it has authority to create executive agencies, require

¹²⁰ *Id.* at 137–38.

¹²¹ *See id.* at 139–40.

executive reporting, and generally oversee the execution of the laws. Indeed, Congress already regulates the Executive's use and dissemination of information—including sensitive or even classified information—in numerous contexts. The Classified Information Procedures Act,¹²² the Foreign Intelligence Surveillance Act,¹²³ the Freedom of Information Act (FOIA),¹²⁴ and the Presidential Records Act¹²⁵ all establish rules regarding information flow from and within the executive branch. Congress also requires the President to “establish procedures to govern access to classified information” and security clearances¹²⁶ and to disclose national security-related information to the congressional intelligence committees.¹²⁷ No serious question has ever arisen as to the constitutionality of any of these statutes.¹²⁸ To assert that Congress can enact this wide range of laws but not pass a law to facilitate performance of its own constitutional duties would be anomalous.

A congressional effort to define and regulate the use of executive privilege also falls within the bounds of separation of powers limits. Even with respect to the presidential communications privilege, which the Supreme Court has justified based on its ability to aid the President's execution of his constitutional obligations;¹²⁹ the privilege is not absolute.¹³⁰ Thus Congress always has had the power to contest presidential claims of privilege. In enacting a statute to promote the orderly settlement of disputes, Congress merely exercises this power in a more systemic fashion by codifying and refining judicial pronouncements about both presidential claims of executive privilege and congressional challenges to such claims. Congress's

¹²² 18 U.S.C. app. § 3 (2006) (governing the use and handling of classified information during criminal proceedings).

¹²³ 50 U.S.C. § 1806(f) (2006) (providing procedures for handling disputes over the use of sensitive information).

¹²⁴ 5 U.S.C. § 552(a)(4)(B) (2006) (governing requests for disclosure of government information to the public).

¹²⁵ 44 U.S.C. §§ 2201–2207 (2006) (governing archiving of presidential records).

¹²⁶ *E.g.*, 50 U.S.C. § 435(a).

¹²⁷ *Id.* §§ 413(a), 413b(c).

¹²⁸ In fact, a challenge on executive privilege grounds to a statute governing the dissemination of President Nixon's materials, the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, tit. I, § 101, 88 Stat. 1695 (1974), was rejected by the Supreme Court. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 429, 455 (1977).

¹²⁹ *United States v. Nixon*, 418 U.S. 683, 708, 712–13 (1974); *see supra* notes 50–53 and accompanying text.

¹³⁰ *See supra* notes 40–43 and accompanying text.

decision to exercise this power, moreover, would reduce any inherent presidential authority to claim executive privilege inconsistent with the terms of the statute to—in the words of the famous *Youngstown* framework¹³¹—its “lowest ebb.”¹³²

The Supreme Court has cautioned, nevertheless, that a statute can constitute an unconstitutional encroachment on executive prerogatives depending upon “the extent to which [it] prevents the Executive Branch from accomplishing its constitutionally assigned functions” and whether that restriction is justified by a “need to promote objectives within the constitutional authority of Congress.”¹³³ The proposed statute remains cleanly within the lines of this separation of powers test. It requires disclosure only where Congress’s constitutional authority to investigate or legislate is established and only when such disclosure is necessary to enable Congress to carry out its objectives. By definition, “objectives within the constitutional authority of Congress” are at issue when a court mandates disclosure.¹³⁴ Ensuring Congress access to information it needs to perform its constitutional functions surely justifies the incremental burden that such disclosure places on the Executive’s ability to do the same; indeed, no President has ever taken the position that Congress could be denied such information.

B. The Proposed Executive Privilege Codification Act Would Substantially Improve Executive Privilege Dispute Resolution

The Act’s three central elements—a clear standard governing

¹³¹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952). Justice Jackson’s concurrence in *Youngstown* provides the accepted tripartite framework for evaluating executive power. First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.” *Id.* at 635 (Jackson, J., concurring). Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637. Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.*

¹³² *Id.* at 637.

¹³³ *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring) (citing *Adm’r of Gen. Servs.*, 433 U.S. at 443); see *Adm’r of Gen. Servs.*, 433 U.S. at 443 (“[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.”).

¹³⁴ *Pub. Citizen*, 491 U.S. at 485.

the use of executive privilege, a recognition of the primacy of Congress's need to secure information, and the guarantee of judicial review—combine to mitigate the problems inherent in the current system.

To compensate for the structural biases that currently favor nondisclosure, the Act specifies that the Executive's interest in nondisclosure must give way when Congress has a "legitimate purpose"¹³⁵ for requesting law enforcement information, or, for other types of privileged information, "a specific need for the subpoenaed information in order to carry out its constitutional obligations," including considering potential legislation or conducting oversight.¹³⁶ The "specific need" standard can be satisfied in any number of ways, but always will be satisfied when Congress shows that "[c]redible evidence [indicates] that the Executive has engaged in unlawful conduct related to the subject matter of the information sought."¹³⁷ Striking the balance between Congress's and the Executive's interests in this fashion recognizes that, when Congress needs the information it seeks for a constitutionally legitimate purpose, the congressional interest outweighs the Executive's need to preserve confidentiality. This formulation should go far toward enabling Congress to serve as an effective check on executive power.

Ensuring that executive privilege disputes can be adjudicated in the courts on an expedited basis, moreover, provides Congress a viable means of timely vindicating its informational rights, alleviating its dependence on counterproductive and ineffective tools, such as withholding funding or threatening impeachment. The Act thus provides a solution in the event that the Executive resists productive negotiations. Eschewing reliance on the Justice Department to enforce congressional contempt citations against executive officials, it instead provides Congress with the means to enforce its own subpoenas.¹³⁸

In addition to facilitating the resolution of conflicts that do

¹³⁵ See Draft Statute for the Executive Privilege Codification Act, *infra* app., § 102(b).

¹³⁶ See Draft Statute for the Executive Privilege Codification Act, *infra* app., § 102(c).

¹³⁷ *Id.* The statute treats diplomatic and law enforcement information slightly differently in that it includes a requirement that sensitive information be redacted or otherwise protected, if possible. See discussion *infra* Part II.C.2.b.; see also Draft Statute for the Executive Privilege Codification Act, *infra* app., § 102(b)–(c).

¹³⁸ While Congress possesses the power to bring a suit to enforce its subpoenas now, such civil actions currently provide an imperfect remedy. See *supra* notes 78–79, 98–9999 and accompanying text.

arise, the Act creates incentives to help prevent executive privilege disputes from even developing. The prospect of a guaranteed, prompt judicial determination means that nondisclosure is no longer the default result of failed negotiations. Instead, the failure of negotiations would place the matter in the hands of a federal court for expeditious resolution. There is reason to believe that when judicial review is certain, the mere prospect of the court's involvement will *expedite* resolution of inter-branch informational disputes.¹³⁹

The statute does not jettison negotiation between Congress and the Executive. Rather, clear rules and judicial review will work in tandem to improve the bargaining dynamics. The parties will be less likely to insist on unreasonable bargaining positions at the start, knowing that any offer that a court might not potentially adopt as proper articulation of the law will not be accepted. More accommodating positions at the beginning of negotiations make resolutions easier to attain. And parties eager to avoid establishing unfavorable judicial precedent contrary to their interests may be even more anxious to settle before the controversy reaches the courts.

