

BRENNAN

CENTER

FOR JUSTICE

EXECUTIVE PRIVILEGE:
A LEGISLATIVE REMEDY

Emily Berman

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S LIBERTY AND NATIONAL SECURITY PROJECT

The Brennan Center initiated its Liberty and National Security Project as part of its Justice Program to foster better public understanding of the importance of accountability, transparency, and checks and balances in the formulation and implementation of national security policy. We have since been at the forefront of advocating for sound, rights-respecting policy based on broad public education, legislative advocacy, litigation, and scholarly activity.

© 2009. This paper is covered by the Creative Commons “Attribution-No Derivs-NonCommercial” license (see <http://creativecommons.org>). It may be reproduced in its entirety as long as the Brennan Center for Justice is credited, a link to the Center’s web page is provided, and no change is imposed. The paper may not be reproduced in part or altered in form, or if a fee is charged, without the Center’s permission. Please let the Brennan Center for Justice know if you reprint.

ABOUT THE AUTHOR

Emily Berman is Counsel and Katz Fellow in the Liberty and National Security Project at the Brennan Center for Justice. She works through litigation, advocacy, and scholarship to promote rights-protecting and effective oversight of United States national security policy. Before joining the Brennan Center, Ms. Berman was at New York University School of Law pursuing her LL.M. in International Law. She clerked for Judge John M. Walker of the Second Circuit Court of Appeals and graduated *magna cum laude* from New York University School of Law (2005).

ACKNOWLEDGMENTS

The author would like to thank Maggie Barron, Liza Goitein, Susan Lehman, Sidney Rosdeitcher, and Michael Waldman of the Brennan Center for their invaluable comments and assistance. Aziz Huq, Eric Lane, Fritz Schwarz, and David Udell deserve special thanks for their extensive contributions. Thanks also go to Ellen Fisher and Chris Stanley for their research assistance. The author also benefited greatly from conversations with Stan Brand, Bruce Fein, Lou Fisher, Rick Kaplan, Irv Nathan, and Patricia Wald. The Brennan Center thanks the Atlantic Philanthropies, the Herb Block Foundation, the John Merck Fund, Newman's Own Foundation, Open Society Institute, Wachtell, Lipton, Rosen & Katz, and Wallace Global Fund for the generous support that made this paper possible. The statements made and the views expressed in this paper are solely the responsibility of the Brennan Center.

TABLE OF CONTENTS

Executive Summary	1
Introduction: The Trouble with “Executive Privilege”	7
I. Executive Privilege: The Status Quo and its Flaws	12
<i>A. Congress’s Right To Information</i>	13
<i>B. The Executive’s Interest in Confidentiality</i>	14
<i>C. Problems with the Current System for Resolving Executive Privilege Disputes</i>	16
1. <i>Lack of Clear Standards Leads to Overreliance on Political Factors</i>	17
2. <i>Congress’s Inability to Overcome the Executive’s Monopoly on Information Creates Bias in Favor of Under-disclosure</i>	18
3. <i>The Branches’ Differing Understandings of the Scope of Executive Privilege Creates Conflict</i>	21
4. <i>Lack of Clear Guidelines and Effective Checks Encourage the Executive’s Tendency to Expand Secrecy</i>	23
II. Addressing Executive Privilege’s Shortcomings	25
<i>A. An Executive Privilege Statute is Constitutional</i>	26
<i>B. The Proposed Executive Privilege Codification Act Would Substantially Improve Executive Privilege Dispute Resolution</i>	27
<i>C. The Proposed Statute – Provision-by-Provision</i>	30
Conclusion	52
Appendix: Text of the Executive Privilege Codification Act	53

EXECUTIVE SUMMARY

Modern history tells a story of steadily ascendant executive power. By the turn of the 21st Century, the federal government's bureaucracy had swelled to assume responsibility for generating and implementing policies in areas ranging from the environment to national security and beyond. 9/11 merely accelerated this growth. An executive branch espousing a monarchical vision of executive power; a citizenry passive because of its fear of international terror; and a Congress sometimes reluctant to assume responsibility, sometimes intentionally sidelined by the Executive; all these combined to concentrate yet more power in the executive branch.

As the Executive gains power, Congress's ability to obtain information about how that power is exercised becomes both more difficult and more important. Critically important information about federal policy is housed almost exclusively within the executive branch, and executive officials have little incentive to disclose it. Moreover, during the last eight years the executive branch increasingly relied on a "need to know" paradigm, attempting to ensure that information would be closely guarded and sparingly distributed.

Even if all executive policies were harmless, excessive secrecy still would be imprudent—more widely vetted policies will be wiser policies, and effective democratic accountability requires transparency. But history demonstrates that executive actions are not reliably benign.¹ When presidents are permitted to implement policies that have not been subject to scrutiny, the results have included justifying abusive interrogation and detention policies through flawed legal analysis; manipulating prosecutorial decision-making for partisan ends; engaging in unlawful conspiracies to influence the outcome of elections; unlawfully funding foreign paramilitary groups; and conducting unlawful surveillance of Americans.

The tendency among government officials to withhold information does not necessarily stem from nefarious motives. In fact, it is entirely natural and predictable. Secrecy represents power—power to act according to one's own preferences, and power to avoid accountability. It is no surprise then when those entrusted with such power attempt to maximize its reach. The result is the routinely acknowledged, systemic over-classification and under-disclosure of information within our executive branch. While this penchant for secrecy is unsurprising, combating it is nevertheless important because of the risks of harm it creates.

The trend toward increased executive power and concomitant secrecy has thrown our constitutional balance of power out of kilter. The Framers crafted the Constitution's checks and balances to limit each branch's powers, to act as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other,"² and thereby to prevent "tyrannical" policies.³ This self-checking function—and, more fundamentally, the constitutional health of our democracy—depends on transparency. When secrecy thwarts the efforts of the people and their elected representatives to obtain information, it undermines Congress's core functions, its ability to enact legislation and exercise oversight. Congress cannot craft legislation absent information

about the problems it aims to ameliorate; nor can it act to check the use of executive power absent knowledge of how that power is exercised.

One of the most important tools in the secrecy repertoire is “executive privilege”—the President’s authority to claim the right to withhold information sought by Congress. Executive privilege may be asserted in many contexts. This report focuses, however, on one context: disputes over Congress’s efforts to access information from the Executive. Reform of executive privilege in this context would constitute an important step toward addressing the Executive’s existing culture of secrecy. Executive privilege is one area where the recent expansion of secrecy can—and should—be rolled back to restore our constitutional balance and to prevent the harms that can result when that balance is misaligned.

THE EXISTING REGIME OF EXECUTIVE PRIVILEGE IS FLAWED

Functioning properly, executive privilege creates a tightly drawn zone of confidentiality around the President to ensure that advisors provide him with candid advice while simultaneously allowing Congress access to the information it needs to engage in its core constitutional functions of policy-making and oversight.

But executive privilege can also serve to promote secrecy that is damaging to effective democratic government. When President Bush invoked executive privilege to stop former White House Counsel Harriet Miers and former aide Karl Rove from testifying to Congress about politicization of the Justice Department—when he refused even to allow them to turn up at Congress’s hearings or even to identify the documents that White House Chief of Staff Joshua Bolten refused to supply (let alone explain why they were privileged⁴)—he frustrated Congress’s ability to inquire into—and, if necessary, to legislate to put a stop to—the perversion of the law in our key legal institutions.⁵

Supreme Court precedent teaches that the key question in disputes over claims of executive privilege—both as a matter of law and as a matter of public policy—is whether Congress’s need for disclosure outweighs the Executive’s interest in confidentiality. Resolving executive privilege disputes demands a mechanism for striking the correct balance between these competing interests. Congresses and presidents have recognized “executive privilege” in some form since the Republic’s early days; historically, disputes over executive privilege’s application have unfolded as clashes resolved through inter-branch negotiation and compromise. But as the struggle over information in the possession of Miers, Rove, and Bolten shows—as do many other cases—this mechanism is not always effective in reaching a resolution that accounts for both Congress and the President’s interests. Instead, sometimes a self-interested Executive is able to determine unilaterally whether the information will be disclosed. The predictable result is that information too frequently remains secret.

The number of executive privilege assertions presidents actually make is not large—no more than a handful in any post-Nixon administration—but the number of privilege assertions does not correlate to the size of the problem. Use of executive privilege can result in damaging levels of

secrecy, preventing or limiting disclosure to Congress even of information it urgently needs for its lawmaking and oversight functions. The controversy involving Miers, Rove, and Bolton, an astonishing example of the phenomenon, is not the only case in point. The number of explicit “executive privilege” disputes is dwarfed by the number of information disputes between Congress and the Executive that, though they do not always involve an explicit presidential assertion of executive privilege, still force Congress to decide whether—and how aggressively—to pursue information with an awareness that, if Congress pushes too hard, the President may assert executive privilege. Knowing that every information request might be met with executive resistance that it has no effective means of overcoming, Congress is likely deterred from requesting more information than it currently does.

Thus, counting the number of times executive privilege is invoked does not tell the full story. Instead, the most troubling executive privilege disputes arise out of a system that contains design flaws that not only allow an intransigent Executive to defy the needs of Congress with relative impunity, but also suggest that even when a compromise is reached, it may not be the compromise that best serves the public interest. These design flaws are:

- **First**, no clear guidelines govern executive privilege. Neither the question of what information qualifies as privileged nor when Congress’s need for disclosure outweighs the Executive’s need for secrecy are governed by established rules. Instead of a deliberative analysis of this question—with consideration of each side’s interests and the rationales for or against disclosure—the determination hinges on such factors as political brinksmanship, media interest, and whether the information Congress seeks is perceived to relate to executive wrongdoing.
- **Second**, the system is biased in favor of the Executive. The realities of the contemporary political environment—the Executive’s monopoly on information, the forces of partisanship in Congress, and the ineffectiveness of the tools currently available to Congress—generate systemic bias toward under-disclosure for which Congress lacks an effective response.
- **Third**, the branches hold different understandings of when the privilege applies. Congress and the Executive hold conflicting views of the scope of executive privilege. This exacerbates the likelihood of conflict.

EXECUTIVE PRIVILEGE IS ONE AREA WHERE THE RECENT EXPANSION OF SECRECY CAN—AND SHOULD—BE ROLLED BACK TO RESTORE OUR CONSTITUTIONAL BALANCE AND TO PREVENT THE HARMS THAT CAN RESULT WHEN THAT BALANCE IS MISALIGNED.

- **Fourth**, the absence of clear, enforceable guidelines encourages the Executive’s tendency to expand the zone of secrecy. The Executive does this both by interpreting the privilege expansively and by employing it without explicitly declaring that it is doing so. The first practice contributes to the lack of clarity regarding what falls within the scope of executive privilege; the second reinforces the privilege’s negative connotations, still lingering from the Watergate era, thereby rendering it a less effective tool.

To be sure, Congress can turn to the courts to secure necessary information. But despite the fact that the House of Representatives brought suit to enforce congressional subpoenas issued to and disregarded by Harriet Miers and Joshua Bolten, many months later that conflict remains unresolved. This and other examples make clear that this route—enforcement of congressional rights through litigation—is, at best, unwieldy at present. Sometimes judges are unwilling to adjudicate such disputes. Even when they are, litigation about executive privilege lacks clear rules and drags on far too long. By the time disputes are resolved, sought-after information may no longer retain its pertinence. Partly because of these drawbacks, just four congressional-executive information disputes have been submitted to the courts in the nation’s history.⁶ If the courts are to be an effective means for resolving executive privilege fights, new procedures must be crafted to clarify the ground rules and to speed outcomes.⁷

To summarize: We have relied on negotiated solutions to informational disputes between the political branches even as one branch (the executive branch) has grown exponentially in size and secrets. We lack definitive standards for when and how executive privilege may be used. And the federal courts currently provide no effective remedy. The result is a surfeit of secrecy, which can be used to hide errors, imprudent or ineffective policies, waste, or even—as may well be the case in the ongoing dispute over information regarding alleged Justice Department politicization—abuse.

EXECUTIVE PRIVILEGE CAN BE FIXED: A PROPOSED STATUTE

This report proposes a remedy that will better resolve executive privilege disputes, help restore our checks and balances, and strengthen our democracy. A proposed statute, the “Executive Privilege Codification Act,” attached as an Appendix to this report, offers a comprehensive framework that responds to the problems with executive privilege. The Act establishes standards, reinvigorates the position of Congress relative to the Executive, and secures the role of the federal courts as the final arbiter of executive privilege disputes when necessary.

There are three fundamental—and novel—elements of the Executive Privilege Codification Act. *First*, it establishes standards regarding the use of executive privilege. The Act specifies when the President may invoke the privilege and how Congress may overcome it. In doing so, it codifies some existing case law, fills gaps in the existing law, clarifies some ambiguous holdings, overrules others, and applies principles established in other executive privilege contexts—for example, grand jury subpoenas or Freedom of Information Act requests—to disputes between Congress and the Executive. The Act will reduce uncertainty in the law, thereby facilitating not only judicial

resolution of these disputes, but also the process of extra-judicial negotiation that occurs between Congress and the Executive.

Second, the Act reinvigorates the role of Congress by requiring disclosure when Congress can show a “specific need”⁸ (or, in the case of law enforcement information, a legitimate purpose) for information in order to carry out its constitutional duties, including legislating and conducting oversight. The statute also specifies that credible evidence indicating that the Executive has engaged in unlawful conduct related to the subject matter of the information sought will always constitute a specific need. Significantly, the Act provides no justification for withholding from Congress information characterized as “state secrets” for national security reasons;⁹ nor does it permit the Executive to cite the so-called “deliberative process privilege” or the attorney-client privilege as grounds for withholding information from Congress. Although the Act strengthens Congress’s hand in each of these ways, it would provide protection to sensitive diplomatic or law enforcement information if its disclosure is likely to cause harm.

This new standard advances executive privilege law along two dimensions. As an initial matter, it eschews the ad hoc, case-by-case balancing of Congress’s and the President’s competing interests envisioned by existing case law. In other words, it rejects the need to analyze whether each particular congressional need for disclosure outweighs each particular executive need for nondisclosure. Instead, for example, the statute’s rules establish categorically the appropriate balance between the executive branch and Congress, establishing that “presidential communications” are presumptively privileged, but if needed for Congress’s constitutional duties, such as lawmaking or oversight, must be disclosed without further consideration of whether the particular need for disclosure outweighs the particular need for nondisclosure. This will facilitate the development of a more stable, predictable legal regime. But, more fundamentally, by establishing a balance that ensures that Congress will be able to obtain information “in a manner that preserves [Congress’s] essential functions,”¹⁰ it also guarantees that Congress will be able to fulfill its constitutional duties and to serve as an effective check on executive power.

The statute’s chosen balance reflects a particular understanding of the relative weight of the interests at stake. While both Congress’s right to information and the President’s right to assert executive privilege are grounded in the Constitution, the burden placed on Congress by the withholding of *necessary* information is greater than the burden placed on the President by requiring disclosure. The Act’s standards regarding when the President’s zone of confidentiality must give way to congressional need recognize this distinction. At the same time, the Act refrains from impairing the Executive’s abilities to carry out its own constitutional obligations. In so doing, the Act remains a constitutional exercise of Congress’s powers.¹¹

Third, the Act expressly authorizes Congress to submit executive privilege disputes to the federal courts, but only when inter-branch negotiations have proved unsuccessful and a majority of the House or the Senate votes to authorize itself, or one of its committees or subcommittees, to file a specific suit. The statute thereby eliminates obstacles to judicial review that have interfered with

efforts to secure judicial resolution of executive privilege conflicts in the past. Consequently, the Act should enable the parties to secure timely decisions. Moreover, the promise of judicial review, in combination with the creation of clear standards, will promote more productive negotiations over executive privilege disputes, obviating the need for litigation in many conflicts.

Finally, the Act makes some other important changes to the status quo:

- *Executive branch officials must appear in person:* The Act makes clear that subpoenaed witnesses must appear in person before Congress and raise the President’s executive privilege assertion only in response to specific questions.¹²
- *“Privilege logs” must be produced:* The Act provides that all subpoenaed individuals who possess non-testimonial information over which the President has asserted executive privilege must provide Congress with a “privilege log”—an index of the information withheld, detailing for each item on the list the reason the privilege applies.
- *Cases will be heard by three-judge courts:* The Act submits civil suits challenging presidential assertions of executive privilege to three-judge panels at the district court level, with direct appeal to the Supreme Court.
- *Transition from one Congress to the next will not make a case moot:* The Act ensures that courts will not employ the doctrine of “prudential mootness” to dismiss a suit brought during one Congress when that Congress adjourns at the end of its two-year term.