Nor does the promise of judicial resolution encourage the parties to abandon negotiations altogether. As an initial matter, according to D.C. Circuit law, they are constitutionally obligated to engage in mutual accommodations.¹⁴⁰ Moreover, the statute requires the branches to exhaust negotiations before turning to the courts. By moving informational bargaining between the branches under “the shadow of the law,” the statute aims to promote productive bargaining,¹⁴¹ reserving litigation as a last

¹³⁹ See generally *United States v. AT&T*, 551 F.2d 384, 386 (D.C. Cir. 1976); FISHER, *supra* note 12, at 247 (noting that if the court had not retained jurisdiction over the case, thus preserving the possibility of a judicially mandated resolution in the future, the parties would have had much less incentive to achieve compromise).

¹⁴⁰ *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977). The executive branch has recognized this obligation explicitly. See 5 Op. Off. Legal Counsel 27, 31 (1981) (“[C]ourts have referred to the obligation of each branch to accommodate the legitimate needs of the other. . . . It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.”); see also Memorandum from John M. Harmon, *supra* note 109, at 5.

¹⁴¹ Bargaining in the shadow of the law is a process by which parties negotiate a settlement to their dispute based on their assessment of existing relevant law and their risk preferences in the face of potential litigation. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (discussing “the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom”).

resort.

Some may argue that, rather than increased productivity of bargaining, the statute will instead lead to more inflexibility on both sides, with the parties preferring to let the court decide the matter. Even if this were to prove true, the statute provides the remedy. Guaranteed judicial resolution on an expedited basis means that disputes between even the most reluctant bargainers will, in fact, reach a timely resolution. Over time, as the courts interpret the statute, and its guidelines are further clarified through judicial decision-making, the ability to adopt a “see you in court” approach will become more and more difficult—once the law has developed to the point where it is sufficiently clear that one side or the other has the better argument, it will be much more difficult to portray as reasonable a decision to resort to litigation. Consequently, neither public opinion nor a majority of a House of Congress—which the statute requires—is likely to support such an approach.

There are already examples of how existing executive privilege law can affect inter-branch negotiating. In an exchange between the Clinton White House and the House of Representatives Resources Committee, for example, each side supported its own position with analyses of how existing appeals court decisions would apply to the documents at issue.¹⁴² If executive privilege rules were clarified by statute and made binding by judicial precedent, their force in guiding negotiations and limiting hold-outs would be all the stronger.

Occasional judicial decisions clarifying the application of the law to particular sets of facts would also help to narrow the current divide between Congress’s and the Executive’s conflicting views of the law.¹⁴³ If OLC and Congress reach differing interpretations of a particular legal issue, but never have an opportunity to determine which interpretation should prevail, intractable conflict may persist. Judicial interventions can provide periodic “course corrections,” requiring each branch to recalibrate its view of the law, thereby expanding common ground. By providing a mechanism to resolve fundamental differences of opinion that develop, the Act will help to reduce the number of information disputes that arise.

The proposed statute, moreover, will be of significant value to those in the White House. Recent history has left executive

¹⁴² ROSENBERG, *supra* note 113, at 23.

¹⁴³ See *supra* Part I.C.3.

privilege with bitter connotations. Given these connotations, just about any assertion of the privilege triggers accusations of a cover-up. As a consequence, Presidents tend to avoid the term (even as they resist disclosure). The clear standard and enforcement mechanisms proposed in the statute would restore public faith in executive privilege as legitimate, rather than as a red flag for fraud or abuse.

C. The Proposed Statute

The proposed statute has three essential elements: (1) it provides guidelines regarding when the Executive can assert executive privilege; (2) it establishes guidelines specifying what Congress must do to overcome a valid claim of privilege; and (3) it guarantees judicial resolution of executive privilege disputes that prove too intractable to be resolved through negotiation. The statute has other important provisions as well—including provisions that create a procedure for asserting executive privilege before Congress and protect classified information. Together, these provisions provide predictability, promote speedier resolution of disputes, and—most importantly—encourage proper information flow between the Executive and Congress. The text of the entire proposed statute is included as an appendix to this article.¹⁴⁴

1. Guidelines for the Executive

The statute's first goal is to set out guidelines for the Executive, specifying that the President may invoke the privilege in certain limited circumstances. These guidelines are contained in Section 101, which establishes that the President has two types of interests that could bring a communication within the ambit of the privilege: (1) a general interest in promoting candid presidential communications; or (2) an interest in preserving the secrecy of certain law enforcement or diplomatic information.

a. Executive's General Interest in Confidentiality of Presidential Communications

The Supreme Court has concluded that the President has a “generalized interest in confidentiality”¹⁴⁵ in a limited number of

¹⁴⁴ See Draft Statute for the Executive Privilege Codification Act, *infra* app.

¹⁴⁵ *United States v. Nixon*, 418 U.S. 683, 713 (1974).

communications with direct advisors. Lower courts have devised guidelines governing when a particular communication is eligible for an assertion of executive privilege. Section 101 codifies these guidelines, which turn on both *who* authored the communications and *what* they concern.

First the “who”: covered communications include those authored by the President himself,¹⁴⁶ and between the President and his direct advisors.¹⁴⁷ The privilege also applies to a limited further set of communications involving White House advisors. As the D.C. Circuit explained, “the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber”¹⁴⁸ justified an incremental extension of the privilege to communications authored or “solicited and received”¹⁴⁹ “by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.”¹⁵⁰ This extension of the privilege to presidential advisors does not apply to executive staff outside the White House or to communications unconnected to advising the President on his core constitutional duties.¹⁵¹

¹⁴⁶ Former Presidents also may assert the privilege over communications made while they were in office, though “[t]he expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 451 (1977).

¹⁴⁷ *See Nixon*, 418 U.S. at 686 (considering a privilege claim with respect to tapes and documents relating to the President’s conversations with aides and advisors).

¹⁴⁸ *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

¹⁴⁹ *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004) (internal quotation marks omitted).

¹⁵⁰ *In re Sealed Case*, 121 F.3d at 752. In reaching this holding, the court first noted the necessity of construing the privilege narrowly and the virtues of open government. *Id.* at 749, 752.

¹⁵¹ *Id.* at 752; *Judicial Watch*, 365 F.3d at 1122–23 (citing *In re Sealed Case*, 121 F.3d at 750). Of course, the interest in confidentiality might be used to argue for a wider privilege within the executive branch. Just as decision-making in the Oval Office benefits from the security that advice given to the President will remain confidential, so too would decision-making in the Justice Department, or the EPA. But it cannot be the case that all communications within and among all executive branch offices is subject to executive privilege. Some limitation is needed since the number of people involved or consulted in executive branch decision-making is vast and ever-growing. *See Shane, supra* note 37, at 463 (noting the dramatic growth in recent years of the parts of the executive branch that report to the President).

Similarly, it would be possible to argue that the privilege should be absolute and non-waivable. If its purpose is to ensure that advice provided to the Executive is not tempered by concerns over how such advice would be perceived

Further, only White House advisors' staff with "broad and significant responsibility for investigating and formulating the advice to be given the President" qualify.¹⁵² Even the closest presidential advisors qualify only if the President is personally involved in the actual decision-making. As noted by the courts, "[c]ommunications never received by the President or his Office are unlikely to 'be revelatory of his deliberations,'"¹⁵³ and hence require no protection.

As to the "what": only communications made or prepared for the purpose of advising the President on his constitutionally assigned, "quintessential and non-delegable"¹⁵⁴ duties qualify for the privilege.¹⁵⁵ The privilege hence attaches only to communications made "in performance of (a President's) [Article II] responsibilities' . . . 'of his office' . . . made 'in the process of shaping policies and making decisions.'"¹⁵⁶

By contrast, courts have refused to shield communications

if made public, avoiding such a result would require an absolute guarantee of nondisclosure. But executive claims of absolute discretion to determine what information might be disclosed have been rejected out of hand. *See generally Nixon*, 418 U.S. at 683–716; *United States v. AT&T*, 567 F.2d 121, 121–33 (D.C. Cir. 1977) (specifically in the national security context). Even had they not been, the privilege belongs to the President, not to the author of the requested information. Thus no advisor could ever be certain that the President would not waive the privilege with respect to her advice.

Given the potentially expansive scope of the privilege suggested by the confidentiality justification, as well as the risks inherent in hiding government actions behind a wall of secrecy, it is important that executive privilege be cabined within narrow and clearly defined limits. *See THE FEDERALIST NO. 70* (Alexander Hamilton), *supra* note 57, at 403 (explaining that the U.S. Executive, because of its unitary nature, will be predisposed to act in secret); Kitrosser, *supra* note 23, at 514 (arguing that any government secrecy must "remain a politically controllable tool of the people and their representatives"). Courts that have considered the appropriate scope of executive privilege have emphasized this need. *In re Sealed Case*, 121 F.3d at 752 ("[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected."); *see Nixon*, 418 U.S. at 710 (noting the historical reluctance of courts to construe privileges expansively).

¹⁵² *In re Sealed Case*, 121 F.3d at 752.

¹⁵³ *Judicial Watch*, 365 F.3d at 1117 (quoting *In re Sealed Case*, 121 F.3d at 752).

¹⁵⁴ *In re Sealed Case*, 121 F.3d at 752.

¹⁵⁵ These powers are the President's Article II functions, such as the appointment and removal powers, the commander in chief power, the authority to receive ambassadors and public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. U.S. CONST. art. II, § 2; ROSENBERG, *supra* note 113, at 19–21.

¹⁵⁶ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting *Nixon*, 418 U.S. at 708, 711, 713).

related to decision-making vested only *by statute* in the President, or duties undertaken pursuant to the generalized “take care” Clause of the Constitution.¹⁵⁷ The D.C. Court of Appeals has contrasted the quintessential presidential authority over appointment and removal—to which executive privilege attaches—with “presidential powers and responsibilities” that “can be exercised or performed without the President’s direct involvement, pursuant to a presidential delegation of power or statutory framework.”¹⁵⁸ The latter do not implicate the exercise of constitutionally committed presidential powers.

Once privilege is properly invoked with respect to communications that meet Section 101’s parameters, the communication is presumed privileged.¹⁵⁹ The presumption of privilege may be overcome if Congress makes a sufficient showing of legislative need—a showing described below.

b. Executive’s Interest in Withholding Certain Diplomatic and Law Enforcement Information

The President may assert executive privilege over information regarding diplomatic relations and law-enforcement investigations in response to congressional information requests so long as the information is reasonably likely to cause the type of harm specified in the statute. In the context of law enforcement information, this means that disclosure would either “interfere with enforcement proceedings” or “constitute an unwarranted invasion of personal privacy.”¹⁶⁰ In the context of diplomatic information, the privilege applies to information that “could reasonably be expected to result in harm to the diplomatic relations” of the United States.¹⁶¹ Moreover, because the statute

¹⁵⁷ See generally *In re Sealed Case*, 121 F.3d at 748; ROSENBERG, *supra* note 113, at 19–20. The duty to take care that the laws are faithfully executed has been held to be an obligation for the President to ensure that the will of Congress is carried out by the executive bureaucracy, not an independent grant of power. *E.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612–13 (1838).

¹⁵⁸ *In re Sealed Case*, 121 F.3d at 752–53.

¹⁵⁹ See *Nixon*, 418 U.S. at 714; see also *In re Sealed Case*, 121 F.3d at 742.

¹⁶⁰ These criteria are drawn from Exemption 7 to FOIA, which provides that FOIA does not require disclosure of some records compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7)(A)–(C) (2006).

¹⁶¹ This standard is adapted from Executive Order 12,958, which sets out the standard for classification of national security information. Information is properly classified if “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.” Exec. Order No. 12,958, 60 Fed. Reg. 19,825–26 (Apr. 20, 1995). The Executive Privilege

requires Congress to take appropriate steps to protect confidential and classified information, disclosure to Congress should not be viewed as the equivalent of public disclosure. Accordingly, the executive branch must explain why the particular harms identified by the statute would result from disclosure *to Congress*.¹⁶² Determining whether such harms are implicated is the court's responsibility.

Because the Executive has no legitimate interest in withholding from Congress information regarding national security or military policy,¹⁶³ the statute does not extend executive privilege protection to information that falls into those categories. Unlike the context of diplomatic materials where any disclosure, even a limited disclosure to Congress in a classified setting, could in some cases affect other nations' willingness to negotiate with the U.S., no harm to U.S. interests can flow from disclosing national security information to Congress if accompanied by appropriate security precautions.

2. Guidelines for Congress

As the Supreme Court told us in *United States v. Nixon*, executive privilege is a *qualified*, not an absolute privilege. Thus the privilege can be overcome by a sufficient showing of need. Section 102 creates standards by which to determine whether Congress's interest in obtaining information is sufficient to overcome the President's interest in preserving its secrecy.

Codification Act borrows this standard and narrows it to cover only information related to the United States' diplomatic relations. Congress is entitled to national security information more broadly. See *supra* notes 61–62 and accompanying text.

¹⁶² In many cases, the harms that could result from public disclosure will not apply when addressing disclosure to Congress. See *Executive Privilege Hearing*, *supra* note 55, at 424 (statement of William H. Rehnquist, Assistant Att'y Gen. of the United States) (“[T]he frequently delicate negotiations which are necessary to reach a mutually beneficial agreement which may be embodied in the form of a treaty often do not admit of being carried on in public. Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of Congress without making the same information prematurely available throughout the world.”).

¹⁶³ See *supra* notes 61–62 and accompanying text. Dicta in *United States v. Nixon* implies that an executive privilege claim over “military or diplomatic secrets” may be entitled to more weight than a claim over other types of information. *Nixon*, 418 U.S. at 710. But when the entity on the receiving end of the information is Congress rather than the courts, the calculus is different—a point that the *Nixon* court explicitly contemplated. *Id.* at 712 n.19 (pointing out that its analysis did not apply to “congressional demands for information”).

a. Executive's Confidentiality Interest in Presidential Communications

Section 102(a) codifies the idea, developed in the case law governing a grand jury subpoena for executive branch information, that when balancing congressional and executive interests, an appropriate showing of need by the branch seeking access to presidential communications can overcome executive privilege.¹⁶⁴ Under existing judicial precedent, an appropriate showing of need for enforcement of a grand jury subpoena exists when a coordinate branch of government demonstrates a “specific need” for information to carry out its constitutional functions,¹⁶⁵ when that information “likely contains important evidence,” and when “this evidence is not available with due diligence elsewhere.”¹⁶⁶

The proposed statute thus requires Congress to show a specific need for the information in order to engage in its constitutional functions, including legislating or conducting oversight, and that the information is not otherwise available. Once Congress establishes this need, it categorically outweighs the Executive's interest in nondisclosure.