Together, these elements of the Act combine to reduce uncertainty, balance the needs of Congress and the Executive, and assure prompt and accurate final resolution of information disputes.

Executive privilege periodically flares up on the political radar when high-profile disputes arise. While controversy lingers, it is difficult to see past the partisan positions of that moment. But as controversy fades, too often so does interest in seeking long-term solutions. And the last several years have shown that grave problems can arise in our federal government when official secrecy, and the reliance of the executive branch on its privileges, is permitted to stymie or distort democratic processes. Past generations have made the mistake of neglecting executive privilege law, allowing energy for needed reform to wane once particular controversies have passed. Today we have an opportunity to do better. In order to guard against the perils of official secrecy, we can install an enduring mechanism to balance the legitimate interests of the political branches, restore our constitutional norms, and strengthen the core value of democratic transparency.

INTRODUCTION: THE TROUBLE WITH “EXECUTIVE PRIVILEGE”

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 executive actions have continued without appropriate scrutiny or constraint.

Consider the ongoing stalemate between Congress and the Executive over allegations of politicization at the Justice Department. In the course of seeking to determine why several United States Attorneys were forced to resign en masse, Congress uncovered credible evidence that the Department of Justice had been commandeered by partisan operatives aiming to entrench their political allies by manipulating prosecutions.¹³ 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 congressional investigations at the White House door, even as he claimed he was not involved in the decisions being investigated. He ordered Karl Rove, former White House aide, Harriet Miers, former White House Counsel, and Joshua Bolten, then White House Chief of staff, not to honor valid congressional subpoenas—claiming executive privilege and immunity for his aides.¹⁴

THE MOST FAMOUS ASSERTION OF EXECUTIVE PRIVILEGE, OF COURSE, IS PRESIDENT NIXON’S DURING THE WATERGATE SCANDAL.

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,¹⁵ and when the Attorney General refused to pursue contempt prosecutions against them,¹⁶ the House Judiciary Committee—after obtaining the approval of a majority of the House—filed suit against Miers and Bolten, seeking to enforce the subpoenas in the federal courts.¹⁷

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 is privileged.¹⁸ Miers and Bolten appealed the decision, obtaining an order from the appeals court absolving them from any obligation to comply with the lower court’s opinion pending the outcome of the appeal.¹⁹ The appeals court, expressing hope that a new Congress and new President will be able to resolve the dispute without the aid of the courts,²⁰ delayed calendaring the appeal. As a consequence, despite the exercise of its subpoena power, a contempt citation, and enlisting the federal courts to aid its efforts, the Bush administration left office without providing Congress access to information it needs 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.

The Miers/Bolten example illustrates the remarkable fact that, despite urgent and legitimate congressional need for information from the executive branch, Congress has no effective mechanism for enforcing its informational rights. In the face of an Executive willing to stonewall, it is toothless.

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.²¹ This cover-up succeeded in concealing unlawful conduct for months, and eventually resulted in an historic political showdown that changed the face of American politics. Ultimately, the Supreme Court ordered disclosure pursuant to a grand jury subpoena, and the President acceded.²² 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.²³ The President declined to share the information, citing its sensitive and deliberative nature.²⁴ Congress pushed back, asking for a more responsive answer than this initial reply. 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. If Congress wanted to use the information it requested to determine whether or not to fund the proposed operation, the President's delay in responding rendered the information useless, despite the fact that ultimately it was provided without compromising national security. Congress was entitled to most of the requested information for the purpose of making funding decisions. But the widespread public support of the first President Bush's military action created a political environment in which congressional insistence on timely information-sharing was fruitless.²⁵

Still another example arose when the Defense Department canceled a contract with McDonnell Douglas Corp. to build the A-12 attack jet. 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. 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 contractor.²⁶ 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. 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.²⁷

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. And since the Defense Department’s accounting policies bear no relation to the President’s Commander-in-Chief responsibilities, there was never any valid basis for denying Congress the memorandum. Yet because the members of the President’s party on the 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 taxpayer’s expense.²⁸

These examples illustrate the perils of improper or overly expansive use of “executive privilege”—the President’s power, claimed to derive from the Constitution, to assert the right to withhold documents or information, even from a coequal branch such as Congress. Executive privilege is

intended to advance goals such as giving presidents a zone of confidentiality, and ensuring advisors’ candor. But these cases—and many others—show it can have pernicious effects as well. Sometimes the information comes out only after severely harmful policies have been implemented. Sometimes Congress succeeds in obtaining some or all of the information it seeks, but only after so much time has passed that the information no longer serves a useful purpose. 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 lead to grievous consequences.

THE MORE SUCCESSFUL THE
EXECUTIVE IS IN KEEPING
SECRETS, THE MORE FREEDOM IT
HAS TO ACT, WHETHER PROPERLY
OR NOT, AND TO RESIST REQUESTS
FOR DISCLOSURE IN THE FUTURE.
SECRECY THUS PERPETUATES ITSELF.

Today, misuse of executive privilege threatens the sound working of our constitutional framework. Our democratic government is based on a fundamental norm of “presumptive openness”²⁹ and a free flow of information.³⁰ But the federal executive branch, which is charged with carrying out the laws, has grown in leaps and bounds.³¹ 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 more 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.³² Secrecy confers power to act according to one’s own preferences and power to avoid accountability.³³ And 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 toward hiding relevant information, and encourage the Executive to develop a default position of nondisclosure. The result is a pattern of systemic over-classification³⁴ and under-disclosure.

Congress's oversight role, rooted in the Constitution and repeatedly confirmed by the Supreme Court,³⁵ is an important if imperfect corrective to these pathologies of secrecy.³⁶ Absent Congress's oversight activities, the executive branch could operate without check by essentially determining unilaterally the bounds of its own secrecy.³⁷ For Congress to carry out its oversight role effectively, it must have access to sufficient information. The more successful the Executive is in keeping secrets, the more freedom it has to act, whether properly or not, and to resist requests for disclosure in the future. Secrecy thus perpetuates itself.

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 of information it urgently needs. The Miers/Bolton controversy, in which Congress possesses evidence that the Executive engaged in partisan manipulation of prosecutions but is still unable to obtain disclosure of essential information from the Executive, is a spectacular example of the phenomenon. Despite significant efforts, Congress has found no effective remedy.

But while the Miers/Bolton saga provides the starkest example of executive privilege dysfunction, as discussed above, it is certainly not the only example. Moreover, the problem is worse than even these examples suggest. Though the number of explicit "executive privilege" disputes that develop may be small, the number of information disputes between Congress 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. Despite a subpoena and a contempt citation, executive officials continued to refuse to turn over the documents, but the President did not assert executive privilege. 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.³⁸ 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?³⁹

Congress's awareness of its inability to overcome the privilege likely shapes—and limits—congressional inquiries. This is especially true in areas where the Executive is more likely to resist disclosure. For example, the Bush White House limited its disclosure about many of its counterterrorism efforts—from its secret warrantless domestic surveillance program to interrogation

and rendition policies—to a few select members of Congress. These legislators were barred by the Administration from alerting their colleagues or staff to the existence of the programs. Most members of Congress never knew that information related to its intelligence oversight responsibilities was being withheld and thus failed to demand it, and the ones that did know recognized the futility of pressing their requests. Eventually, some of the memoranda supporting the programs leaked out through the media, and some were supplied as part of an effort to enlist congressional support for a new surveillance statute. President Bush never had to assert executive privilege explicitly with respect to these memoranda. But nor was Congress ever able to demand to see them.

In fact, national security is perhaps the most vulnerable area of policy-making when it comes to the dangers of excessive secrecy, and thus limiting the use of executive privilege in this area is especially important. Some secrecy is often required for security reasons. But once we concede some degree of secrecy, policing the extent of that secrecy becomes a challenge.

History shows that on many occasions, the intelligence community has egregiously abused executive power, and then hidden these abuses.⁴⁰ The list of deeply troubling policies is long, and it has only grown since 9/11: the misuse of domestic surveillance powers exposed by the Church Committee in the 1970s; the circumvention of Congress's ban on support to anti-communist guerillas in Nicaragua, known as the Iran-Contra affair; and, most recently, the CIA's use of abusive interrogation tactics and its outsourcing of torturous interrogations by transferring detainees to countries with a history of employing torture; and the National Security Agency's (NSA) domestic warrantless surveillance program.

Yet the post-9/11 era has also seen a dramatic curtailing or hobbling of congressional oversight mechanisms over national security activities.⁴¹ For example, the White House has sometimes limited congressional briefings to a "Gang of Eight," which not only limits who sees details of security policies, but also ensures that those who do get details are effectively prevented from doing anything about violations of the law.⁴² This limitation—which has the effect of crippling effective oversight—is justified in the name of secrecy.

In the national security context, therefore, striking a proper balance between sufficient information flow to policymakers and the safeguarding of sensitive information from needless disclosure becomes especially important. The use of executive privilege to withhold necessary national security information from Congress does harm to effective policy-making and to the nation's security.

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 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 report demonstrates that the

structural flaws inherent in the way executive privilege now functions prevent consideration of the most important question—whether disclosure is warranted. These structural flaws include the lack of clear standards governing the use of executive privilege leading to overreliance on political factors; bias toward the Executive stemming from its monopoly 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. As executive power increases, it becomes ever more important to address these failings.

This report proposes a draft statute designed to stem this government dysfunction: The Executive Privilege Codification Act—reproduced in the Appendix to this report—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. By reducing uncertainty, the statute will also promote the informal resolution of disputes without resort to the courts.⁴³ The result will be 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.⁴⁴ Only with the Watergate crisis of the 1970s did the 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.⁴⁵

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.⁴⁶ Instead, the Court said, the privilege is a “*qualified*” one:⁴⁷ 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.⁴⁸ 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] claim of privilege” as much as with respect to any other matter of law.⁴⁹

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 have 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. 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 of the requested documents would be provided to the Committee.⁵⁰ 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.⁵¹ These negotiations are often relatively uneventful and without rancor.

CONGRESS’S POWER TO ACQUIRE INFORMATION IS PART AND PARCEL OF THE POWER TO LEGISLATE, AND IS “AS PENETRATING AND FAR-REACHING AS THE POTENTIAL POWER TO ENACT AND APPROPRIATE UNDER THE CONSTITUTION.”

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/Bolten example shows, even overwhelming congressional need can be insufficient to enable Congress to obtain information from the Executive.

To be sure, the current scheme has endured for many years and has its champions,⁵² but it frequently fails to produce timely 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,⁵³ and

is “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”⁵⁴ Congress’s right to investigate in pursuit of its oversight role is similarly broad. “It 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.”⁵⁵ 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.⁵⁶ 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 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 President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends”⁵⁷ 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 decision-making process.”⁵⁸ 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.”⁵⁹ 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.⁶⁰

In addition to this “generalized interest in confidentiality”⁶¹ 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 “intra-governmental deliberations”; information regarding “law enforcement actions”; and “diplomatic, military, or sensitive national security secrets.”⁶² And, in certain contexts, the courts 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, for example when a third party's secrets are at stake. But these interests are quite different from the confidentiality interests at issue when executive privilege is asserted over "presidential communications," which concern only a President's own secrets. 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.⁶³

Second, responsibility for making and for 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."⁶⁴ The impartial enforcement of laws thus requires some insulation from legislative pressures.⁶⁵ 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."⁶⁶

Disclosure of sensitive diplomatic information may risk undermining the confidence other nations have in the U.S. 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.⁶⁷ The concern here is not that Congress cannot be 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 concern with confidentiality, however, cannot be extended to information about signed treaties' purposes and effects when the Senate is considering the treaty for ratification. The President cannot expect the Senate to ratify a treaty he has signed absent this information.

This report 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.⁶⁸ 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.⁶⁹ The need for *absolute* confidentiality within government is, at best, overstated.

Congress's need for information on national security is indeed often *greater* than its need for information in other areas. Facts about national security policies are, often for good reason,⁷⁰ more shrouded in secrecy than details of policies in, say, health or education. Because public debate necessarily cannot play the catalytic role in security policy development that it does elsewhere, the public relies more heavily on Congress to scrutinize the wisdom of national security policy, and to ensure that the government is not infringing on constitutional or statutory rights. Acknowledging the centrality of Congress's role in ensuring effective and accountable government in this area is an important aspect of the executive-privilege analysis.

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*.⁷¹ 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.⁷² But disclosure to Congress is not the equivalent of public disclosure.⁷³ 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,⁷⁴ 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. To ensure that sensitive information is adequately protected, Congress has implemented policies to protect classified information.⁷⁵ Leaks, purposive or otherwise, are more likely to come from the executive branch than from Congress. Fears of congressional leaking on which executive-power proponents rely are overblown.⁷⁶

C. PROBLEMS WITH THE CURRENT SYSTEM FOR RESOLVING EXECUTIVE PRIVILEGE DISPUTES

Congressional-executive negotiations over the Congress’s requests for information are influenced by a broad range of factors—including, for example, 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. However, under our current system, there is no assurance that either branch will consider the factor potentially most important to the 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 necessary to enable it to perform these functions, the other factors alone should not dictate whether the information is disclosed. Considering again the Miers/Bolten example, we see that Congress’s overwhelming interest in disclosure did not dictate the outcome of the dispute.

The current system’s inability to produce a satisfactory resolution in the Miers/Bolten controversy is not an isolated incident. It is the product of structural problems that permeate *all* executive privilege disputes. *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 rely only on political factors, thus marginalizing consideration of the branches’ more fundamental constitutional interests. *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 information⁷⁷—has created a systemic bias in favor of the Executive that Congress’s tools for forcing disclosure are insufficient to overcome and thus likely results in significant under-disclosure. *Third*, the branches disagree on the scope of the privilege. This makes conflict likely, if not inevitable. And *fourth*, in the absence of clear, enforceable guidelines, executive efforts to expand inappropriately the zone of confidentiality are all too common.

1. Lack of Clear Standards Leads to Overreliance 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. Such enormously important matters as congressional oversight and responses to, say, the politicization of U.S. Attorneys or the mass warrantless surveillance of the American public, may therefore hinge on the configuration of political forces at the time Congress seeks the relevant information.

CONGRESS'S TOOLS ARE INSUFFICIENT TO OVERCOME THE EXECUTIVE'S INFORMATION MONOPOLY.

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"⁷⁸ and the long-term interests of the branch of government to which they belong.⁷⁹ Legislators often decline to advance Congress's constitutional interests if they share partisan affiliation with the White House's occupant.⁸⁰ 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,⁸¹ 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.

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. The current system ignores the way that the dynamics created by the Executive's information monopoly combine with the inadequacy of Congress's tools to overcome that monopoly to favor under-disclosure.

Consider first the central importance of the executive branch's monopoly on much information.⁸² For 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. 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.⁸³ 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. Recent examples include President Bush's decisions both to declassify select portions of the National Intelligence Estimate on Iraq to provide support for going to war in 2003⁸⁴ and to describe the post-9/11 warrantless surveillance program as applying only to communications that had some connection to al-Qaeda.⁸⁵ Selective disclosures in each of these cases were designed to alter public perception and to bolster support for President Bush's preferred policies. Though evidence later revealed that the Bush Administration had failed to disclose the full story in each of these cases, Congress could not rebut these selective leaks or disclosures. The Executive's control over information thus provides the very tools to perpetuate its monopoly by using information only it has access to as a means of staving 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. While all of these tools may be applied to attempt to compel the Executive to disclose information,⁸⁶ each is problematic, either because it is ineffective or counterproductive.

First, all extract a significant toll in political capital, sometimes more than Congress possesses, or more than it is able to spend.⁸⁷ The cost in political capital can be especially high in the national security arena, where the Executive has argued—spuriously but successfully—that it

ought to have a monopoly on policy, and where the rewards for legislative diligence are weak. The President's detention and interrogations policies present one example. When the Supreme Court invalidated the President's initial military-commissions scheme,⁸⁸ Congress could have refused to enact any law authorizing military commissions until the President disclosed to Congress the memoranda justifying "enhanced interrogation tactics." Instead, Congress simply passed the Military Commissions Act, providing congressional approval for the President's desired military commissions. This may have simply reflected Congress's reasoned policy judgment. But seeming to oppose needed national security measures—even if that opposition is merely a temporary effort to secure relevant information—exact a political toll.

Second, to exercise its powers, Congress must overcome the significant challenges to collective action that plague all legislative decision-making.⁸⁹ 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.⁹⁰ When Congress most needs information—because it knows little or nothing about secret activity within the executive branch for which there have been no public signals of any problem—is precisely when Congress most lacks both political capital and incentive to compel disclosure. Yet if the information would reveal malfeasance, public support for Congress's active pursuit of an investigation might *become* considerably more intense. Until that information becomes public, Congress may lack sufficient support to maintain the political will necessary to employ the tools at its disposal.⁹¹

To make this problem concrete, consider that before the *New York Times* broke the story of the NSA's domestic warrantless surveillance activities,⁹² Congress would have had little basis for intrusive inquiry into what the NSA was doing, or the related question of what surveillance Justice Department lawyers had authorized. It was only when the press published its initial information about the controversial program that legislators gained sufficient leverage and the political capital to hold hearings and demand additional information. An executive branch successful in maintaining confidentiality is thus also successful in maintaining a political environment that facilitates nondisclosure.

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. Contempt citations, or threats of contempt citations, have succeeded in securing congressional access to disputed information, for example, from then-Secretary of State Henry Kissinger on CIA covert actions;⁹³ from President Reagan's Secretary of the Interior James Watt on Canada's treatment of U.S. mineral investors;⁹⁴ from President Clinton's White House Counsel Jack Quinn on the firings of several White House Travel Office employees.⁹⁵ 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.⁹⁶ Since 1984, the Justice Department’s Office of Legal Counsel (OLC)⁹⁷ 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.”⁹⁸ Because the Justice Department will not proceed 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 1982⁹⁹—contempt citations lack the force they once had to resolve information disputes between Congress and the Executive.¹⁰⁰ Unless a contempt citation prompts a compromise resolution of its own force—which might happen, for example, if it generates sufficient public pressure for disclosure—it is an empty gesture.

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.¹⁰¹ But use of this power is as problematic as Congress’s other tools.¹⁰² A contemnor can be held only until the end of the current session of Congress.¹⁰³ And

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.¹⁰⁴ Thus any use of inherent contempt powers against executive officials likely will give rise to protracted litigation over the constitutionality of such actions. Most importantly, inherent contempt is unseemly, cumbersome, disruptive of Congress’s ability to carry out its other pressing duties,¹⁰⁵ and requires an inordinate expenditure of political capital.¹⁰⁶ 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 1935¹⁰⁷—and remains unwieldy.

Civil legal actions are also an insufficient remedy given the procedural barriers that they currently face.¹⁰⁸ Courts, in an effort to avoid confronting the momentous constitutional questions that they present, have evinced reluctance to adjudicate congressional-executive information disputes.¹⁰⁹ Moreover, even when courts are willing to weigh in, civil suits often involve extended litigation over threshold issues of standing and jurisdiction, significantly delaying any ruling on the merits. By the time a ruling is obtained, the information sought may no longer be useful. There is thus no guarantee of a satisfactory judicial resolution even if Congress were to seek one.

CONGRESS’S POWERS TO
SECURE INFORMATION FROM
THE EXECUTIVE OFTEN
FAIL IN THE FACE OF
EXECUTIVE INTRANSIGENCE.

Even if Congress were to prevail using one of these tools, the Executive can still delay long enough to overcome the pressure to disclose. Recall, for example, that when Congress requested access to information regarding Operation Desert Storm, it eventually received much of the information it had asked for. But negotiations and a claim of executive privilege that ultimately was withdrawn allowed President Bush to delay disclosure long enough that Congress was unable to use the requested information in its decision-making process.¹¹⁰ The Executive can resist at any phase of negotiation by ignoring requests or complying only partially with them, or by shifting bargaining positions.

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 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 has in the Miers/Bolten case, each subsequent Executive realizes that Congress is toothless in the face of an Executive unwilling to compromise on disclosure. Moreover, these obstacles to disclosure likely discourage Congress from initiating or pursuing even valid information requests. The result dramatizes the deficiencies of the current system which, even when it yields resolution, does so in a way that undervalues Congress's need for information.

The ineffectiveness of congressional information-forcing political tools is especially evident in the national security arena. Mustering sufficient political capital to employ political tools means marshalling public support for a tactic—an inherent contempt trial or a restriction on funding a particular executive agency—that seems drastic in a context where any disagreement with the Executive has traditionally been treated as tantamount to heresy. Because national security-related information often will be classified and thus subject to distribution limitations, the public will remain unaware of the program as well as any struggle over information about it. Under these circumstances, Congress simply will not be able to rally the necessary public support to compel executive compliance via political tools.

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.¹¹¹ So while each branch, internally, may possess a relatively well-developed opinion of when executive privilege may be asserted validly, 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.¹¹² 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, 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.¹¹³

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.¹¹⁴ Indeed, the Justice Department uses this very concern to suggest that presidents not permit presidential aides to testify before Congress.¹¹⁵ Moreover, because each branch has become accustomed to viewing its own position as the governing rule, each side is convinced of the merits of its own position. Absent a neutral decisionmaker, neither has a principled reason to acquiesce in the other's position.

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.¹¹⁶ But while Congress views its right to information as equal in either circumstance,¹¹⁷ 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."¹¹⁸ 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 whether Canada was entitled to reciprocity under the Mineral Lands Leasing Act was based at least in part on the conclusion that the inquiry was based solely on Congress's oversight powers.¹¹⁹ This position appears to be based on dicta from the District of Columbia appeals court, which in fact hardly supports such a rule.¹²⁰ But with such different starting positions, it is no wonder that conflict sometimes results.

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,"¹²¹ and the President may direct those advisors who "are an extension of the President... 'not even to appear before the committee.'"¹²² 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.¹²³ In the past, presidential aides have acquiesced in some congressional requests for testimony while resisting others.¹²⁴

Even if the parties could agree on the history relevant to a particular dispute, it would not facilitate the resolution of disputes since each negotiated settlement between the branches is the result of the unique political and factual environment in which it was reached. It thus tells us nothing about the proper balance between disclosure and nondisclosure in the current dispute. For example, in a Clinton-era struggle over information about a White House decision to fire several White House Travel Office employees, revelations of improper executive scrutiny of the terminated employees' FBI files led President Clinton to abandon his executive privilege claim over the Travel Office documents.¹²⁵ The disclosure thus resulted from the political environment created by revelations of impropriety. Does this mean that future disputes over similar documents in a White House office also should necessarily result in disclosure? Hardly. So while examples of past resolutions are held out as guidelines for the dispute at hand, they in fact may or may not prove relevant.

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.¹²⁶ The White House's recent assertion of executive privilege over documents related to the EPA's decision to deny California permission to regulate emissions provides an example. 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. 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 presidential communication privilege.¹²⁷ 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.¹²⁸ As a result, presidents sometimes attempt to achieve the same results by other means¹²⁹—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.¹³⁰ When Congress requested an OLC memorandum regarding the FBI's authority to apprehend 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.” Since that time, other presidents have done the same with potentially controversial OLC memoranda.¹³¹ More recently, this approach has been used to shield from disclosure memoranda regarding the treatment of military detainees, the use of wiretapping, and the use of 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.”

JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES V. MIERS ET AL.

The ongoing showdown between the House of Representatives Judiciary Committee and former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten illustrates many of the intractable problems with our current way of resolving executive privilege disputes.

Congressional interest: The battle arises out of a Judiciary Committee investigation into the forced resignation in late 2006 of several federal prosecutors. The House sought testimony from Miers and documents from Bolten to pursue evidence that “decision[s] to fire or retain some U.S. Attorneys may have been based in part on whether or not their offices were pursuing or not pursuing public corruption or vote fraud cases based on partisan political factors,”¹³² and if the evidence was accurate, whether White House officials had been involved. It was a classic example of a legitimate congressional need for information.¹³³

Executive interest: The President, despite initial indications that he was not personally involved in the decision to force the prosecutors to resign,¹³⁴ nevertheless asserted executive privilege over information related to that decision. On its face, this appears paradoxical, or an attempt to expand executive privilege’s reach to cover areas it has not and should not reach¹³⁵ in an effort to hide incompetence or wrongdoing.

After months of negotiations to secure the requested documents and testimony on a voluntary basis reached an impasse,¹³⁶ the House Committee subpoenaed Miers and Bolten.¹³⁷

Divergent legal understandings: On the basis of a presidential assertion of executive privilege and the executive belief that close presidential aides are immune from congressional process, Miers was instructed not to appear at the hearings to which she had been subpoenaed and Bolten was instructed not to provide the requested documents.¹³⁸ The Committee rejected the privilege and immunity claims made on behalf of the White House, maintaining that both Miers and Bolten were obligated to comply with the congressional subpoenas and that the requested information was not privileged.¹³⁹

Partisan response: The House of Representatives voted 223-32 to hold Miers and Bolten in contempt of Congress.¹⁴⁰ The tally of votes against the contempt citation is so low only because most congressional Republicans walked out of the House chamber in protest against the vote.¹⁴¹ Contrast the last time Congress held an executive branch official in contempt. When Congress held President Reagan’s then-EPA Administrator Rita M. Lavelle in contempt in 1983, the vote was 413-0.¹⁴²

Ineffectiveness of Congress’s Tools: The Attorney General, pursuant to Justice Department policy,¹⁴³ refused to proceed against Miers and Bolten on the contempt charges.¹⁴⁴ Nor did the contempt resolution itself prompt any efforts at compromise.

Ultimately, the House sought relief through the unusual step of filing a civil suit against Miers and

Bolten seeking a judicial order requiring them to comply with the terms of their subpoenas.¹⁴⁵ The district court fully endorsed the House’s position, holding that Miers was obligated to appear before the Committee, and that Bolten must provide all non-privileged documents and catalog the reasons for withholding any documents labeled as privileged.¹⁴⁶ But the appeals court stayed the district court’s order pending the defendants’ appeal, ensuring that the issue would remain unresolved until a new Congress and a new President were in place.¹⁴⁷

Despite Congress’s not insignificant efforts—through the first contempt citation of an executive official in over twenty years and the filing of a civil suit—President Bush leaves office with this particular executive privilege dispute still unresolved. Congress is thus deprived of the opportunity to take any necessary remedial action and accountability for those responsible for any wrongdoing is, at best, delayed.

The lack of guidelines or enforcement mechanisms encourages this second means of expanding executive secrecy in indirect ways. Regularization of the use of executive privilege through codification of clear standards and congressional ability to enforce those standards would aid in undoing the negative connotations with which past abuse has imbued it. Consequently, presidential invocations of executive privilege would not automatically trigger implications of wrongdoing and presidents might be less reluctant to assert it in appropriate circumstances. They would therefore not need to find other, less well-defined ways of maintaining secrecy.

Moreover, 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 in 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 convincing. Ensuring that assertions of executive privilege are subject to proper checks 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.

The status quo—a Congress unable to overcome assertions of executive privilege and other methods employed by the Executive to preserve secrecy—disserves the long-term interests of the nation in empowering its legislature to engage in its constitutional responsibilities. It exacerbates the risk of fraud, waste, abuse, and the implementation of imprudent policy.

II. ADDRESSING EXECUTIVE PRIVILEGE’S SHORTCOMINGS

This report urges the enactment of a statute—the Executive Privilege Codification Act—to solve the problems with executive privilege. As discussed in detail below, 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. Not only does Congress have the power to enact such a statute, but doing so would go far toward remedying the problems that the current method of resolving executive privilege disputes presents.

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 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,¹⁴⁸ the Foreign Intelligence Surveillance Act,¹⁴⁹ the Freedom of Information Act (FOIA),¹⁵⁰ and the Presidential Records Act¹⁵¹ 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 clearances¹⁵² and to disclose national security-related information to the congressional intelligence committees.¹⁵³ No serious question has ever arisen as to the constitutionality of any of these statutes.¹⁵⁴ 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,¹⁵⁵ the privilege is not absolute.¹⁵⁶ 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 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* framework¹⁵⁷—its “lowest ebb.”¹⁵⁸

Even *Department of the Navy v. Egan*,¹⁵⁹ the Supreme Court case frequently relied upon by the Executive to claim that national security-related information may not constitutionally be regulated by Congress, supports this analysis. *Egan* did caution courts to tread carefully in the national security area—“unless Congress specifically has provided otherwise.”¹⁶⁰ Echoing the *Youngstown* framework, *Egan* supports the exercise of Congress's authority to regulate in the national security area. Moreover, *Egan* hinged on a question of statutory interpretation, not a determination of constitutional authority.

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.”¹⁶¹ 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. 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 any or all 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 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” 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. The “specific need” standard can be satisfied in any number of ways, but always will be satisfied when Congress shows that “credible evidence [indicates] that the Executive has engaged in unlawful conduct related to the subject matter of the information sought.”¹⁶² 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, moreover, provides Congress a viable means of 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.¹⁶³

In addition to facilitating the resolution of conflicts that do arise, the Act creates incentives to help prevent executive privilege disputes from even developing. The prospect of a guaranteed, prompt judicial determination would mitigate the problem presented by the fact that nondisclosure is 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 interbranch informational disputes.¹⁶⁴

UNITED STATES V. AT&T¹⁶⁵

Congressional efforts in the 1970s to secure information about the warrantless wiretaps of U.S. citizens illustrate how productive judicial intervention can be in resolving executive privilege disputes. A House subcommittee sought letters sent to AT&T by the FBI requesting electronic surveillance of certain individuals.¹⁶⁶ When efforts to reach a negotiated compromise failed, the subcommittee issued a subpoena for the documents.¹⁶⁷ President Ford instructed AT&T to “respectfully decline” to comply with the subpoena, but AT&T felt obligated to disregard this instruction.¹⁶⁸ The Justice Department then sued to prevent AT&T from producing the documents.

After the trial court granted the injunction, blocking Congress’s access to the documents, the D.C. Circuit reviewed the case. Rather than reach a definitive conclusion on whether AT&T had to provide Congress with requested information, the appeals court twice sent the case back to the lower court with instructions that the parties attempt to negotiate a settlement, the second time laying out in detail a possible compromise.¹⁶⁹ Following the second remand and instruction to negotiate, the parties settled. The *AT&T* cases illustrate the role the federal judiciary can play in facilitating the resolution of executive privilege disputes. While the case dragged on too long, judicial supervision was able to ensure a resolution.

The new 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.¹⁷⁰ Moreover, the statute requires the branches to exhaust negotiations before turning to the courts. These obligations reduce the likelihood that litigation will become the first step in executive privilege disputes rather than a last resort. By moving informational bargaining between the branches under “the shadow of the law,” the statute aims to promote productive bargaining.¹⁷¹ Moreover, by explicitly disclaiming, as the Act does, any precedential effect of negotiated resolutions, the statute adds additional flexibility, since neither side needs to fear that its position will later be used against it.

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 were this 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. So if the Executive's response to an information request is "see you in court," Congress's appropriate response would be, "fine." Over time, as the courts interpret the statute, and its guidelines are further clarified through judicial decision-making, the ability to adopt this "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 is likely to support such an approach.

Note that the Act's provisions presuppose two branches that both hope to reach a mutually satisfactory resolution. If either branch adopts a particular position for the purposes of establishing a precedent, the specter of judicial resolution may not be effective in prompting settlement. This was apparently the case in the controversy that resulted in a contempt citation for then-EPA Administrator Ann Gorsuch.¹⁷² The President and his aides hoped to create precedent for the proposition that an executive agency could withhold certain documents from congressional committees. Consequently, despite Gorsuch's willingness to turn over the requested documents, executive intransigence ensured that the dispute ballooned into one of the most contentious in recent memory. But in instances where both sides are engaged in a good faith effort to seek the mutually accommodating solution that the Constitution both envisions and requires,¹⁷³ the availability of a procedure to submit any intractable disputes to a neutral decisionmaker will create incentives that reduce the likelihood of stalemates.

There are already examples of how existing executive privilege law can affect interbranch 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.¹⁷⁴ 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.¹⁷⁵ 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 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 a legitimate concept rather than as a red flag for fraud or abuse.

C. THE PROPOSED STATUTE—PROVISION-BY-PROVISION

What follows is a discussion of the role and purpose of each of the statute’s provisions. These provisions articulate a clear standard, reinvigorate Congress’s ability to secure necessary information, and guarantee judicial review. Together, they provide predictability, encourage speedier resolution of disputes, and—most importantly—encourage proper information flow between the Executive and Congress.

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.”