Note that while Congress may demonstrate its specific need in any number of ways, Section 102(a) provides that credible evidence of unlawful executive activity will always satisfy the requirement that Congress show a specific need for the information at issue. For this provision to apply, the information request must be related to the specific subject matter for which evidence of illegality exists. Information that is merely peripheral or tangential to the evidence of illegality is not covered by this provision.¹⁶⁷ Nor are allegations alone sufficient. Thus,

¹⁶⁴ See *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc) (per curiam); see also *Nixon*, 418 U.S. at 706. The Nixon-era cases considered a prosecutor's need for information to enforce criminal law important enough to overcome a President's valid claim of executive privilege. Congress's need for information is arguably stronger than that of a prosecutor, as Congress can neither legislate nor investigate absent necessary information. See Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 8 (1974).

¹⁶⁵ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 501 (1977); *Nixon*, 418 U.S. at 713; see *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (noting that the executive privilege balance turns on “whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the [requesting] Committee's functions”).

¹⁶⁶ *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

¹⁶⁷ See cases interpreting 50 U.S.C. § 431(c)(3) (2006), which limits certain

accusations of unlawful activity backed solely by anonymous sources whose claims have not been subject to any independent investigation or confirmation may not be used to justify suits to enforce subpoenas. Actual evidence on the other hand, whether it comes out in media reporting, or through a congressional investigation, or as evidence in a judicial proceeding, can trigger this provision regardless of whether such evidence would be considered admissible in court.

With respect to what will qualify as part of Congress's legitimate constitutional role, the statute diverges from existing case law in one regard: it would override *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹⁶⁸ a decision in a suit brought by a Senate committee to enforce a subpoena issued to the President for tape recordings of conversations with a senior aide in the Oval Office about criminal acts accomplished in the 1972 election campaign. After holding that the tapes were presumptively privileged, the D.C. Circuit Court found Congress's interest in the tapes insufficient to warrant disclosure, citing three grounds: first, the interest was described as "cumulative" because the tapes already had been turned over to the House Judiciary Committee;¹⁶⁹ second, the court identified "no specific legislative decisions that [could not] responsibly be made without access to materials uniquely contained in the tapes;"¹⁷⁰ and third, that congressional investigations have no need to reconstruct past events.¹⁷¹

These rules—a bar against cumulative requests, a rule that allows disclosures only for consideration of specific pending legislation, and a failure to recognize Congress's need for specific facts regarding past events—are unsound and unwarranted.

Consider first the bar against duplicative requests. Even if one committee of Congress possesses certain information, another committee still might need the same material: the two committees may be considering different legislation, or their oversight efforts might have different foci. After all, while each

FOIA requests to information related to "the specific subject matter of an investigation." *E.g.*, *Morley v. CIA*, 508 F.3d 1108, 1118 (D.C. Cir. 2007) ("We hold that the requirement . . . that a FOIA request concern 'the specific subject matter of an investigation' is satisfied where the investigating committee would have deemed the records at issue to be central to its inquiry. . . . [rather than records] that merely 'surfaced in the course of the investigation' . . .").

¹⁶⁸ 498 F.2d 725 (D.C. Cir. 1974).

¹⁶⁹ *Id.* at 732.

¹⁷⁰ *Id.* at 733.

¹⁷¹ *Id.* at 732.

congressional committee exerts responsibility over a specific jurisdiction, such jurisdictions often overlap, and committees may therefore seek the same information for different uses.¹⁷² Moreover, the House and the Senate have different constitutional roles that also might lead to legitimate needs for the same information.¹⁷³ *Senate Select Committee* thus erred in treating congressional committees as fungible.

Second, the Executive has read *Senate Select Committee* to suggest that Congress's interest in "obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question."¹⁷⁴ This is flatly incorrect. No dichotomy between legislative and investigatory interests presumed by the executive branch can be drawn from *Senate Select Committee's* actual reasoning. To the contrary, the court took pains to note that it "need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be."¹⁷⁵ Congress's oversight interests were simply not at issue. The decision rests "not upon any purported difference between Congress's oversight and legislative functions,"¹⁷⁶ but on the erroneous conclusion that "merely cumulative" requests are necessarily inadequate to overcome the privilege.¹⁷⁷ The Executive's contrary reading of the case is a stratagem designed to expand inappropriately the bounds of permissible nondisclosure.

¹⁷² For example, while both the Judiciary and the Intelligence Committees sometimes will request similar information, they likely will use the same information to inform very different actions. Consider inquiries into the National Security Agency's warrantless surveillance program, for example. While the Judiciary Committees might use information about a warrantless surveillance program to determine if Justice Department procedures should be altered to strengthen intra-executive oversight efforts, the Intelligence Committees might apply it in discussing legislation to modify substantive intelligence-gathering programs. Each committee's work is important. Each needs the information. But their resulting action will be considerably different.

¹⁷³ Appropriations bills must be initiated in the House. U.S. CONST. art. I, § 7, cl. 1. The Senate must confirm appointments and ratify treaties. *Id.* art. II, § 2, cl. 2.

¹⁷⁴ 5 Op. Off. Legal Counsel 27, 30 (1981). The executive branch continues to repeat this interpretation as gospel. *E.g.*, 13 Op. Off. Legal Counsel 153, 160 (1989); Letter from Janet Reno, Att'y Gen., to William J. Clinton, President of the U.S. (Sept. 30, 1996), <http://www.justice.gov/olc/drugs.pot.htm>.

¹⁷⁵ *Senate Select Comm.*, 498 F.2d at 732.

¹⁷⁶ Marshall, *supra* note 49, at 797 n.104 (refuting the Executive's interpretation of *Senate Select Committee on Presidential Campaign Activities v. Nixon*).

¹⁷⁷ *Senate Select Comm.*, 498 F.2d at 732.

Congress's power to investigate is inherent in its power to legislate and is equally capacious.¹⁷⁸ Oversight investigations undertaken pursuant to Congress's authority "to expose corruption, inefficiency or waste"¹⁷⁹ often reveal a need to legislate, while wise legislation demands data gleaned from oversight. Moreover, distinguishing between Congress's entitlement to information in oversight and in legislative investigations would not hold up in practice. In every oversight effort, Congress could simply indicate that any shortcomings exposed would become the subject of remedial legislation, thus turning every oversight investigation into a consideration of legislation. Legislative and oversight requests overlap and inform one another.

Finally, once it becomes clear that Congress's oversight investigations form an equally legitimate basis for information requests, Congress's need to discover specific facts also crystallizes. In evaluating the efficiency, efficacy, or propriety of executive action, Congress must discover what that action is. Congress also may need to seek specific facts as part of the consideration of legislation. Not all legislative initiatives aim to address broad policy concerns, where relevant evidence might include information such as the possible effects of privatization of Social Security, or the expected environmental impact of a new dam. Devising properly targeted remedial legislation requires a thorough understanding of how the problems that must be remedied came about. Congress's investigative and oversight obligations thus frequently require access to information regarding specific past events. *Senate Select Committee's* implication to the contrary is therefore inaccurate.

Notwithstanding its recognition of the primacy of Congress's need for information, the Act recognizes that Congress, too, sometimes can abuse its powers—the era of Joe McCarthy comes to mind. In fact, Presidents Truman and Eisenhower both asserted broad claims of executive privilege designed to limit access to information by the House Un-American Activities Committee (HUAC)—a committee investigating allegations of disloyalty in the Truman Administration—and the Army-McCarthy Hearings.¹⁸⁰ With such potential congressional

¹⁷⁸ *E.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927).

¹⁷⁹ *Watkins*, 354 U.S. at 187.