This provision governs the first of two inquiries a court will make to determine if requested information may be withheld from Congress: whether the information is of a kind entitled to protection by the privilege. Only if the information falls within the scope of the privilege will a court move to the second question: whether Congress’s interest in obtaining the information suffices to overcome a presidential interest in secrecy. These inquiries are described in greater detail below.

Pursuant to the Act, 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.

1. Executive’s General Interest in Confidentiality of Presidential Communications

The Supreme Court has concluded that the President has a “generalized interest in confidentiality”¹⁷⁶ in a limited number of communications with direct advisors. Lower courts have devised guidelines governing when a particular communication is eligible for an assertion of executive privilege. This provision 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,¹⁷⁷ and between the President and his direct advisors.¹⁷⁸ 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 decision-making is of the highest caliber”¹⁷⁹ justified an incremental extension of the privilege to communications authored or “solicited and received”¹⁸⁰ “by members of an immediate White House advisor’s staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate.”¹⁸¹ This extension of the privilege to presidential advisors does not apply to executive staff outside the White House—e.g., cabinet department heads¹⁸²—or to communications unconnected to advising the President on his core constitutional duties.¹⁸³

Further, only White House advisors’ staff with “broad and significant responsibility for investigating and formulating the advice to be given the President” qualify.¹⁸⁴ Even the closest presidential advisors qualify only if the President is personally involved in the actual decision-making. “Communications never received by the President or his Office are” after all, “unlikely to ‘be revelatory of his deliberations,’”¹⁸⁵ 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”¹⁸⁶ duties qualify for the

privilege.¹⁸⁷ 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.’”¹⁸⁸

By contrast, courts have refused to shield communications related to decision-making vested only *by statute* in the President, or duties undertaken pursuant to the generalized “take care” clause of the Constitution.¹⁸⁹ The D.C. appeals court 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.”¹⁹⁰ The latter do not implicate the exercise of constitutionally committed presidential powers.

According to these rules, drafts of the President’s State of the Union address—a duty assigned to the President by the Constitution—prepared by his close advisors, even if they solicited ideas from outside the White House, would thus qualify for the privilege, while memoranda developed within the EPA regarding the implementation of the Clean Air Act—policies developed outside the White House and intended to implement a congressional enactment—would not. Similarly, advice supplied by the head of the President’s National Economic Council will fall within the scope of the privilege, while policy recommendations generated by the Justice Department attorney assigned to review pardon requests, and not solicited and received by White House advisors, will not.

In fact, information generated by executive or independent agencies rarely will be covered by executive privilege.¹⁹¹ All agencies are congressional creations, carrying out functions largely defined and delegated by the legislature. Congress has a right and a responsibility to ensure that they are carrying out the purpose for which they were established. To do so it needs free access to the information they generate.

Another category of information that cannot be considered privileged is legal opinions by the Department of Justice, such as opinions of the Department’s Office of Legal Counsel, that are binding on the executive branch or that provide the legal justification for executive actions or policies. Such opinions constitute the “working law” of the executive branch, and therefore are not entitled to any claim of privilege.¹⁹²

Once privilege is properly invoked with respect to communications that meet section 101’s parameters, the communication is presumed privileged.¹⁹³ The presumption of privilege may be overcome if Congress makes a sufficient showing of legislative need—a showing described below.

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

Claims of executive privilege stemming from the President’s need for candid advice—sometimes referred to as “presidential communications privilege” claims—are not the only ones recognized by this statute. Certain other kinds of sensitive information also should be presumptively guarded

from disclosure. This provision hence includes certain diplomatic and law enforcement material within the privilege's compass.

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 effect, the requested information must implicate the concerns that justify bringing such information within the scope of the statute in the first place. 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.”¹⁹⁴ 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.¹⁹⁵ Moreover, because the statute 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.¹⁹⁶ Determining whether such harms are implicated is the court's responsibility.

Whatever justification is advanced for an executive privilege claim, the court must review each disputed piece of information to ascertain if it in fact meets the necessary criteria for the privilege. Information that fails to qualify must be disclosed; information entitled to the presumption of privilege will remain confidential unless Congress is able to make the requisite showing of need under section 102.

The statute does not bring national security or military information inside the scope of executive privilege. The Constitution does not recognize national security as a sphere of exclusive presidential interest that warrants an informational bar on *Congress*. The Constitution shares responsibility for military and national security policy between Congress and the President.¹⁹⁷ And, 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. Consequently, the Executive does not possess any discretion to withhold national security information from Congress, and a privilege that may be asserted in court or in response to a request under the FOIA should not be available in response to Congress's legitimate requests for sensitive military or national security information.

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.¹⁹⁸ Other cases, such as those concerning the state secrets doctrine like *United States v. Reynolds*, support this recalibration in judicial proceedings.¹⁹⁹ 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.²⁰⁰ *Reynolds*' logic does not apply to information disputes between Congress and the Executive.

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 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.”

This provision sets out the second inquiry needed to determine if information may be withheld from Congress: whether Congress’s interest in obtaining information is sufficient to overcome the President’s interest in preserving its secrecy.

1. 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.²⁰¹ 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,²⁰² when that information “likely contains important evidence”; and when “this evidence is not available with due diligence elsewhere.”²⁰³

The proposed statute applies this test to the context of congressional requests for presidential communications in a way that mitigates the need for judicial discretion in evaluating any of its elements.²⁰⁴ There is no ad hoc balancing. Instead, under the Act, Congress must show that it has a specific need for the information in order to engage in its constitutional functions, including legislating or conducting oversight. Congress’s need for the information must be established, but once established, will categorically outweigh the Executive’s interest in nondisclosure.

Note that while Congress may demonstrate its specific need in any number of ways, section 102(a) overrules existing case law in providing that credible evidence of unlawful executive activity always will 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 about which evidence of illegality exists. Information that is merely peripheral or tangential to the evidence of illegality is not covered by this provision.²⁰⁵ Nor are allegations alone sufficient. Thus 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.

In a 1974 case, the D.C. Circuit court stated that suspicion of executive malfeasance is irrelevant to privilege determinations.²⁰⁶ Statements in other cases, however, suggest otherwise. The Supreme Court has thus held that Congress’s investigatory authority “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”²⁰⁷ This would suggest that

evidence of misconduct is a salient factor in the legitimacy of a congressional investigation—as it certainly should be. Another D.C. Circuit case, considering the scope of attorney-client privilege for government attorneys, also recognized the strong public interest in preventing privilege claims from shielding executive wrongdoing.²⁰⁸ Presidents, too, have endorsed this principle consistently.²⁰⁹ President Andrew Jackson, never one to favor a weak President, explained that:

[I]f the Congress could “point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose.”²¹⁰

And in practice, presidents have tended to waive executive privilege when faced with credible allegations of executive misconduct or illegality. During Watergate, President Nixon initially refused to allow his aides to testify before congressional committees,²¹¹ but eventually agreed to the unrestricted testimony of present and former White House staff. President Ford himself testified before Congress about his pardon of former President Nixon when suspicion surfaced that Ford and Nixon might have struck a deal: “the White House for a pardon.”²¹² More recently, President Bush withdrew an assertion of executive privilege over most documents that Congress had requested in an investigation relating to the FBI’s gross abuse of its authority in anti-organized crime efforts.²¹³ Of course, the Miers/Bolten case shows that presidents do not always abide by this principle, reinforcing the need for its statutory codification.

The statute hence codifies the unsurprising premise that credible allegations of unlawful activity undermine the legitimacy of a privilege claim. Faced with actual evidence of executive misconduct, Congress not only must ascertain whether any laws should be modified or enacted to prevent such misconduct, it also must restore public faith in institutions tainted by alleged impropriety by making a full accounting. Such evidence by itself thus provides Congress with a need for the relevant information.

In eschewing ad hoc balancing and instead focusing on congressional need, the Act limits the judicial role to determining, first, whether the disputed information falls within the scope of executive privilege, and if so, whether Congress has adequately demonstrated both its need for the information at issue and that it is otherwise unavailable.²¹⁴ This should alleviate the concerns of commentators who argue that congressional-executive information disputes are non-justiciable political questions because they “lack judicially discoverable and manageable standards for assessing the relative importance of a Congressional need for information and an Executive requirement of secrecy.”²¹⁵ This approach allows the parties to predict *ex ante*, with more certainty than a case-by-case balancing test can provide, how a court will resolve disputes. The parties need not guess, in each instance, how a court would evaluate the importance of Congress’s request as compared to the Executive’s desire for confidentiality. Under the Act, it is clear that so long as Congress can show that its request is made in pursuit of its constitutional duties and there is a specific need for

the information, Congress is entitled to the information. And if Congress cannot make such a showing, the information remains privileged and the Executive need not disclose it.

Note that section 102 reflects a particular understanding of the relative weight of the interests at stake. While both Congress's right to information and the President's right to assert presidential communications privilege are grounded in the Constitution, their centrality to the respective branches' abilities to carry out their constitutional duties are not necessarily equal. Instead, the burden placed on Congress by the nondisclosure of *necessary* information is far more problematic than the burden placed on the President by disclosure. Put another way, information is the lifeblood of Congress's constitutional responsibilities, including lawmaking and oversight. Absent the necessary information, the legislative branch cannot perform its functions. On the other hand, such a disclosure rule imposes a much smaller burden on Article II functions. Some advisors would be freer with candid advice if assured of confidentiality—although they are never absolutely assured since the President can, at any time decide to disclose. But even absent such assurances, presidential aides will continue to advise the Executive. The President will not be barred from carrying out his constitutional obligations in the same way that Congress would be impeded by the denial of necessary information. The Act's standards defining when the President's zone of confidentiality must give way to congressional need are designed to reflect this distinction.

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*,²¹⁶ 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, that interest was described as "cumulative" because the tapes already had been turned over to the House Judiciary Committee; second, the court identified "no specific legislative decisions ... [that could not] responsibly be made without access to materials uniquely contained in the tapes;"²¹⁷ and third, that congressional investigations have no need to reconstruct past events.²¹⁸

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 congressional committee exerts responsibility over a specific jurisdiction, such jurisdictions often overlap. Moreover, the House and the Senate have different constitutional roles that also might lead to legitimate needs for the same information.²¹⁹ *Senate Select Committee* thus erred in treating congressional committees as fungible.

Moreover, committees may seek the same information for different uses. 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 NSA'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.

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."²²⁰ 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."²²¹ Congress's oversight interests were simply not at issue. The decision rests "not upon any purported difference between Congress's oversight and legislative functions,"²²² but on the erroneous conclusion that "merely cumulative" requests are necessarily inadequate to overcome the privilege.²²³ The Executive's contrary reading of the case is a stratagem designed to expand inappropriately the bounds of permissible nondisclosure.

Congress's power to investigate is inherent in its power to legislate and is equally capacious.²²⁴ Oversight investigations undertaken pursuant to Congress's authority "to expose corruption, inefficiency or waste"²²⁵ 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.

And 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. *Senate Select Committee's* implication that the legislative branch need never reconstruct past events is thus inaccurate. What may be less obvious is that 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. As the investigation into politicization of the Justice Department or the revelations of the Church Committee illustrate, 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.

Notwithstanding its recognition of the primacy of Congress's need for information and permitting Congress to overcome executive privilege by showing evidence of unlawful executive conduct, 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.²²⁶ With such potential congressional 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. Thus subpoenas could not be used merely to harass White House staff when the information the subpoena seeks is available from a source outside the White House. 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.

To illustrate how these standards would play out, consider the following hypothetical situations:

- 1) Congress delegates broad authority to the Treasury Department to take steps to address major breakdowns in the U.S. financial system. Some members of Congress want the Treasury Secretary to use that authority to provide multi-billion dollar loans to failing auto manufacturing companies. The Treasury Secretary declines to issue the loans. Under the Act, if Congress wanted to know the reasons for the decision not to issue the loans, it could demand that information from the Treasury Secretary—that information is not presumptively privileged under section 101 as it arose solely within an agency and concerned the implementation of a statute. In testimony before Congress, the Treasury Secretary indicates that he declined to loan money to the auto manufacturers because he did not believe the loans would solve the companies' problems, would never be repaid, and would thus be a waste of taxpayer dollars. When asked whether the White House was involved in the decision, the Treasury Secretary says that he discussed the matter with the head of the President's National Economic Council, who he assumes discussed it with the President. If Congress then sought to subpoena the head of the National Economic Council to discover the contents of his

conversation with the President, it could not force disclosure under this statute. The communications between the President and his advisor are presumptively privileged under section 101. And because the decision whether to issue the loans rested with the Treasury Secretary, who already provided Congress with the reason for his decision, Congress has already obtained the information it sought, thus failing to satisfy the requirement that the information be “not otherwise available.” Moreover, Congress would be unable to articulate a constitutional responsibility that it was attempting to carry out for which it had a “specific need” for the contents of any conversation between the President and the head of his National Economic Council. For Congress to consider effectively any modifications to the powers it had allocated to the Treasury Secretary or to conduct oversight of how the money Congress had appropriated to use in addressing the financial crisis was being spent, it would need no further information than the Treasury Secretary himself was able to provide. Its constitutional responsibilities form the basis of no legitimate need for the contents of the President’s conversations with his advisors. Congress could thus obtain the information it needs regarding how its statute is being administered, but could not force disclosure of the President’s confidential discussions of economic issues with his close White House advisors.

- 2) In a conversation between the President and several of his close White House advisors, a vigorous debate ensues regarding whether the upcoming State of the Union address should identify health care reform or energy policy as the President’s first priority for the upcoming year. The President decides the speech should focus on energy policy, and it does. After the State of the Union is delivered, some members of Congress, who believe that health care reform should dominate the policy-making agenda, want to know who advocated for prioritizing energy policy above health care and why. The statute would not permit Congress to enforce a subpoena against the President’s advisors to get that information. As an initial matter, the conversations between the President and his close White House advisors would be presumptively privileged under section 101. Under section 102, Congress would be unable to articulate a reason that it would need that information to perform its constitutional responsibilities. Congress has no legitimate interest in determining how the State of the Union was drafted or how the President decided what it would include. That is the President’s constitutional obligation in which Congress has no role.
- 3) Similarly, Congress would have no authority to subpoena information about how the President and his White House advisors reached a decision to issue a pardon. As noted above, however, the statute would not shield from disclosure communications drafted by the attorney(s) within the Justice Department charged with reviewing pardon requests and making recommendations, as long as those communications were not solicited and received by White House advisors.

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

While the proposed statute's most important reform is its recalibration of the congressional-executive balance in the context of the presidential communications privilege, section 102 also strikes a balance with respect to the protection of law enforcement files and diplomatic information. Valid legislative information requests must flow from investigations into proposed legislation or legitimate oversight.

Both law enforcement and diplomatic negotiations—though not all foreign policy activities—are traditionally executive branch functions.²²⁷ 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,²²⁸ 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 Congress also has authority “[t]o regulate Commerce with foreign Nations,”²²⁹ 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.²³⁰ 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 implementing remedial action.²³¹

Unlike the President's generalized interest in confidentiality, which protects intra-executive confidentiality, the interests in nondisclosure of presumptively privileged law enforcement and diplomatic material stem from other concerns—individual privacy, prosecutorial integrity, and the maintenance of diplomatic relations. Such interests remain even when Congress has articulated a legitimate need for material. And they are sufficiently weighty that, even when Congress's need for information enables it to overcome the presumption of privilege, the information that qualified the material for the privilege presumption should, if feasible, be redacted or summarized or otherwise conveyed in a way to protect the sensitive information. If, however, there is no means of conveying the information that Congress needs without also disclosing to Congress the sensitive elements of the material, such disclosure is warranted.

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 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.

As discussed previously, military or national security matters—another area traditionally staked out as one where the Executive has broad discretion to withhold information—should not be subject to privilege claims when considering disclosure to Congress. Section 116 does recognize, however, that when classified information is disclosed to Congress, Congress is obligated to take appropriate measures to protect that information from improper public disclosure.

The executive branch considers another category of information subject to executive privilege that this statute does not recognize: intra-governmental deliberative material. Like military and national security information, communications among executive branch officials in the regular conduct of their jobs would not be entitled to privileged status vis-à-vis Congress. Memoranda or emails exchanged between officials at, for example, the Department of Energy, because they are too far removed from presidential decision-making, would not be protected from disclosure to the Congress by executive privilege. Of course any intra-governmental deliberations that satisfy the requirements of the presidential communications privilege defined in Section 101 would be eligible for the presumption of privilege and Congress would need to articulate the requisite need to compel disclosure. But communications that do not qualify for the privilege under Section 101 could not be withheld from Congress.²³²

Attorney-client privilege is also sometimes considered an element of executive privilege. Like deliberative process, however, the statute declines to recognize executive assertions of attorney-client privilege in response to congressional information requests. While this privilege has independent application in the context of litigation involving the government and in response to FOIA requests by members of the public, even according to the Executive it is not generally considered to be distinct from the executive privilege in any dispute between the executive and legislative branches. The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for information.²³³

Whatever the rules may be regarding public disclosure of deliberative or attorney-client material, those limitations should not apply in the congressional context. This means, among other things, that the Executive may not invoke the attorney-client privilege to deny Congress access to OLC memoranda setting out the Executive’s understanding of the 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.”

A formal, written policy within the executive branch will have several salutary effects. Most importantly, certainty for officials of both branches will promote smooth interaction between the requesting committees and the agencies from which they request information on a regular basis. In addition, policies developed while considering information sharing in the abstract are likely to produce guidelines that make more sense as a general matter; rules or practices developed in the context of a particular dispute, on the other hand, are likely to be skewed to produce particular outcomes. The increased certainty created by clear policies also will reduce the number of disputes that arise.²³⁴

A formal executive policy would not be without precedent. The extremely aggressive use of executive privilege by the Eisenhower administration²³⁵ prompted Congress to demand the articulation of clear executive privilege policies during the Nixon Administration.²³⁶ Since that time, several—though not all—presidents have articulated formal policies governing the assertion of executive privilege.²³⁷ These policies have had varying success in actually governing an administration’s use of executive privilege.

The policy implemented by President Reagan provides a good starting point.²³⁸ According to that policy, when a congressional request raises a “substantial question of executive privilege,”²³⁹ the head of an executive department shall consult with department counsel. And if that department-head believes that compliance with a congressional request raises a substantial question of executive privilege, he should consult with the Attorney General through the Office of Legal Counsel, who will then consult with the Counsel to the President. The department head, Attorney General, and Counsel to the President may present the issue to the President, who will then inform them of his decision.²⁴⁰

The policy must specify that executive privilege may be asserted only when the information at issue falls within the scope of executive privilege as defined in the proposed statute.

In addition, the policy also should include an instruction to executive officials to make all possible efforts to resolve disputes without litigation and to provide that assertions of privilege should be explicit since obfuscation undermines the perceived legitimacy of valid privilege claims. Once a formal policy is developed, it should not be revised upon each presidential transition; instead, it should remain in effect unless and until reasons to alter it arise.²⁴¹

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.²⁴²

“(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.”

Section 104(a) codifies the understanding, shared by both the Executive and Congress, that the exercise of executive privilege requires express approval by the President. This rule first emerged during the criminal trial of Aaron Burr.²⁴³ When District Attorney George Hay tried to prevent the admission into evidence of certain passages from President Jefferson’s correspondence, Chief Justice John Marshall resisted the request, instead stating that “[t]he propriety of withholding it must be decided by [President Jefferson], not by another for him. ... They must therefore be approved by himself, and not be the mere suggestions of another for him.”²⁴⁴ Congressional insistence on adherence to this policy has sometimes aided the resolution of potential disputes. For example, Congress insisted that only the President can assert executive privilege in the face of the FDA commissioner’s indication of his intent to assert executive privilege. When the White House decided not to assert executive privilege over the information in the FDA’s possession, all documents were subsequently produced to Congress.²⁴⁵ When President Reagan issued a formal executive privilege policy memorandum, this requirement was codified in regulations.²⁴⁶ It should be codified statutorily.

Section 104(b) requires a witness called to testify before Congress at minimum to appear at the hearing, testify, and assert executive privilege in response to particular questions.²⁴⁷ This

was precisely what Harriet Miers and Karl Rove declined to do. But when the Executive asserts executive privilege over information, Congress must make an independent determination whether to accept that claim of privilege as valid. To do so, Members need to know certain things about the allegedly privileged information.²⁴⁸ Only equipped with this knowledge—obtained solely through questioning of a witness—can they pass judgment on the legitimacy of the privilege claim.²⁴⁹ While they sometimes resist congressional invitations to testify, many White House aides have testified before congressional committees, many of them on multiple occasions.²⁵⁰

This provision thus rejects the executive branch’s long-held view that close presidential advisors cannot be compelled to appear before Congress.²⁵¹ This position is inconsistent with current understandings of the Constitution. It stems from a memorandum drafted in 1971 by William Rehnquist, then-Assistant Attorney General in the Office of Legal Counsel, which concludes that:

The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.²⁵²

Moreover, argues OLC, because separation of powers principles preclude Congress from compelling the President to appear before it, the President’s advisors—by virtue of their status as “an extension of the President”—also are immune from compelled congressional testimony.²⁵³

But this conclusion, as one court recently explained, has since “been virtually foreclosed by the Supreme Court.”²⁵⁴ Both the D.C. Circuit court and the Supreme Court have made plain that courts—and not the Executive—are “the ultimate arbiter of executive privilege.”²⁵⁵ It is thus settled law that an executive privilege claim cannot render even a President immune from subpoenas from a grand jury²⁵⁶ or a district court criminal proceeding,²⁵⁷ depositions in connection with a criminal trial,²⁵⁸ or civil suits arising out of his non-official actions even while in office.²⁵⁹ Subpoenas from Congress should be no different. And if the President himself may be subpoenaed, a claim that his aides can avoid that responsibility by the mere invocation of the executive privilege label is plainly implausible.

The Supreme Court has definitively rejected any extension of such absolute immunity to senior White House aides in other contexts too. While absolute immunity for civil damages arising out of their official duties has been granted to legislators, judges, prosecutors, and the President, the Court declined to extend that principle to presidential aides, instead holding that “qualified immunity represents the norm” for executive officials.²⁶⁰ Close presidential aides thus may not use “a claim of absolute *immunity* from compulsory process ... as a surrogate for the claim of absolute executive privilege already firmly rejected by the courts.”²⁶¹

The Rehnquist memorandum itself provides weak support for aides’ absolute immunity from congressional process. Rehnquist characterized his own conclusions about presidential advisors’ testimony as “tentative” and “sketchy,” based on “erratic” and “inconclusive” past practice.²⁶² Later

during the same year the memorandum was written, he testified before Congress that a subpoenaed executive-branch official would

be at least a compelling witness in the sense that he would have to respond to a subpoena the same way a witness does who seeks to invoke the privilege against self-incrimination. ... The fact that you plan to invoke the privilege of self-incrimination is not itself a basis for simply ignoring a subpoena.²⁶³

This was in plain contradiction to his earlier “tentative” conclusion. Whatever rhetorical force Rehnquist’s 1971 memorandum might have had at the time it was drafted, its reasoning now should be abandoned as grounded on a “discredited notion of executive power and privilege.”²⁶⁴ In testimony given at a 1973 hearing, then-Attorney General Richard Kleindienst made plain that the contention that the President could legitimately instruct his subordinates to ignore a congressional subpoena was based on a theory of absolute presidential discretion, the same theory rejected in favor of a qualified privilege by the Supreme Court in *United States v. Nixon*. At that hearing, Kleindienst said that “if the President of the United States should direct me or any other person on his staff not to appear before a congressional committee to testify or to bring documents, that he has the constitutional power to do so,” even if the subject matter of the testimony was a crime.²⁶⁵ That this entitlement was claimed for any member of the President’s staff and with respect to any subject matter reveals the extremity of the argument and its inconsistency with subsequent case law.

For substantially similar reasons, section 104(c) of this provision requires the Executive to provide Congress with a privilege log for any documents over which executive privilege is asserted. A privilege log is simply a list of documents withheld on the basis of privilege, which includes enough information about each withheld document to understand fully the basis for the Executive’s privilege claim. Requiring the Executive to provide one is no new suggestion. In the FOIA context, federal courts have developed a practice of requiring defendants to yield up a detailed list of requested documents with explanations for nondisclosure.²⁶⁶ This technique has already been applied in executive privilege cases.²⁶⁷ And the executive branch frequently follows a similar practice when faced with congressional information requests,²⁶⁸ though President Bush has refused to do so with respect to documents subpoenaed in Congress’s investigation of the U.S. Attorneys’ forced resignations.

A party asserting an evidentiary privilege in litigation generally bears the burden of demonstrating that it applies to the particular situation in which it is asserted.²⁶⁹ Executive privilege should be no different.²⁷⁰ Privilege logs, or their functional equivalent, are a familiar tool that may be used in carrying this burden. They also flush out improper claims of secrecy and narrow the issues under contention. This provision thus ensures that Congress obtains at least as much information from the Executive in assessing a claim of executive privilege as a private FOIA litigant would receive in a challenge to government secrecy.

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.”²⁷¹

This provision 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. There are, of course, constitutional standing requirements that Congress cannot abrogate.²⁷² But this statutory grant of standing to congressional bodies²⁷³ does not run afoul of the constitutional floor.²⁷⁴ Moreover, use of the word “shall” denies courts authority to exercise prudential discretion to decline to hear a case.²⁷⁵

This provision also tracks procedures currently used for contempt resolutions by requiring approval by a full House of Congress²⁷⁶ as well as the process utilized to authorize the House 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. Every committee in Congress has power to issue subpoenas.²⁷⁷ Members of Congress who want to initiate an investigation have the power to do so without the burden of convincing all lawmakers that the investigation is necessary. Under this provision, however, those Members must be able to make their 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.

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.”

This provision extinguishes any lingering doubt as to whether courts have jurisdiction over a congressional civil action to enforce a valid subpoena.²⁷⁸ They do. One suit to enforce a privilege was once dismissed on technical jurisdictional grounds²⁷⁹ that no longer apply. 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.²⁸⁰ While courts have been reluctant to wade into congressional-executive information disputes historically,²⁸¹ such reluctance in fact underpins the need for a statutory provision explicitly affirming their role. To be sure, cases about executive privilege present delicate, often politically sensitive, questions. But as one former federal judge reminded us, it is the responsibility of a federal judge across a gamut of varied cases to examine evidence—often in areas where she lacks expertise, from medical malpractice to securities regulation to eighteenth-century cultural norms about firearms—and to reach a reasoned decision. “[T]he Constitution says, by reasonable implication, that if there is a dispute between the Executive and the Legislative Branch, the court must decide it. ... [I]f you are a judge you just put your head to it.”²⁸² In the end, it has been and remains “emphatically the province and the duty of the judicial department to say what the law is.”²⁸³

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.”

This provision ensures that the transition from one Congress to the next will not doom actions brought pursuant to this statute every two years. Unlike the Senate, the House of Representatives is not a continuing body.²⁸⁴ Thus every two years when Congress adjourns, the House’s outstanding subpoenas expire and “a question of mootness may be raised” in any pending action brought to enforce one of them.²⁸⁵ Arguably then, to continue to press the suit, the new House of Representatives must once again issue its subpoena and once again authorize suit. But this is a legal fiction. If the successor Congress continues to prosecute a suit brought by its predecessor, it clearly retains the same interests in its outcome. Accordingly, the constitutional requirements for mootness simply do not apply, and with regard to the doctrine of “prudential mootness,” the statute makes clear that the transition from one Congress to the next should not be allowed to moot a live, unresolved civil action.

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.”

This provision brings the advantages of a hallowed procedural device, “the three-judge district court,” to bear on executive privilege disputes. A three-judge district court convenes a panel of

three judges to adjudicate disputes at the trial level, instead of using the customary one judge. Originally employed to determine all constitutional challenges to state statutes,²⁸⁶ the decisions of three-judge district court may be appealed directly to the Supreme Court.²⁸⁷

Three-judge panels are helpful to the expeditious solution of privilege disputes in three ways. First, the statutory committal of a case to a three-judge panel impresses upon the participating judges the serious nature of the dispute. Indeed, the institution of three-judge panels was conceived initially as a way to convey the seriousness of constitutional adjudication.²⁸⁸ Second, in cases apt to be controversial, a determination from three judges is likely to enjoy more respect and legitimacy than a lone judge's ruling.²⁸⁹ Executive privilege conflicts are sure to be hotly contested, and often will arise in the midst of contentious congressional-executive fights. One side will likely be tempted to allege executive misconduct, the other will accuse legislators of politicizing the oversight process. Under these circumstances, mechanisms that counter any appearance of political influence on the judiciary's part are desirable. Finally, a three-judge panel allows direct appeal to the Supreme Court. This expedites resolutions—a laudable feature when matters are time-sensitive,²⁹⁰ as with many congressional information requests.

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.”

The promise of judicial intervention with expedited resolution mitigates the Executive's ability to undermine timely resolution of a dispute. Assurance of a timely decision from a neutral adjudicator constrains executive stratagems to use that branch's informational monopoly to stall disclosure. The statute eschews specific deadlines. It allows courts to devote necessary time and thought to these cases.

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.”

Under this provision, the parties are obliged 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.²⁹¹ “[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.”²⁹² And courts should not intervene in congressional-executive disputes unless and until a non-litigation resolution is clearly infeasible.

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.”

This provision encourages negotiated settlements by limiting the precedential effect of non-judicial settlements. Safe in the knowledge that concessions made in the course of any one dispute will not be binding in future negotiations, each side is freed to make reasonable compromises without concern about future disputes.

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.”

Under this provision, a court would appoint a special master if it determined that empirical evaluation of the balance of interests at issue would be aided by such appointment. This might be appropriate in cases where, for example, the volume of information under review is burdensome. The court also may delegate review in cases where the information sought is of a technical nature, such that an expert in the area could help the court determine which subset of that information Congress in fact needs. National security issues, where special masters would require clearances, are one such area.

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.”

The statute encourages courts to utilize a flexible range of remedial tools. In so doing, it draws on a series of D.C. Circuit decisions that authorized a “semi-judicial” resolution in which the court guided the parties’ negotiations, narrowed the issues, and suggested possible means of compromise.²⁹³ This provision ensures that a “spirit of dynamic compromise,” rather than an adherence to technicalities, guides courts toward accommodation of all parties’ legitimate needs.²⁹⁴ Moreover, if the information is sensitive, the court may condition its production on a protective order barring Congress from disclosing the information further. Any unauthorized congressional disclosure would then be subject to contempt of court sanctions.

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.”

This provision makes explicit that the purpose of the statute is to codify all forms of executive privilege that the President may properly assert in the face of a congressional information request.²⁹⁵ Efforts by the executive branch to shield information by methods not set forth in this statute should be rejected, although witnesses will retain their right to invoke non-executive privileges.

Sec. 115 No Waiver

“Any disclosure of presumptively privileged information to 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.”

No court should consider any disclosure to Congress a waiver of any privilege that the executive branch may assert in litigation against parties other than Congress. For example, if the executive branch discloses information to Congress that, in the context of a FOIA litigation, would be eligible for protection under the attorney-client privilege, that disclosure to Congress should not be considered a waiver of the privilege. Moreover, this provision makes plain that it would be improper for Members of Congress to use their access to otherwise privileged information to affect ongoing litigation by disclosing to the non-government party information that the party is not entitled to obtain. Of course, Congress retains the ability to affect the outcome of ongoing litigation through legislation, and may use otherwise privileged information to craft such legislation.

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.”

This provision recognizes that, despite the fact that the statute declines to recognize an executive privilege against congressional requests for military or national security information, when classified information is disclosed to Congress, Congress is obligated to take appropriate measures to protect that information from improper public disclosure.

CONCLUSION

Calls for the reform of executive privilege are hardly new.²⁹⁶ The first spate of proposals emerged after Watergate. That controversy prompted resolutions and bills designed to govern the exercise of executive privilege.²⁹⁷ Watergate Special Prosecutor Archibald Cox himself reluctantly advocated the enactment of a system empowering Congress to compel executive disclosure.²⁹⁸

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.²⁹⁹ But time and again, the dysfunction reemerges, and the cycle begins again.

Congress and the people need to act now, at a time when the abuses of executive privilege are on ample display. Informational asymmetries between Congress and the ever-enlarging executive bureaucracy 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 to unnecessary conflict and acrimony.

Enacting the statute proposed in this report to regulate and limit executive privilege would respond to that trend. It would provide a clear standard for the branches to follow when executive privilege disputes arise, it would ensure Congress's access to necessary information, and it would provide a judicial forum for intractable disputes.

With fuller and more accurate information about executive branch policies and practices, Congress can again 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: TEXT OF THE 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 200X.”

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 decisionmaker 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.”