¹⁸⁰ 6 Op. Off. Legal Counsel 751, 774–75 (1982); ROZELL, PRESIDENTIAL

overreaching in mind, the Act contains several elements that limit the ability of members of Congress to engage in inappropriate investigations. As an initial matter, the substantive standards of the statute discourage its abuse. To overcome a valid claim of executive privilege, Congress must satisfy the court that it is: (1) engaged in the legitimate exercise of its constitutional powers; (2) that it has a specific need or legitimate purpose for the information sought in order to carry out those constitutional responsibilities; and (3) that the information is not otherwise available. Procedurally, the statute also places barriers in the way of inappropriately motivated congresspersons. For a suit to go forward, attempts at negotiated settlement must have been exhausted, and a legislator must persuade a majority of an entire House of Congress to authorize the suit. A single rogue subcommittee chair with an axe to grind cannot hale the President or his aides into court. The statute hence employs political checks against political abuse.

b. Executive's Interest in Preserving Confidentiality of Certain Law Enforcement or Diplomatic Information

Section 102 also strikes a balance with respect to the protection of law enforcement files and diplomatic information. Congress may overcome a presumption of privilege with respect to diplomatic information by making the same showing that it must make in the presidential communications context—that it has a specific need for the information in order to carry out its constitutional obligations, and the information is not otherwise available. When it comes to law enforcement information, Congress must show only that it has a legitimate purpose for the information.

Both law enforcement and diplomatic negotiations—though not all foreign policy activities—are traditionally executive branch

POWER, *supra* note 32, at 38–40; Mark P. Doherty, *Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques*, 19 N. ILL. U. L. REV. 801, 823–24 (1999). Those directives, issued in response to the perceived congressional overreaching embodied in the HUAC and McCarthy investigations, resulted in dozens of assertions of executive privilege and the withholding of a significant volume of information. See ROZELL, PRESIDENTIAL POWER *supra* note 32, at 38–40. The frequent and often indiscriminate claims of executive privilege that resulted from these directives, in turn, prompted congressional pushback in the form of an insistence that claims of executive privilege be asserted only if they had specific presidential approval. See *id.* at 73–74; Memorandum from John M. Harmon, *supra* note 109, at 5.

functions.¹⁸¹ However, there are instances in which congressional access to such material is nonetheless appropriate. In foreign affairs more generally, responsibility is divided between the political branches. Congress may or may not be included in the negotiating process,¹⁸² but the Senate inevitably becomes involved in foreign affairs when it ratifies treaties. It is thus entitled to information to determine whether to ratify a treaty or to confer fast-track trade negotiating authority on the Executive. The entire body of Congress also has authority “[t]o regulate Commerce with foreign Nations,”¹⁸³ which may sometimes justify requests for information about diplomatic activities.

Legislators legitimately may require information about law enforcement or diplomatic matters in other contexts as well. A legitimate congressional need for diplomatic information might arise if, for example, the Executive has negotiated secret agreements with other nations to circumvent American anti-torture laws and treaty obligations by sending terrorism suspects abroad for detention and coercive interrogation.¹⁸⁴ Such revelations warrant inquiry to ascertain if new laws or changes in appropriations are needed. Similarly, Congress would have legitimate reason to investigate evidence that the Executive is carrying out its law enforcement obligations in a partisan manner in contravention of existing statutes and regulations. The firing of nine U.S. Attorneys at the end of 2006 in circumstances that implicated partisan interference is surely one instance where legislators had a compelling interest in investigating and

¹⁸¹ U.S. CONST. art II, § 1, cl. 1; *id.* art II, § 2, cl. 2.

¹⁸² See Louis Fisher, *Treaty Negotiation: A Presidential Monopoly?*, 38 PRESIDENTIAL STUD. Q. 144, 145, 149–50 (2007) (arguing that the concept of the President as the sole negotiator of treaties is both constitutionally and factually inaccurate).

¹⁸³ U.S. CONST. art. I, § 8, cl. 3. Based on this power, Congress’s power—and thus entitlement to necessary information—extends to the authorization of, *inter alia*, trade agreements.

¹⁸⁴ For example, both the European Union and Human Rights Watch have reported that the United States colluded with European allies to secretly detain and harshly interrogate prisoners. HUMAN RIGHTS WATCH, QUESTIONS AND ANSWERS: U.S. DETAINEES DISAPPEARED INTO SECRET PRISONS: ILLEGAL UNDER DOMESTIC AND INTERNATIONAL LAW 1 (2005), <http://www.hrw.org/legacy/backgrounder/usa/us1205/us1205.pdf>; Doreen Carvajal, *Rights Group Offers Grim View of C.I.A. Jails*, N.Y. TIMES, June 9, 2007, at A7. A situation such as the Iran-Contra scandal, where executive intelligence agencies were working with foreign nations to circumvent Congress’s prohibition on aid to the Contras, also would justify congressional investigation into the Executive’s diplomatic activities.

implementing remedial action.¹⁸⁵

The statute safeguards the individual privacy interests at stake in the law enforcement privilege context—and also ensures that the investigation will not be thwarted by public disclosure of its contours—by requiring Congress to protect the confidentiality of any presumptively privileged law enforcement information that it obtains. And the concern over improper congressional interference with law enforcement activities is addressed through the requirement that Congress must show a legitimate purpose for its information request in order to overcome the presumption of privilege in the law enforcement context. Because this particular concern can be addressed through a “legitimate purpose” showing, Congress need not meet the “specific need” standard required to overcome the presumption of privilege in the presidential communications or diplomatic materials contexts.

3. Judicial Resolution

Several provisions of the proposed statute are designed to ensure timely, effective judicial intervention should inter-branch negotiations prove unable to effect a resolution to an executive privilege dispute.

a. Standing and Authorization to Sue

Section 105 makes plain that when a majority of a House of Congress intends to allow either itself or one of its committees or subcommittees to bring a suit under this Act, that House or committee or subcommittee has “standing” to challenge in the courts a claim of executive privilege.¹⁸⁶ There are, of course,

¹⁸⁵ In addition to the ongoing battle over information related to the 2006 U.S. Attorney firings, one of the most controversial recent struggles over executive privilege came in the course of congressional investigations looking into possible improper or inadequate enforcement of environmental statutes. See H.R. REP. NO. 110-423, at 15 (2007); Shane, *supra* note 37, at 509 (noting “allegations that the EPA was not adequately enforcing [environmental laws] against parties responsible for hazardous waste sites”).

¹⁸⁶ An existing statute permitting the Senate to bring a civil action to enforce its subpoenas assumes that the Senate or its committees has standing. See 2 U.S.C. § 288d (2006) (providing that any directive to the Senate Counsel to bring a civil action to enforce a subpoena shall constitute authorization to bring such action and shall require the Counsel to bring a civil action under any statute conferring jurisdiction on any court); 28 U.S.C. § 1365 (2006) (conferring jurisdiction on the District of Columbia District Court over civil actions brought by the Senate or its committees to enforce a subpoena). This report takes the position that a House of Congress already has standing to bring an action to

constitutional standing requirements that Congress cannot abrogate.¹⁸⁷ But this statutory grant of standing to congressional bodies¹⁸⁸ does not run afoul of the constitutional floor.¹⁸⁹ Moreover, use of the word “shall” denies courts authority to exercise prudential discretion to decline to hear a case.¹⁹⁰

This provision also tracks procedures currently used for contempt resolutions by requiring approval by a full House of Congress¹⁹¹ as well as the process utilized to authorize the House

enforce a subpoena issued to executive officials under 28 U.S.C. § 1331 (2006). Since the standing to bring such a suit has been challenged in recent litigation, this proposed statute explicitly confers standing on a House of Congress in actions to enforce subpoenas. See Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss and in Opposition to Plaintiff’s Motion for Partial Summary Judgment on Counts I and II, at 23, Committee on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 1:08cv00409), 2008 WL 2149261.