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 Sue³⁰⁰

“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.”

Sec. 115 No Waiver

“Any disclosure of presumptively privileged information to 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.”

ENDNOTES

- 1 See, e.g., FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED, PRESIDENTIAL POWER IN A TIME OF TERROR 21-49 (2007) (describing revelations in the 1970s of intelligence-community excesses and abuses); BOB WOODWARD & CARL BERNSTEIN, ALL THE PRESIDENT'S MEN (1974).
- 2 Buckley v. Valeo, 424 U.S. 1, 122 (1976).
- 3 THE FEDERALIST NO. 47, at 305 (James Madison) (Isaac Kramnick ed., 1987).
- 4 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 62-63 (D.D.C. 2008).
- 5 See generally H.R. REP. NO. 110-423 (2007); Miers, 558 F. Supp. 2d 53.
- 6 The first settled before the court determined what congressional showing would be required. United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977). In the second, former President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act's, 44 U.S.C. §§ 3315 et seq., grant of custody of records to the Administrator of General Services. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977). There, the Supreme Court rejected Nixon's constitutional challenge, relying on the "substantial public interest[]" at issue and Congress's "broad investigative power" to trump executive confidentiality. *Id.* at 453. For discussion of the third, see *infra* notes 216-225 and accompanying text. The fourth is the as-yet-unresolved dispute between the Executive and the House of Representatives' Judiciary Committee.
- 7 In resolving disputes about executive privilege, courts can thus aid the democratic process by unclogging the arteries of fair deliberation. In this respect, the action of courts in resolving interbranch disputes bears a good deal of resemblance to their work protecting individual and minority-group rights. See JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980) (advocating judicial review as the solution to the problem of "the ins ... choking off the channels of political change to ensure that they will stay in and the outs will stay out"). Others have adapted this theory of the court's role to critique other mechanics of democracy, such as elections and redistricting. Sam Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 710-12 (1998). We extend this idea to "competition" between the two political branches of the federal government.
- 8 United States v. Nixon, 418 U.S. 683, 713 (1974).
- 9 See *infra* notes 68-76 and accompanying text.
- 10 United States v. Nixon, 418 U.S. at 707.
- 11 See *infra* notes 148-160 and accompanying text.
- 12 This requirement presents no novel or unprecedented idea. Louis Fisher, *White House Aides Testifying Before Congress*, 27 PRESIDENTIAL STUD. Q. 139,139 (1997); HAROLD C. RELYEA & TODD B. TATELMAN, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL ADVISERS' TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW 7-21 (2007).
- 13 H.R. REP. NO. 110-423, at 15 (2007).
- 14 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (Miers & Bolten); Carrie Johnson, *House Panel Subpoenas Rove Over Role in Justice Dept. Actions*, WASH. POST, May 23, 2003, at A3 (Rove); Paul Kane, *Senate Panel Approves Subpoenas for 3 Top Bush Aides*, WASH. POST, Mar. 23, 2007, at A4.
- 15 Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES, Feb. 15, 2008, at A17.
- 16 Letter from Michael Mukasey, Attorney General, to Congresswoman Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008).

- 17 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).
- 18 *See generally id.*
- 19 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 542 F.3d 909, 912 (D.C. Cir. 2008).
- 20 *Id.*
- 21 This describes the events behind the Watergate scandal of the 1970s. *See generally* WOODWARD & BERNSTEIN, *supra* note 1.
- 22 United States v. Nixon, 418 U.S. 683 (1974).
- 23 LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 156 (2004).
- 24 Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1108-09 (1998).
- 25 *Id.* at 1109.
- 26 Ralph Vartabedian, *Bush Withholds Memo on Military Contractors*, PHILA. INQUIRER, Aug. 16, 1991, at A1.
- 27 Rozell, *supra* note 24, at 1110-11.
- 28 *Id.* at 1111.
- 29 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).
- 30 A plethora of judges, scholars, and legal philosophers have noted that open government is essential to the democratic political process. *E.g.*, JAMES MADISON, *THE COMPLETE MADISON* 346 (Saul K. Padover, ed., 1953) (“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.”); *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.”). *See also generally* HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (1953); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* (1948).
- 31 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).
- 32 Kitrosser, *supra* note 29, 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)).
- 33 *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.”).
- 34 *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. (Aug. 24, 2004) (Statement of J. William Leonard, then-Director, Information Security Oversight Office National Archives and Records Administration) (“It is no secret that the Government classifies too much information. . . . [M]any senior officials will candidly acknowledge the problem of excessive classification.”).

- 35 See *infra* notes 53-56 and accompanying text.
- 36 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 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.”).
- 37 Rahul Sagar, *On Combating the Abuse of State Secrecy*, 15 *J. POL. PHIL.* 404, 408 (2007); see also PALLITTO & WEAVER, *supra* note 33, at 200-01 (“A system that relies on the executive to police and constrain itself—to be, in short, ‘judge in its own cause’—encourages executive overreaching.”).
- 38 MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 91 (2002).
- 39 Recent examples of this phenomenon were cataloged in MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, *REINING IN THE IMPERIAL PRESIDENCY, LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH* 242-45 (2009).
- 40 See SCHWARZ & HUO, *supra* note 1, at 21-49; Kitrosser, *supra* note 36, at 1165 (“The years of abuse that prompted the Church hearings and FISA demonstrate the intuitive insight that human beings are no ‘angels,’ that they have a natural tendency to abuse power, and that this tendency can flourish particularly well in an office equipped for secrecy and vigor.”) (quoting THE FEDERALIST NO. 51 (James Madison)).
- 41 Letter from Sen. John D. Rockefeller to Vice President Dick Cheney, July 17, 2003 (“Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities. . . . Without more information and the ability to draw on any independent legal or technical expertise I simply cannot satisfy lingering concerns.”); see also AZIZ Z. HUO, *TWELVE STEPS TO RESTORE CHECKS AND BALANCES* 16-18 (2008).
- 42 Under the National Security Act of 1947, the President may limit reporting of covert actions—though not other intelligence activities—to the chairmen and ranking members of the congressional intelligence committees, the House and Senate majority and minority leaders, and any other member of Congress the President may designate if he finds such limitations essential “to meet extraordinary circumstances affecting vital interests of the United States.” 50 U.S.C. § 413b(c)(2). A briefing according to this limitation is known familiarly as a “Gang of Eight” briefing. There is some evidence that overuse of the Gang of Eight procedures has undermined effective oversight. See Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, *WASH. POST*, Dec. 9, 2007, at A1; LOUIS FISHER, *THE CONSTITUTION AND 9/11* 296-97 (2008) (arguing that Members of Congress briefed at “Gang of Eight” briefings have an obligation to reach out to colleagues and staff if they suspect the activities they have been briefed about are illegal or unconstitutional).

- 43 Others have emphasized the need for more certainty in executive privilege doctrine. *E.g.*, Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Law: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 541-42 (1986); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1186-87 (1998).
- 44 The Executive always has held the position that there is some information which he may withhold from Congress. *See e.g.*, FISHER, *supra* note 23, 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, 1319-20 (1975) (President 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); Kitrosser, *supra* note 29, at 493 (same).
- 45 *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting President’s claim of executive privilege asserted to quash Watergate special prosecutor’s subpoena for tapes of Oval Office conversations between the President and his close advisors). *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 (1977) (access to presidential papers); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (congressional subpoena); *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (grand jury subpoena); *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (Freedom of Information Act request).
- 46 *United States v. Nixon*, 418 U.S. at 703-07. 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. *Nixon v. Sirica*, 487 F.2d 700, 712 (1973) (en banc; per curiam) (grand jury); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d at 727 (congressional committee).
- 47 *United States v. Nixon*, 418 U.S. at 706-13; *Senate Select Comm.*, 498 F.2d at 729 (“[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.”) (quoting *Nixon v. Sirica*, 487 F.2d at 716).
- 48 *United States v. Nixon*, 418 U.S. at 714; *see also In re Sealed Case (Espy)*, 121 F.3d at 746.
- 49 *United States v. Nixon*, 418 U.S. at 704 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
- 50 ROZELL, *supra* note 38, at 102-03.
- 51 *Id.* at 126-27; *see also* Shane, *supra* note 43, at 505 (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); FISHER, *supra* note 23, at 116-17 (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).
- 52 *E.g.*, 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.”); ROZELL, *supra* note 38, 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.”); FISHER, *supra* note 23, at 258 (“Untidy as they are, political battles between Congress and the executive branch are generally effective in resolving executive privilege disputes.”); 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 they want 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.”).

- 53 *McGrain*, 273 U.S. at 161 (“In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate.”).
- 54 *Barenblatt*, 360 U.S. at 111.
- 55 *Watkins*, 354 U.S. at 187.
- 56 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 (2004) (citing James M. Landis, *Constitutional Limits on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 169 (1926)). This widespread practice came to the colonies with the British settlers, and state legislatures in the 1700s exercised investigatory power in Massachusetts, Pennsylvania, Virginia, and Rhode Island, *id.* at 785-86 (citing Landis, *supra*, at 166-67); *see also* Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044, 1058-59 (1965), as did the early United States Congresses. *Id.* at 1060; *McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927) (recognizing that the understanding that congressional power includes the power of inquiry predates the Constitution). The U.S. Congress plays the role of grand inquest, a role that legislatures traditionally have played throughout the history of Anglo-American constitutional political systems. *See* BERGER, *supra* note 44, at 34 (linking Congress and the Constitution to the traditional power of British and colonial legislatures to investigate and demand even secret information). *See also* *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975); *Watkins v. United States*, 354 U.S. 178 (1957); *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 *McGrain v. Daugherty*, *supra*, and *In re Chapman*, 166 U.S. 661 (1897).

Congressional investigatory power and the concomitant power to subpoena may be exercised only in the course of investigations with a legitimate congressional purpose. *McGrain*, 273 U.S. at 173-74; MORTON ROSENBERG & TODD B. TATELMAN, CONGRESSIONAL RESEARCH SERVICE, CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE 48 (2007). A committee lacks legislative purpose if it seems to be conducting the equivalent of a “legislative trial,” rather than an investigation in aid of its constitutional duties. ROSENBERG & TATELMAN, *supra*, at 50. Moreover, Congress may not inquire into the private affairs of individuals or “expose for the sake of exposure,” *Watkins*, 354 U.S. at 200, or to inquire into purely private affairs, *Kilbourn v. Thompson*, 103 U.S. 168 (1880). But if Congress acts pursuant to its constitutional power, the judiciary may not invalidate a congressional inquiry based on the motives that led to the investigation. *Barenblatt v. United States*, 360 U.S. 109 (1959). Finally, the information requested must be pertinent to the congressional purpose, 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); ROSENBERG & TATELMAN, *supra*, at 50-52, and all investigations must be authorized by a statute, a resolution, or a standing rule, *id.* at 46-48.

- 57 *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. *Compare* *United States v. Nixon*, 418 U.S. 683, 708 (1974) *with* Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 201 (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 also* Telephone Interview with Bruce Fein, Former Deputy Attorney General, (Feb. 12, 2008) (asserting that public officials would offer candid advice even absent executive privilege).

- 58 *United States v. Nixon*, 418 U.S. at 705.
- 59 *Id.* at 708, 705; *see also id.* at 705 & n.16 (justifying executive privilege as necessary for the executive branch to perform its constitutional functions effectively).
- 60 *Id.* at 711-13; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 729-33 (D.C. Cir. 1974); *In re Sealed Case (Espy)*, 121 F.3d 729, 744-45 (D.C. Cir. 1997).
- 61 *United States v. Nixon*, 418 U.S. at 713.
- 62 In 1971, then-Assistant Attorney General William Rehnquist identified four categories to which the doctrine of executive privilege "has historically been pretty well confined": foreign relations, military affairs, pending investigations, and intra-governmental 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. 422 (1971). *See also, e.g.*, 1 Op. Off. Legal Counsel 269, 271 (1977) (diplomatic secrets & intra-governmental deliberations); 10 Op. Off. Legal Counsel 68, 75-76 (1986) (law enforcement files). These same categories are historically the types of information that, when requested by Congress, have most frequently been denied by the executive. *See* 6 Op. Off. Legal Counsel 751 (1982) (cataloging executive refusals to provide information to Congress).
- 63 10 Op. Off. Legal Counsel 68, 77 (1986).
- 64 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 68, 76 (1986).
- 65 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. But the personal information about individuals contained in even closed investigatory files should be shared judiciously.
- 66 10 Op. Off. Legal Counsel 68, 76 (1986).
- 67 *E.g.*, 6 Op. Off. Legal Counsel 751, 755-56, 759, 761-65 (1982) (providing examples of withholding information involving diplomatic relations).
- 68 *E.g.*, Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182-83 (1999).
- 69 *See* U.S. CONST., art. I (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); *see also* *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977) ("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.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality) (noting that the Constitution "envisions a role for all three branches" even in times of conflict); *accord* *Hamdan v. Rumsfeld*, 548 U.S. 577, 636-37 (2006) (Kennedy, J., concurring); *id.* 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.”); Louis Fisher, *Congressional Access to National Security Information*, 45 HARV. J. ON LEGIS. 219, 224 (2008) (“To assure that the laws are faithfully executed, Congress has an independent duty to supervise federal agencies and departments. To fulfill that duty it needs access to executive branch information, including information about national security affairs.”) (footnote omitted). An exception might be information regarding the President’s exercise of his Commander-in-Chief responsibilities. Those responsibilities, however, do not extend to all national security policy.

- 70 Sometimes such secrecy is necessary for carrying out these policies effectively. *See, e.g.*, 42 U.S.C. §§ 2014(i), (y), 2274 (criminalizing unauthorized dissemination of certain nuclear secrets).
- 71 345 U.S. 1 (1953). For detailed consideration of the *Reynolds* case, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (2006); BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS (2008).
- 72 *Id.* at 9-10. Congress is considering regulating and curtailing the use of the state secrets privilege. *See* State Secrets Protection Act, S. 2533, 110th Cong. (2008).
- 73 *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (“No 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.”).
- 74 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 U.S. intelligence activities, including “significant anticipated intelligence activity.” 50 U.S.C. §§ 413(a)(1), 413a(a)(1). The sole exception to this requirement is that the DNI is required to protect unauthorized disclosure of classified information related to sensitive intelligence sources and methods. 50 U.S.C. § 413a(a). This provision was intended to apply only in extremely rare circumstances to certain sensitive aspects of operations or collection programs. S. REP. NO. 96-730, at 6 (1980).
- 75 The Senate has established an Office of Senate Security, which sets and implements standards for handling and safeguarding classified information. In the House, individual committee and Member offices have implemented their own procedures regarding classified information. FREDRICK M. KAISER, CONGRESSIONAL RESEARCH SERVICE, PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 1-3 (2006). Congress can, of course, receive and consider information in executive session and thereby prohibit public disclosure if necessary.
- 76 In fact, the greater concern historically has been from the Executive’s practice of selectively leaking (or selectively de-classifying) information to support its own policy agenda. *See infra* note 83 and accompanying text.
- 77 *See supra* notes 29-37 and accompanying text.
- 78 David A. O’Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1122 (2007).
- 79 *Id.* at 1124-26.
- 80 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2326 (2006); O’Neil, *supra* note 78, 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).
- 81 *See supra* note 62.
- 82 *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 31, at 2316.

- 83 See, e.g., *Restoring the Rule of Law: Hearings before the Senate Judiciary Committee Subcommittee on the Constitution*, 110th Cong. (2008) (Statement of Sen. Whitehouse) (noting that the Executive sometimes declassified only the facts supporting its positions, leaving Congress legally barred by the classification rules from providing effective counterarguments).
- 84 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”).
- 85 Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Dec. 19, 2005 (describing al-Qaeda focused surveillance program); JAMES BAMFORD, *THE SHADOW FACTORY* 132-33 (2008) (calling into question the proposition that the surveillance program focused only on communications with al-Qaeda connections).
- 86 See generally FISHER, *supra* note 23 (enumerating Congress’s political weapons to wield against executive privilege claims and citing examples of their use).
- 87 O’Neil, *supra* note 78, at 1127 (“[T]he prevailing branch will be the one that enjoys the popular support necessary to invoke and sustain the coercive collateral measure with which such disputes are fought.”).
- 88 *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).
- 89 Posner & Vermeule, *supra* note 82, 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* (2d ed. 1971).
- 90 See Sagar, *supra* note 37, 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).
- 91 See JOHN HART ELY, *WAR AND RESPONSIBILITY* 175 n.34 (1993) (“Separation of powers issues are not the sort voters get exercised about.”).
- 92 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
- 93 ROZELL, *supra* note 38, at 80-81.
- 94 *Id.* at 100.
- 95 *Id.* at 126.
- 96 2 U.S.C. §§ 192, 194. When Congress holds someone in contempt, the U.S. Attorney is required to “bring the matter before the grand jury.” 2 U.S.C. § 192; see also Sen. REP. NO. 95-170 (1977) (discussing conflict of interests inherent in expecting the Justice Department to represent Congress’s interests in some legal proceedings).
- 97 The Office of Legal Counsel (OLC) is a division of the Justice Department that issues authoritative interpretations of federal law, which are typically binding within the executive branch. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).
- 98 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 129-32.