¹⁸⁷ Standing is the legal right to initiate a lawsuit. To establish standing, a person must be sufficiently affected by the matter at issue and there must be a controversy that can be resolved by legal action. The Supreme Court has held that “the irreducible constitutional minimum of standing” has three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent’ Second, there must be a causal connection between the injury and the conduct complained of Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 560–61 (citations omitted).

¹⁸⁸ Congress can confer standing statutorily where there might be prudential questions about a party’s standing to sue in the absence of a statute. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (“[W]here a dispute is otherwise justiciable, the question whether the litigant is a ‘proper party to request an adjudication of a particular issue,’ . . . is one within the power of Congress to determine.” (citation omitted)).

¹⁸⁹ The case law holding that individual legislators do not have standing to challenge executive action does not control in circumstances where the challenge is brought by an entire congressional body as a whole. Compare *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (finding that an “abstract and widely dispersed” “institutional injury” to Congress did not support standing for individual legislators), and *Chenoweth v. Clinton*, 181 F.3d 112, 117 (D.C. Cir. 1999) (holding that a claimed injury to individual members of Congress was indistinguishable from *Raines*), with *Miers*, 558 F. Supp. 2d at 70 (distinguishing the case from *Raines* on the grounds that the injury to Congress was “more concrete”).

¹⁹⁰ Courts have the discretion to decline to entertain an action arising out of implied causes of action or statutes indicating that courts “may” adjudicate the legal rights of the parties involved. See, e.g., *Miers*, 558 F. Supp. 2d at 94–95.

¹⁹¹ See *Wilson v. United States*, 369 F.2d 198, 202 (D.C. Cir. 1966) (“[W]here the alleged contempts are committed while Congress was in session, the Speaker may not certify to the United States Attorney the statements of fact prepared by the Committee until the report of alleged contempt has been acted upon by the House as a whole.”). When Congress is not in session, the contempt statute has been interpreted to require “the Speaker of the House and the

Judiciary Committee's suit against Miers and Bolten. It balances Congress's need for information with the risk of individual legislators or committees abusing their power. Under this provision, a member or committee must be able to make its case to the full House or Senate before enforcing a subpoena in the courts. This ensures significant deliberation of any decision to litigate a privilege claim.

b. Jurisdiction

The next provision, section 106, extinguishes any lingering doubt as to whether courts have jurisdiction over a congressional civil action to enforce a valid subpoena.¹⁹² They do. One suit to enforce a privilege was once dismissed on technical jurisdictional grounds that no longer apply.¹⁹³ Even if no longer strictly necessary, this provision reinforces Congress's unambiguous intention to have courts adjudicate congressional-executive information disputes. It also rejects the concerns, voiced by some commentators, that the judiciary is ill-equipped to answer the questions presented by executive privilege cases or that courts simply lack the competence to evaluate the comparative weight of Congress's need for information and the Executive's need for confidentiality.¹⁹⁴ While courts have been reluctant to wade into

President pro tempore of the Senate . . . to provide a substitute for the kind of consideration which would be provided by the house involved if it were still in session." *Id.* at 204.

¹⁹² Such doubts already have largely been eliminated, as both Congress and the Executive seem to agree that jurisdiction over such actions is proper. The Justice Department now concedes that 28 U.S.C. § 1331 provides a valid basis for suits brought against the Executive by a House of Congress. *See Miers*, 558 F. Supp. 2d at 64.

¹⁹³ The D.C. Circuit once dismissed a congressional effort to enforce Executive compliance with a subpoena for lack of jurisdiction because the action did not claim damages amounting to \$10,000, which was a requirement for the assertion of federal jurisdiction at the time. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 61 (D.D.C. 1973); *see* 28 U.S.C. § 1331 (1976). This requirement has since been eliminated from the statute. 28 U.S.C. § 1331 (2006); *see* 8 Op. Off. Legal Counsel 101, 137 n.36 (1984); James Hamilton & John C. Grabow, *Statute: A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 160 n.91 (1984).

¹⁹⁴ *See Secrecy in Government Hearings*, *supra* note 100, at 116–17 (testimony of Antonin Scalia, Assistant Att'y Gen. of the U.S.); Paul A. Freund, *Forward: On Presidential Privilege*, 88 HARV. L. REV. 13, 38–39 (1974); O'Neil, *supra* note 71, at 1129–30; *see also* Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 745–46 (1993).

congressional-executive information disputes historically,¹⁹⁵ such reluctance in fact underpins the need for a statutory provision explicitly affirming their role.

c. Expedited Schedule

One of the persistent problems with executive privilege disputes, especially those that have found their way into the courts, is that they often take far too long to resolve. To combat this phenomenon, Section 109 of the proposed statute provides that the courts should place executive privilege actions on an expedited schedule and make their timely resolution a priority. Assurance of a timely decision from a neutral adjudicator constrains executive stratagems to use that branch's informational monopoly to stall disclosure.

d. Mutual Accommodation and Exhaustion

Despite providing for judicial review of executive privilege disputes, the statute aims to preserve the central role of negotiation. Thus Section 110 obliges the parties to explore in good-faith all possible avenues of compromise before turning to the courts. Such mutual accommodation is constitutionally compelled: “[A] spirit of dynamic compromise [should] promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system,” the D.C. Circuit has explained.¹⁹⁶ “[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.”¹⁹⁷ And it makes clear that courts should not intervene in congressional-executive disputes unless and until a non-litigation resolution is clearly not feasible.

¹⁹⁵ See *supra* note 99 and accompanying text.

¹⁹⁶ *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977); see *supra* note 140.

¹⁹⁷ *AT&T*, 567 F.2d at 127. The executive branch has recognized this obligation explicitly. See 5 Op. Off. Legal Counsel 27, 31 (1981) (“[C]ourts have referred to the obligation of each branch to accommodate the legitimate needs of the other. . . . It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.”); Memorandum from John M. Harmon, *supra* note 109, at 5.

CONCLUSION

Calls for the reform of executive privilege are hardly new.¹⁹⁸ The first spate of proposals emerged after Watergate. That controversy prompted resolutions and bills designed to govern the exercise of executive privilege.¹⁹⁹ Watergate Special Prosecutor Archibald Cox himself reluctantly advocated the enactment of a system empowering Congress to compel executive disclosure.²⁰⁰

¹⁹⁸ Some attempt, like this paper's proposed statute, to set forth the contours of executive privilege and the circumstances in which its assertion should be accepted as valid. Dorsen & Shattuck, *supra* note 164, at 23 (arguing for circumscribed boundaries of executive privilege enforced by judicial action); Prakash, *supra* note 37, at 1187 (arguing that Congress should codify executive privilege by statute); Smith, *supra* note 103, at 604–09 (setting out proposed legislation); Matthew Cooper Weiner, Note, *In the Wake of Whitewater: Executive Privilege and the Institutionalized Conflict Element of Separation of Powers*, 12 J.L. & POL. 775, 806–10 (1996) (advocating that Congress enact guidelines to define the contours of executive privilege). Others focus on purely procedural remedies. Hamilton & Grabow, *supra* note 193, at 157–59 (proposing a bill to allow civil enforcement of congressional subpoenas); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 680–87 (1997) (arguing that congressional-executive information disputes present justiciable cases and controversies that the courts should adjudicate, not avoid). Both substantive and procedural proposals often include a provision that would submit disputes to a court. Dorsen & Shattuck, *supra* note 164, at 35 (proposing a new jurisdictional statute to get around the amount-in-controversy problem, which no longer exists); Miller, *supra*, at 679–87; O'Neil, *supra* note 71, at 1129–34. Some suggest that a special prosecutor or independent counsel be employed to determine when congressional contempt citations issued to executive officials should be prosecuted. Brand & Connelly, *supra* note 49, at 86–89 (advocating amendment of the criminal contempt statute to provide for appointment of independent counsel whenever Congress votes a contempt citation against an executive official).

¹⁹⁹ See, e.g., S. 2073, 93d Cong. (1973) (providing a means for Congress to obtain a judicial determination of the existence of executive privilege and its application); S. 858, 93d Cong. (1973) (setting forth procedures for the invocation of executive privilege and providing that employees of the executive branch subpoenaed by Congress cannot refuse to appear on the basis of executive privilege); S.J. Res. 72, 93d Cong. (1973) (having the same effect as S. 858); Brand & Connelly, *supra* note 49, at 89–90 (discussing a bill introduced by Rep. Barney Frank that would require the appointment of a special prosecutor within five days of a congressional certification of a criminal contempt action against a high-level executive official).

²⁰⁰ Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1432–34 (1974). Though skeptical of the courts' ability to craft manageable principles upon which to render decisions, Cox nevertheless concluded that such reform was necessary based on three developments: (1) the increase in presidential power; (2) the rise in the number of executive privilege claims; and (3) the expansion of government and concomitant increase in information necessary to self-governance in the sole control of the Executive. *Id.* Noted by Cox in 1973, these trends have continued into the present day.

Since Watergate, other reform proposals have been advanced in the wake of one or another scandal, but the will to reform has waned, often due to indications that Congress has notched some temporary victories in extracting information from the Executive.²⁰¹ But time and again, the dysfunction reemerges, and the cycle begins again.

In July 2009, Rep. Brad Miller (D-NC) introduced the Checks & Balances Restoration and Revitalization Act of 2009.²⁰² It includes many of the procedural elements of the statute proposed in this paper—for example, it creates a cause of action to enforce congressional subpoenas against executive branch officials. But it leaves up to the political branches and the courts the substantive contours of executive privilege. Such a bill—with the threat of judicial intervention—could expedite resolutions, but it still falls short of providing ground rules for negotiations necessary to affect true reform.

To be fair, neither the proposal advanced in this paper nor Rep. Miller's bill will remedy all of the problems associated with congressional-executive information sharing. Congress still must have the will to press for the information it needs, and it must sometimes be willing to expend the political capital necessary to force information out of a reluctant Executive through its political tools. And the Executive still may attempt to thwart legitimate congressional investigations, even in the face of a determined Congress, willing to use the methods available to it. But proposals along the lines of this one, and of Rep. Miller's, would go a long way to ensure that Congress has all possible arrows in its quiver.

Informational asymmetries between Congress and the ever-enlarging federal government show no signs of diminishing, and the consequences can be far-reaching. Congress can be prevented from acting as an equal partner in the creation and implementation of national security policy; or it can be blocked from investigating and remedying improper politicization of criminal law enforcement; or inter-branch relations can be subject

²⁰¹ *E.g.*, Doherty, *supra* note 180, at 828–31; Miller, *supra* note 198, at 687. Indeed, reliance on political negotiation to resolve information disputes has led to a pattern of alternating extremes: “Episodes of presidential popularity have permitted increases in secrecy, leading to malfeasance that is uncovered only after political fortunes have changed. The aftermath of those revelations, in turn, prompts intense congressional scrutiny that too often devolves into a political tool rather than an earnest effort to conduct oversight.” O’Neil, *supra* note 71, at 1137.

²⁰² H.R. 3362, 111th Cong. (2009).

to unnecessary conflict and acrimony.

With fuller and more accurate information about executive branch policies and practices, Congress can execute its constitutional obligations effectively to ensure that policies are implemented as intended by elected officials; to detect and deter violations of law, regulation, and policy as well as waste and inefficiency; and to hold officials accountable for the actions they take in carrying out the people's business.

The result will be a safer and stronger democracy for us all.

APPENDIX

EXECUTIVE PRIVILEGE CODIFICATION ACT

An Act

To codify standards that govern when presidents may assert executive privilege in response to congressional requests for information; to specify when Congress may overcome a claim of executive privilege; and to provide a judicial forum for resolution of conflicts arising from executive privilege assertions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1 Short Title

“This Act may be cited as the “Executive Privilege Codification Act of 201X.”

Sec. 2 Findings

“Congress finds that—

“(a) assertions of executive privilege provide the opportunity to perpetuate excessive executive secrecy and to deny Congress access to the information it requires to perform its constitutional responsibilities;

“(b) excessive secrecy creates an unacceptable risk of fraud, abuse, waste, misconduct, or the implementation of unwise policies within the executive branch;

“(c) codifying standards governing when the President may assert executive privilege and when Congress can overcome such an assertion will facilitate more appropriate resolution of executive privilege conflicts, leading to more appropriate levels of both executive confidentiality and congressional access to information;

“(d) a judicial forum should be available to resolve conflicts over claims of executive privilege. The availability of this forum not only will allow Congress and the President to present their disputes to a neutral decision maker if necessary but also will encourage more productive negotiation, thus rendering intractable disputes less likely to occur.”

Sec. 101 Scope of Executive Privilege Assertions

“(a) PRESIDENTIAL COMMUNICATIONS. The President may assert executive privilege over communications made in the course of providing advice to the President for the purpose of the exercise of his Article II responsibilities. Such privilege shall extend only to such communications solicited and received or

authored by a White House advisor or a member of a White House advisor's staff with broad and significant responsibility for investigating and formulating advice for the President. White House advisors shall not include positions confirmed by the Senate. Legal opinions prepared by the Department of Justice that are binding on the executive branch or that provide legal justification for an executive action or policy shall never be privileged.

“(b) LAW ENFORCEMENT INFORMATION. The President may assert executive privilege over information regarding ongoing law enforcement investigations whose disclosure to Congress could reasonably be expected to—

“(1) interfere with enforcement proceedings; or

“(2) constitute an unwarranted invasion of personal privacy.

The Executive must provide a particularized explanation of how disclosure of each piece of information to Congress would result in such interference or invasion of privacy.

“(c) DIPLOMATIC INFORMATION. The President may assert executive privilege over information regarding diplomatic relations with other nations whose disclosure to Congress could reasonably be expected to result in harm to those diplomatic relations.

The Executive must provide a particularized explanation of how disclosure of the particular piece of information to Congress would result in such harm to the diplomatic relations of the United States.

“(d) DETERMINATION AS TO APPLICABILITY OF EXECUTIVE PRIVILEGE. The court shall review *in camera* each piece of information over which the President asserts executive privilege to determine whether it falls within the scope of executive privilege. Any information that the court determines falls within the scope of executive privilege shall be presumptively privileged.”

Sec. 102 Assessing Congress's and the Executive's Competing Interests

“(a) PRESIDENTIAL COMMUNICATIONS. When a court has determined that information is presumptively privileged based upon the President's generalized interest in confidentiality, a House of Congress, or a duly authorized committee or subcommittee thereof, may overcome this presumption by showing that Congress, or a committee or subcommittee thereof, has a specific need for the subpoenaed information in order to carry out its constitutional obligations, and the information is not

otherwise available. Credible evidence that the Executive has engaged in unlawful conduct related to the subject matter of the information sought shall always constitute a specific need for the subpoenaed information.”