But the floor debate about that statute includes a statement that the bill “proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people.” ROSENBERG & TATELMAN, *supra* note 56, at 31 (quoting 42 Cong. Globe 429 (1857)). But even if the Department of Justice’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 56, at 88.

- 99 8 Op. Off. Legal Counsel 101 (1984); Letter from Michael Mukasey, Attorney General, to Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008). 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 (D.D.C. 1983), the parties reached a negotiated resolution of the underlying information dispute. This resolution was prompted, at least in part, however, by further revelations of possible misconduct within the EPA. Shane, *supra* note 43, at 513. Absent these subsequent developments, there is no guarantee that an agreement would have been reached.
- 100 The law provides no means for challenging the Justice Department’s inaction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). Some commentators have recommended that when Congress holds an executive branch official in contempt, a special prosecutor should be appointed to review the case and make a determination whether criminal proceedings should go forward. *E.g.*, Brand & Connelly, *supra* note 56, at 86-89.
- 101 Brand & Connelly, *supra* note 56, at 73 (describing Congress’s inherent contempt power); ROSENBERG & TATELMAN, *supra* note 56, at 12.
- 102 Because of the limitations of the inherent contempt power, in 1857 Congress enacted a statutory criminal contempt procedure. ROSENBERG & TATELMAN, *supra* note 56, at 21. This provision was meant as an alternative to—not a replacement for—the inherent contempt powers. *Id.* at 21-23.
- 103 *Watkins v. United States*, 354 U.S. 178, 207 n.45 (1957); *see also* ROSENBERG & TATELMAN, *supra* note 56, at 13-14.
- 104 8 Op. Off. Legal Counsel 101, 140 n.42 (1984). This argument could be pressed in a habeas corpus proceeding brought by the alleged contemnor.
- 105 ROSENBERG & TATELMAN, *supra* note 56, at 15.
- 106 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 that, given the existence of a parallel means of pursuing contempt—2 U.S.C. §§ 192, 194—it believes better serves the people to pursue.
- 107 ROSENBERG & TATELMAN, *supra* note 56, at 15.
- 108 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 101, 137 (1984); *see also* 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. *United States v. House of Representatives of the U.S.*, 556 F.Supp 150 (D.D.C. 1983). But in *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), the Justice Department has argued that Congress lacks standing for such an action.
- 109 *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976) (remanding executive action to enjoin compliance with a congressional subpoena for further congressional-executive negotiations); *United States v. AT&T*, 567 F.2d

121 (D.C. Cir. 1977) (same); *United States v. House of Representatives of the U.S.*, 556 F. Supp. 150 (D.D.C. 1983) (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 also* *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002). *Cf.* Tr. of Mots. Hr'g at 108, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409) (Statement of Judge Bates) ("I didn't volunteer for this responsibility.")

110 *See* Rozell, *supra* note 24, at 1108-09.

111 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 (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.*; *cf.* Moss, *supra* note 97, at 1323-24 (noting that executive branch past practice and precedent can serve as markers of the scope of 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, General Counsel to the Clerk, U.S. House of Representatives, to Hon. John Dingell, Chairman, Subcomm. on Oversight and Investigations, U.S. House of Representatives, Re: Attorney General's Letter Concerning Claim of Executive Privilege for Dep't of Interior Documents (Nov. 10, 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) in *Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior*, Comm. Print 97-X Prepared for Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Commerce, 97th Cong. 5-14 (1981). And when information disputes arise, a committee's staff searches these records for guidance from the ways in which similar disputes have been resolved in the past. Interview with Stanley M. Brand, Former General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Mar. 24, 2008). 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-Asst. 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 limitation 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) (Statement of Sen. Muskie); *see also* *Executive Privilege: Secrecy in Government, Freedom of Information: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 93^d Cong. 41 (1973) ("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 advisers 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.'") (Statement of Sen. Ervin).

112 *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).

113 James V. Grimaldi & Dan Eggen, *Criminal Probe of Pardon Begins; Gifts from Ex-Wife of Rich Are Focus*, WASH. POST, Feb. 15, 2001, at A1; Jonathan Turley, Op-Ed, *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.

- 114 Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 GEO. WASH. L. REV. 570, 572-99 (2002) (citing examples).
- 115 6 Op. Off. Legal Counsel 751 (1982).
- 116 *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); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“[Congress’s oversight power] comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”); *see also supra* notes 53-56 and accompanying text.
- 117 *Executive Privilege: Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G Watt, Secretary of the Interior*, Comm. Print 97-X, Prepared for Subcomm. on Oversight and Investigations of the H.R. Comm. on Energy and Commerce, 97th Cong. 8-12 (1981) (legal analysis of Stanley M. Brand, General Counsel to the Clerk of the House of Representatives, describing the executive’s position as “baseless” and contrary to Supreme Court precedent); *id.* 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”).
- 118 5 Op. Off. Legal Counsel 27, 30 (1981).
- 119 *Id.* at 29-31.
- 120 *See infra* notes 216-225 and accompanying text.
- 121 *E.g.*, Letter from Janet Reno, Attorney General, to President Clinton, Assertion of Executive Privilege with Respect to Clemency Decision (Sept. 16, 1999) (citing Memorandum from John M. Harmon, Acting Asst. Attorney General, Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep’t of Justice, Re: Executive Privilege, at 5 (May 23, 1977)).
- 122 *E.g., id.* (citing Memorandum from John M. Harmon, Asst. Attorney General, Office of Legal Counsel, Dual-purpose Presidential Advisers, Appendix at 7 (Aug. 11, 1977)); *see also* Memorandum from William H. Rehnquist, Asst. Attorney General, Office of Legal Counsel, Power of Congressional Committee to Compel Appearance or Testimony of “White House Staff,” at 7 (Feb. 5, 1971).
- 123 *E.g.*, H.R. REP. NO. 110-423, at 3 (2007) (noting committee’s rejection of Harriet Miers’ claims of immunity from testifying). At least two federal judges have agreed with Congress. *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 99-107 (D.D.C. 2008); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, J., concurring in opinion granting a stay pending appeal) (describing the district court’s rejection of absolute immunity from congressional process for presidential advisors as “persuasive[]”). This report takes this position as well. As noted above, White House aides frequently have testified before Congress. *See supra* note 12.
- 124 *See supra* note 12.
- 125 ROZELL, *supra* note 38, at 126-27.
- 126 MORTON ROSENBERG, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 15 (2008).
- 127 Richard Simon, *White House Invokes Executive Privilege in EPA Inquiry*, L.A. TIMES, June 21, 2008; Felicity Barringer, *White House Refused to Open Pollutants E-Mail*, N.Y. TIMES, June 25, 2008 at A15.
- 128 *E.g.*, ROZELL, *supra* note 38, at 76 (“To many in the public and in Congress, ‘executive privilege’ and ‘Watergate’ were intertwined.”).

- 129 *Id.* at 72-83 (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 Federal Court of Appeals for the District of Columbia Circuit, in Washington, D.C. (Feb. 28, 2008).
- 130 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. ROZELL, *supra* note 38, at 107.
- 131 ROZELL, *supra* note 38, at 117-18.
- 132 H.R. REP. NO. 110-423, at 15 (2007).
- 133 Compl. at § 27, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409).
- 134 David Johnston & Eric Lipton, *White House Said to Prompt Firing of Prosecutors*, N.Y. TIMES, Mar. 13, 2007, at A1.
- 135 As the Supreme Court has held, “Presidential privilege could apply at most to the . . . items with which the [President] was personally familiar.” Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 449 (1977).
- 136 H.R. REP. NO. 110-423, at 4-5 (2007) (“[L]etters were exchanged between the Committee and the White House to seek to resolve voluntarily the Committee’s requests for information from the White House, but those efforts were not successful.”).
- 137 Del Quentin Wilber, *Judge Urged to Order Associates Of President to Honor Subpoena*, WASH. POST, June 24, 2008, at A15.
- 138 Letter from George T. Manning, Attorney for Harriet Miers, to Congressman John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, and Congresswoman Linda T. Sánchez, Chairwoman, Subcommittee on Commercial and Administrative Law (July 10, 2008).
- 139 Letter from Congressman John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, and Congresswoman Linda T. Sánchez, Chairwoman, Subcommittee on Commercial and Administrative Law to George T. Manning, Attorney for Harriet Miers, (July 11, 2008); H.R. REP. NO. 110-423, at 21.
- 140 Philip Shenon, *House Cites 2 Bush Aides for Contempt*, N.Y. TIMES, Feb. 14, 2008.
- 141 *Id.*
- 142 FISHER, *supra* note 23, at 129; *see also* Interview with Stanley M. Brand, Former General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Mar. 24, 2008) (describing bipartisan agreement on contempt vote against former EPA Administrator Anne Gorsuch in 1982).
- 143 *See supra* notes 96-100 and accompanying text.
- 144 Letter from Michael Mukasey, Attorney General, to Nancy Pelosi, Speaker of the House of Representatives (Feb. 29, 2008).
- 145 H.R. Res. 982, 110th Cong. (2008). On one other occasion, a congressional committee brought a lawsuit in an attempt to enforce its subpoenas. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (Senate committee brought suit against President Nixon in an attempt to compel him to comply with a subpoena duces tecum for tapes of Oval Office conversations).

- 146 *See generally* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).
- 147 Comm. on the Judiciary of the U.S. House of Representatives v. Miers, 542 F. 3d 909, 912 (D.C. Cir. 2008).
- 148 18 U.S.C. app. 3 (governing the use and handling of classified information during criminal proceedings).
- 149 50 U.S.C. § 1806(f) (providing procedures for handling disputes over the use of sensitive information).
- 150 5 U.S.C. § 552(a)(4)(B) (governing requests for disclosure of government information to the public).
- 151 44 U.S.C. § 2201 et seq. (governing archiving of presidential records).
- 152 *E.g.*, 50 U.S.C. § 435(a).
- 153 50 U.S.C. §§ 413(a), 413b(c).
- 154 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, 44 U.S.C. § 2107 et seq., was rejected by the Supreme Court. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).
- 155 *United States v. Nixon*, 418 U.S. 683, 708, 712-13 (1974); *see supra* notes 57-60 and accompanying text.
- 156 *See supra* notes 47-48 and accompanying text.
- 157 *Youngstown Sheet & Tube Co. v. Sawyer*, 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, for it includes all that he possesses in his own right plus all that Congress can delegate." *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. In such a circumstance, Presidential authority can derive support from "congressional inertia, indifference or quiescence." *Id.* Finally, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb." *Id.* at 637.
- 158 *Id.* at 637.
- 159 *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988).
- 160 *Id.* at 530.
- 161 *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 484-85 (1989) (Kennedy, J., concurring) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)); *see also* *Nixon v. 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.").
- 162 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 infra* notes 227-232 and accompanying text.
- 163 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 108-109 and accompanying text.
- 164 *See United States v. AT&T*, 551 F.2d 384, 386 (D.C. Cir. 1976); FISHER, *supra* note 23, 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).
- 165 United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976); United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977).
- 166 United States v. AT&T, 551 F.2d at 385.
- 167 *Id.*
- 168 *Id.* at 387.
- 169 *Id.* at 394-95; United States v. AT&T, 567 F.2d at 131-33.
- 170 See *infra* note 293 and accompanying text.
- 171 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 (1979) (discussing “the impact of the legal system on negotiations and bargains that occur outside the courtroom”).
- 172 ANNE BURFORD & JOHN GREENYA, ARE YOU TOUGH ENOUGH? 153 (1986); see also ROZELL, *supra* note 38, at 101.
- 173 See United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977) (“[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.”).
- 174 ROSENBERG, *supra* note 126, at 23.
- 175 See *supra* Part I.C.3.
- 176 United States v. Nixon, 418 U.S. 683, 713 (1974).
- 177 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).
- 178 See *United States v. Nixon*, 418 U.S. at 686 (considering privilege claim with respect to tapes and documents relating to the President’s conversations with aides and advisors).
- 179 *In re Sealed Case (Espy)*, 121 F.3d 729, 750 (D.C. Cir. 1997).
- 180 *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004).
- 181 *In re Sealed Case (Espy)*, 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. It then acknowledged that valuable advisors do not “pull their final advice to [the President] out of thin air.” *Id.* at 750. Rather, they investigate relevant facts, solicit input from others with expertise in the area, and analyze multiple policy options before reaching a decision regarding what recommendation to make. *Id.*
- 182 *Judicial Watch*, 365 F.3d at 1115 (recognizing that the presidential communications privilege is based on the unique role of the president).
- 183 *In re Sealed Case (Espy)*, 121 F.3d at 752; *Judicial Watch*, 365 F.3d at 1121-22. Of course, the interest in confidentiality might be used to argue for a wider privilege within the Executive. 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 Environmental Protection Agency. 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 43, 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 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. *United States v. Nixon*, 418 U.S. 683 (1974) (generally); *United States v. AT&T*, 567 F.2d 121 (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 privilege suggested by the confidentiality justification, as well as the risks inherent in hiding government actions behind a wall of secrecy, *see, e.g.*, Kitrosser, *supra* note 29, at 513-15 (arguing that any government secrecy must “remain a politically controllable tool of the people and their representatives”); *THE FEDERALIST* NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (explaining that the U.S. executive, because of its unitary nature, will be predisposed to act in secret); it is important that executive privilege be cabined within narrow and clearly defined limits. Courts that have considered the appropriate scope of executive privilege have emphasized this need. *In re Sealed Case (Espy)*, 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 decision-making process is adequately protected.”); *see also* *United States v. Nixon*, 418 U.S. at 710 (noting the historical reluctance of courts to construe privileges expansively.).

184 *In re Sealed Case (Espy)*, 121 F.3d at 752.

185 *Judicial Watch*, 365 F.3d at 1117.

186 *In re Sealed Case (Espy)*, 121 F.3d at 752.

187 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. *See* U.S. CONST. Art. II; ROSENBERG, *supra* note 126, at 19-21.

188 *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

189 *See In re Sealed Case (Espy)*, 121 F.3d at 748; ROSENBERG, *supra* note 126, at 19-20. The duty to take care that the laws are faithfully executed has been held to be an obligation on 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. (12 Pet.) 524, 612-13 (1838).

190 *In re Sealed Case (Espy)*, 121 F.3d at 752-53.

191 If an immediate White House advisor asked for information from an agency to use in advising the President regarding his Article II powers, that communication might fall within the scope of the privilege.

192 *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) (“[T]he public is vitally concerned with the reasons which . . . supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the ‘working law’ of the agency and have been held by the lower courts to be [non-privileged].”); *National Council of La Raza v. Department of Justice*, 411 F.3d 350, 360 (2d Cir. 2005) (noting, in requiring disclosure of an OLC opinion adopted as the express basis for agency policy, that government agencies may not “adopt a legal position while shielding from public view the analysis that yielded that position”).