“(b) LAW ENFORCEMENT INFORMATION. When a court has determined that information is presumptively privileged based upon the Executive’s interest in protecting law enforcement material, a House of Congress, or a committee or subcommittee thereof, may overcome this presumption by showing that it has a legitimate purpose for requesting the subpoenaed information in order to carry out its constitutional obligations, and the information is not otherwise available. If the subpoenaed information can be redacted or summarized or otherwise conveyed without disclosing the aspects of the information or communications that render it reasonably expected to: i) interfere with enforcement proceedings, or ii) constitute an unwarranted invasion of personal privacy, while still serving the legitimate purpose for which Congress requested the information, the court shall require such measures to be taken. Any House of Congress or committee or subcommittee thereof receiving information that is presumptively privileged under this subsection shall protect its confidentiality during any such period as the law enforcement investigation or proceeding to which the information relates is ongoing. No Member of Congress may further disseminate information disclosed pursuant to this section.”

“(c) DIPLOMATIC INFORMATION. When a court has determined that information is presumptively privileged based upon the Executive’s interest in protecting diplomatic material, a House of Congress, or a committee or subcommittee thereof, may overcome this presumption by showing that it has a specific need for the subpoenaed information in order to carry out its constitutional obligations, and the information is not otherwise available. Credible evidence that the Executive has engaged in unlawful conduct related to the subject matter of the information sought shall always constitute a specific need for the subpoenaed information. If the subpoenaed information can be redacted or summarized or otherwise conveyed without disclosing the aspects of the information or communications that render it reasonably expected to result in harm to the diplomatic relations of the United States, while still meeting the specific need Congress has for the information, the court shall require such measures be taken.”

“(d) DETERMINATION AS TO CONGRESSIONAL NEED OR PURPOSE.

If the court determines that Congress, or a committee or subcommittee thereof, has made the requisite showing required by (a), (b), or (c) of this section, it shall enforce the congressional subpoena.”

“(e) PROTECTION OF CLASSIFIED INFORMATION. When properly classified information is disclosed to Congress pursuant to this statute, Congress shall handle such information in accordance with the security procedures established by Congress as required under federal law.”

Sec. 103 Executive Policy

“Within 90 days of the enactment of this statute, the President or the Attorney General shall promulgate binding guidelines setting forth a policy governing the use of executive privilege. The policy shall specify—

“(a) the procedures by which a decision to assert executive privilege is reached, which shall be consistent with section 104; and

“(b) that executive privilege may be asserted over information only when consistent with the specifications provided in sections 101 and 102.”

Sec. 104 Procedures Governing Assertion of Executive Privilege Before Congress

“(a) FORMAL ASSERTION OF EXECUTIVE PRIVILEGE BY THE PRESIDENT. An assertion of executive privilege must be accompanied by a statement signed by the President requiring that executive privilege be asserted as to the testimony or information sought.

“(b) TESTIMONY. Any witness, including officers or employees of the United States, who is subpoenaed to testify before a committee or subcommittee of a House of Congress shall appear before that committee pursuant to the terms of the subpoena. A presidential assertion of executive privilege shall not be sufficient ground to refuse to appear. At that appearance, the witness shall—

“(1) answer truthfully all questions calling for non-privileged information, including questions whose answers would tend to establish whether a valid claim of executive privilege may be asserted in response to other questions; or

“(2) invoke the President’s assertion of executive privilege, or any privilege other than executive privilege available to the witness, when warranted.

“(c) PRIVILEGE LOG. Any witness, including officers or employees of the United States, in possession or control of

documents or other non-testimonial information over which the President has asserted executive privilege shall provide a detailed index of any requested information that is being withheld, explaining in each instance the reason that executive privilege applies to that particular piece of information.”

Sec. 105 Standing & Authorization to Sue

“A House of Congress that elects by a majority vote of the whole House to bring a specific civil action under this statute, or a committee or subcommittee of a House of Congress authorized by a majority vote of the whole House to bring a specific civil action under this statute, has standing and may bring that civil action in the federal District Court for the District of Columbia to compel compliance with a subpoena duly issued to any witness, including an officer or employee of the United States, if that witness has failed to comply with the terms of the subpoena on the basis of a claim of executive privilege. When a House of Congress, or an authorized committee or subcommittee, brings such a suit in the federal courts, the courts shall exercise their jurisdiction over the action.”

Sec. 106 Jurisdiction

“In addition to the subject matter jurisdiction available under 28 U.S.C. § 1331, the District Court for the District of Columbia shall have original, exclusive jurisdiction over any civil action, brought by either House of Congress, or any duly authorized committee or subcommittee thereof, with respect to any claim of executive privilege asserted before either House or any committee of either House.”

Sec. 107 Mootness

“The expiration of a Congress shall not be deemed to render any civil action brought pursuant to this statute moot on prudential grounds. The subsequent Congress shall possess all the rights and powers under this statute that its predecessor possessed.”

Sec. 108 Three-Judge Panel

“Any civil action brought pursuant to this statute shall be heard and adjudicated by three judges appointed in accordance with 28 U.S.C. § 2284. Any party may appeal the decision of the panel directly to the Supreme Court in accordance with 28 U.S.C. § 1253.”

Sec. 109 Expedited Schedule

“The federal courts shall place any action filed pursuant to this statute on an expedited schedule and make its timely resolution a priority.”

Sec. 110 Mutual Accommodation & Exhaustion

“Members of Congress and the Executive shall seek all means of mutually accommodating one another’s needs with respect to congressional information requests. No House of Congress, or any committee or subcommittee thereof, shall bring a civil action as authorized herein until it has attempted to secure the subpoenaed information through negotiations with the Executive.”

Sec. 111 Effect of Negotiated Settlements

“Settlements of executive privilege conflicts reached by negotiation between the parties, either before or after suit has been filed, shall have no effect as binding legal precedent.”

Sec. 112 Special Master

“The court is authorized in its discretion to appoint a special master with appropriate expertise to facilitate the court’s ability to evaluate the parties’ claims.”

Sec. 113 Remedy

“The court shall exercise discretion to determine and craft appropriate remedies in any given case based on equitable and prudential concerns. Remedies may include, but are not limited to, an order requiring—

“(a) full disclosure;

“(b) partial disclosure;

“(c) no disclosure;

“(d) disclosure of redacted information;

“(e) disclosure of substitute summaries;

“(f) disclosure under a protective order that bars the information from being disclosed beyond Congress;

“(g) oral briefings;

“(h) continued negotiations under the court’s supervision;

“(i) other measures which the court finds suitable given the information in question and the congressional need.”

Sec. 114 Preemption

“The privileges set forth in this statute represent the exclusive forms of executive privilege that the Executive may assert in response to information requests from Congress.”¹

Sec. 115 No Waiver

“Any disclosure of presumptively privileged information to

¹ This statement of exclusivity is not relevant to personal privileges held by individual executive branch officials, such as the spousal privilege or the Fifth Amendment privilege against self-incrimination. It applies only to privileges that members of the executive branch, by nature of their office, might assert against Congress.

Congress in accordance with this statute shall not be deemed to constitute a waiver of any right or privilege that the executive branch may assert in litigation against parties other than a House of Congress or a committee or subcommittee of a House of Congress. Any House of Congress or committee or subcommittee thereof obtaining information that relates to ongoing litigation and that would be subject to a claim of privilege in the context of such litigation shall protect the confidentiality of that information.”

Sec. 116 Protection of Classified Information

“When properly classified information is disclosed to Congress pursuant to this statute, Congress shall handle such information in accordance with the security procedures established by Congress as required under federal law.”