- 193 United States v. Nixon, 418 U.S. at 714; *In re Sealed Case (Espy)*, 121 F.3d at 742.
- 194 These criteria are drawn from Exemption 7 to the Freedom of Information Act (FOIA), which provides that FOIA does not require disclosure of some records compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7).
- 195 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 cause damage to the national security.” The Executive Privilege 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 68-76 and accompanying text.
- 196 In many cases, the harms that could result from public disclosure will not apply when addressing disclosure to Congress. *See Executive Privilege: The Withholding of Information by the Executive, Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 424 (1971) (statement of William H. Rehnquist, Asst. Attorney General) (“[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 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.”).
- 197 *See supra* note 69 and accompanying text.
- 198 United States v. Nixon, 418 U.S. at 710. But that same passage explicitly notes that the case does not concern military or diplomatic secrets. *Id.*
- 199 *See id.* at 710-11 (citing United States v. Reynolds, 345 U.S. 1 (1953)).
- 200 *Id.* at 712 n.19 (pointing out that its analysis did not apply to “congressional demands for information”).
- 201 Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) (en banc; per curiam); United States v. 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).
- 202 United States v. Nixon, 418 U.S. at 713; Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 501 (1977); *see also* 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”).
- 203 *In re Sealed Case (Espy)*, 121 F.3d 729, 754 (D.C. Cir. 1997).
- 204 Many objections to judicial resolution of executive privilege disputes are premised on skepticism of the courts’ ability to judge this balancing exercise effectively. O’Neil, *supra* note 78, at 1129-30; Paul A. Freund, *Forward: On Presidential Privilege*, 88 HARV. L. REV. 13, 38 (1974); *Executive Privilege—Secrecy In Government: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 94th Cong. 116-17 (1975) (testimony of Antonin Scalia, Asst. Attorney General, Office of Legal Counsel); *see also* Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 745-46 (1993).
- 205 *See* cases interpreting 50 U.S.C. § 431(c), which limits certain 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.’”).

- 206 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (“[T]he showing required to overcome the presumption favoring confidentiality turn[s], not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.”) (footnote omitted).
- 207 Watkins v. United States, 354 U.S. 178, 187 (1957).
- 208 *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998) (“The public interest in honest government and in exposing wrongdoing by government officials ... lead[s] to the conclusion that a government attorney may not invoke ... privilege” to avoid providing information about the possible commission of a crime.).
- 209 *E.g.*, Richard M. Nixon, Statement About Executive Privilege, Mar. 12, 1973 (“Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.”).
- 210 Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1405 (1973) (quoting 13 Cong. Deb., App. 202 (1837)).
- 211 Louis Fisher, *White House Aides Testifying Before Congress*, 27 PRESIDENTIAL STUD. Q. 139, 140-41 (1997).
- 212 ROZELL, *supra* note 38, at 77-78. There are other examples as well. In the wake of the Iran-Contra revelations, President Reagan allowed his two former National Security Advisors to testify before Congress, he permitted Cabinet officials to discuss with Congress their conversations with him, and he turned over thousands of classified documents. *Id.* at 102-04. And when a House investigation into the firing of seven officials from President Clinton’s travel office revealed improper accessing of former employees’ FBI files, President Clinton abandoned a claim of executive privilege over information sought by the House. *Id.* at 125-27.
- 213 ROZELL, *supra* note 38, at 151-54.
- 214 If an information request covers multiple documents or conversations, the court may determine that Congress has made a sufficient showing for some, but not all, of the requested material.
- 215 *E.g.*, Freund, *supra* note 204, at 38.
- 216 498 F.2d 725 (D.C. Cir. 1974).
- 217 *Id.* at 733.
- 218 *Id.* at 732.
- 219 Appropriations bills must be initiated in the House. U.S. CONST. ART. I, § 7. The Senate must confirm appointments, U.S. CONST. art II, § 2, and ratify treaties, *id.*
- 220 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, Attorney General, to President Clinton, Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking (Sept. 30, 1996).
- 221 *Senate Select Comm.*, 498 F.2d at 732.
- 222 Marshall, *supra* note 56, at 798 n.104; *see also id.* (refuting the Executive’s interpretation of *Senate Select Committee on Presidential Campaign Activities v. Nixon*).

- 223 *Senate Select Comm.*, 498 F.2d at 222.
- 224 *See supra* note 53-55 and accompanying text.
- 225 *Watkins v. United States*, 354 U.S. 178, 187 (1957).
- 226 ROZELL, *supra* note 38, 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); 6 Op. Off. Legal Counsel 751, 774-75 (1982). 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. ROZELL, *supra* note 38, 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 that claims of executive privilege be asserted only if they had specific presidential approval. ROZELL, *supra* note 38, at 73-74; Memorandum from John M. Harmon, Acting Asst. Attorney General, Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep't of Justice, Re: Executive Privilege, at 4 (May 23, 1977).
- 227 U.S. CONST. art II, § 3.
- 228 *See* Louis Fisher, *Treaty Negotiation: A Presidential Monopoly?*, 38 PRES. STUD. Q. 144, 145-50 (2007) (arguing that the concept of the President as the sole negotiator of treaties is both constitutionally and factually inaccurate).
- 229 U.S. CONST. art. I, § 8. Based on this power, Congress's power—and thus entitlement to necessary information—extends to the authorization of, *inter alia*, trade agreements.
- 230 For example, both the European Union and Human Rights Watch have reported that the U.S. colluded with European allies to secretly detain and harshly interrogate prisoners. Doreen Carvajal, *Rights Group Offers Grim View of C.I.A. Jails*, N.Y. TIMES, June 9, 2007, A7; HUMAN RIGHTS WATCH, QUESTIONS AND ANSWERS: U.S. DETAINEES DISAPPEARED INTO SECRET PRISONS: ILLEGAL UNDER DOMESTIC AND INTERNATIONAL LAW 1 (2005). 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.
- 231 In addition to the ongoing battle over information related to the 2006 U.S. Attorney firings, H.R. REP. NO. 110-423, at 15 (2007), 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. Shane, *supra* note 43, at 509 (noting allegations that the EPA was “not adequately enforcing [environmental laws] against parties responsible for hazardous waste sites”).
- 232 To be sure, the deliberative process privilege has long been recognized as an executive prerogative, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), which originated in the common law and was codified in the FOIA, *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc); 5 U.S.C. § 552(b)(5). Some, including some members of the Brennan Center staff, believe that the proposed legislation should include the deliberative process privilege and that omission of the privilege will render the statute insufficiently protective of executive decision-making autonomy. This report does not advance this view. As an initial matter, concern about an overly secretive executive branch argues for a narrow definition of executive privilege. Moreover, if the statute were to include such a privilege, it would provide significantly less protection than is provided by the other forms of executive privilege in the statute, as the case law indicates that it requires a lesser showing of need to overcome. *In re Sealed Case (Espy)*, 121 F.3d at 746. Because it would be relatively easy for Congress to overcome a presumption of privilege established in the deliberative process context, inclusion of the deliberative process privilege in the statute would be more formal than substantive. The issue is, however, a legitimate point of debate.
- 233 10 Op. Off. Legal Counsel 68, 78 (1986).

- 234 “[I]n most matters,” Justice Louis Brandeis famously observed, “it is more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). The existence of an established body of law can lead to more efficient interactions between potentially adverse parties. Settled law facilitates dispute resolution by “both by narrowing the universe of potential controversies and by facilitating settlement when controversies do arise.” *See, e.g.*, Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265 (1974) (“[A]n increase in the predictability of the outcome of litigation should result in an increase in the settlement rate . . . [and] reduce the total costs of legal dispute resolution.”); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court’s Doctrine of Precedent*, 78 N.C. L. REV. 643, 643 (2000) (arguing that judicial adherence to established doctrine decreases the costs associated with litigation).
- 235 Memorandum from John M. Harmon, Acting Asst. Attorney General, Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep’t of Justice, Re: Executive Privilege, at 4 (May 23, 1977).
- 236 *See, e.g.*, 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, 797-798 (1996).
- 237 Presidents Nixon, Reagan, George H.W. Bush, and Clinton all adopted formal executive privilege policies. ROZELL, *supra* note 38, at 56, 94, 106-07, 123-24; Johnsen, *supra* note 52, at 1128 n.3. In fact, the 1982 Reagan memo remained in effect through the first Bush and Clinton presidencies. Presidents Ford and Carter, however, successfully resisted calls for development of a formal executive privilege policy. Weiner, *supra* note 236, at 800, 80; ROZELL, *supra* note 38, at 73-76, 84-87.
- 238 Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies (Nov. 4, 1982). The Reagan memorandum was, ironically, modeled in large part on a March 24, 1969, memorandum from Richard Nixon.
- 239 *Id.* at 1.
- 240 *Id.* at 2.
- 241 Continuity, like clarity, promotes certainty. Johnsen, *supra* note 52, at 1128 n.3 (noting benefits of continuity resulting from application of Reagan policy through subsequent administrations).
- 242 This provision supersedes that portion of title 28 U.S.C. § 1365(a), the statute authorizing the Senate to enforce its subpoenas through a civil action, that precludes enforcement against officers or employees of the federal government acting in their official capacity.
- 243 *United States v. Burr*, 25 F. Cas. 187 (C.C.Va. 1807) (no. 14,694).
- 244 *Id.* at 192.
- 245 ROZELL, *supra* note 38, at 116.
- 246 Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies (Nov. 4, 1982).
- 247 *See Watkins v. United States*, 354 U.S. 178, 187-88 (1957) (“It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of Congress and its committees and to testify fully with respect to matters within the province of proper investigation.”); *see also Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938).
- 248 They must know, for example, its author—was it a close presidential advisor or a low-level employee of an agency outside the White House? Under what circumstances was the information generated—did the President or one of

his close advisors ask for it? Or was it created as part of the day-to-day responsibilities of a government employee with no regular contact with the President? What is the subject of the information? Does it relate to the President's Article II responsibilities?

- 249 Once possessed of the necessary information, Congress might agree that some or all of the information is validly privileged and abandon—or narrow—its request. This has, in fact, happened on several occasions. In response to Congress's investigation of President Kennedy's military Cold War education and speech-review policies, President Kennedy asserted executive privilege over his advisors' recommendations for changes in specific speeches. Congress upheld as valid that claim of executive privilege and withdrew its request for the information. Doherty, *supra* note 226, at 824-25. And more recently, the House of Representatives requested from President Clinton's White House documents regarding the President's Haiti policy, including memoranda from the National Security Advisor to the President. In response to a subpoena for the documents, President Clinton asserted executive privilege. The House determined the claim to be valid and declined to challenge it. Rozell, *supra* note 24, at 1122.
- 250 See *supra* note 12.
- 251 Memorandum from Stephen G. Bradbury, Principal Deputy Asst. Attorney General, to Fred Fielding, Counsel to the President, at 1 (July 10, 2007) ("Administrations of both political parties have taken the position that 'the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee.'") (quoting 23 Op. Off. Legal Counsel 1 (1999) (opinion of Attorney General Janet Reno (quoting Memorandum from John M. Harmon, Acting Asst. Attorney General, Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep't of Justice, Re: Executive Privilege, at 5 (May 23, 1977)) and Memorandum from William H. Rehnquist, Asst. Attorney General, Office of Legal Counsel, Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff," at 7 (Feb. 5, 1971)).
- 252 Memorandum from William H. Rehnquist, Asst. Attorney General, Office of Legal Counsel, Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff," at 7 (Feb. 5, 1971).
- 253 See 6 Op. Off. Legal Counsel 751 (1982); Memorandum from Stephen G. Bradbury, Principal Deputy Asst. Attorney General, to Fred Fielding, Counsel to the President, at 1 (July 10, 2007); 23 Op. Off. Legal Counsel 1 (1999); Letter from Christopher H. Schroeder, Acting Asst. Attorney General, Office of Legal Counsel, to Lloyd Cutler, Counsel to the President, Re: Immunity of the Council to the Counsel to the President (Sept. 3, 1996).
- 254 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 100 (D.D.C. 2008); see also Comm. on the Judiciary, U.S. House of Representatives v. Miers, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, J., concurring in opinion granting a stay pending appeal) (noting that the district court's rejection of absolute immunity was "persuasive[]").
- 255 *Miers*, 558 F. Supp. at 103; *United States v. Nixon*, 418 U.S. 683, 705 (1974).
- 256 *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc; per curiam).
- 257 *United States v. Nixon*, 418 U.S. 683 (1974); see also *United States v. Burr*, 25 F. Cas. 187 (C.C.Va. 1807) (No. 14,694).
- 258 *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).
- 259 *Clinton v. Jones*, 520 U.S. 681 (1997).
- 260 *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).
- 261 Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 103 (D.D.C. 2008).
- 262 Memorandum from William H. Rehnquist, Acting Asst. Attorney General, Office of Legal Counsel, Power of

- Congressional Committee to Compel Appearance or Testimony of “White House Staff,” at 4, 6, 7 (Feb. 5, 1971).
- 263 *U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings Before a Subcomm. of the H.R. Comm. on Government Operations*, 92d Cong. 385 (1971) (statement of William H. Rehnquist, Asst. Attorney General).
- 264 *Miers*, 558 F. Supp. 2d at 103.
- 265 *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 93d Cong. 30 (1973).
- 266 The required document is frequently referred to as a *Vaughn* index, named after the case in which the court devised this technique. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).
- 267 *Nixon v. Sirica*, 487 F.2d 700, 721 (D.C. Cir. 1973) (en banc; per curiam) (“Without compromising the confidentiality of the information, the analysis [of the particular claims of privilege asserted by the President] should contain descriptions specific enough to identify the basis of the particular claim or claims.”); *Dellums v. Powell*, 642 F.2d 1351 (D.C. Cir. 1980).
- 268 *E.g.*, ROZELL, *supra* note 38, at 132 (describing a privilege log provided by the White House during a dispute over documents related to a Committee on Government Reform and Oversight investigation into whether the White House had improperly influenced an Interior Department decision to deny an application for an Indian gaming facility); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 666 (1997) (noting that the White House produced a privilege log during the congressional investigation into the firings of several employees of the White House Travel Office).
- 269 *E.g.*, *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (“[T]he Office of the President must present the underlying facts demonstrating the existence of the privilege in order to carry its burden. . . . A blanket assertion of the privilege will not suffice. Rather, the proponent must conclusively prove each element of the privilege.”) (internal quotations and citations omitted).
- 270 *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997) (“If the government seeks to assert the presidential communications privilege in regard to particular communications . . . the government bears the burden of proving that the communications occurred in conjunction with the process of advising the President.”).
- 271 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* 28 U.S.C. § 1365 (conferring jurisdiction on the District of Columbia District Court over civil actions brought by the Senate or its committees to enforce a subpoena); 2 U.S.C. § 288d (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). And this report takes the position that a House of Congress already has standing to bring an action to enforce a subpoena issued to executive officials under 28 U.S.C. § 1331. But because the standing to bring such a suit has been challenged in recent litigation, *see* Mem. of P.& A. in Supp. of Defs.’ Mot. to Dismiss & in Opp’n to Pl.’s Mot. for Partial Summ. J., Comm. on the Judiciary, *U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409), this proposed statute explicitly confers standing on a House of Congress in actions to enforce subpoenas.
- 272 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.* (citations omitted).

- 273 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.” (citations omitted)).
- 274 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 (1997); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999) with *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).
- 275 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., Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 70 (D.D.C. 2008).
- 276 *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 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.
- 277 Historically, the power to issue subpoenas was much more circumscribed than today. Marshall, *supra* note 56, at 804 (“The House and Senate originally exercised its power to investigate by passing specific resolutions rather than delegating the power [to committees].”). The investigation of the Teapot Dome Scandal in the 1920s, for instance, involved multiple resolutions, each of which required full Senate action. *Id.*
- 278 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 Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 64 (D.D.C. 2008).
- 279 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 (D.D.C. 1973); *see* 28 U.S.C. § 1331 (1979). This requirement has since been eliminated from the statute. 28 U.S.C. § 1331; *see also* 8 Op. Off. Legal Counsel 101, 137 n.36 (1984); James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated By Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 160-61 n.91 (1984).
- 280 *See* O’Neil, *supra* note 78, at 1129-30; Freund, *supra* note 204, at 38; *Executive Privilege—Secrecy In Government: Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 94th Cong. 116-17 (1975) (testimony of Antonin Scalia, Asst. Attorney General, Office of Legal Counsel); *see also* Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 745-46 (1993).
- 281 *See supra* note 109 and accompanying text.
- 282 Interview with Patricia Wald, Former Judge on the Federal Court of Appeals for the District of Columbia Circuit, in Washington, D.C. (Feb. 28, 2008). Moreover, the courts have been able to decide effectively cases presenting the question where to draw the line in other realms of congressional-executive tug-of-war—the validity of a legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), the constitutionality of the Presidential Recordings and Materials Preservation Act, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977), the scope of domestic presidential authority during wartime, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It can surely do so in instances where executive privilege is asserted. *See also id.* at 597 (“[T]he judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government.”) (Frankfurter,

- J., concurring). The federal courts in Washington, D.C., moreover, have concluded that upholding rule of law requires judicial resolution of skirmishes over the limits of executive power with respect to information disputes. Patricia M. Wald & Jonathan R. Siegel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 GEO. L.J. 737, 748, 753-61 (2001).
- 283 *Marbury v. Madison*, 1 U.S. (Cranch) 137, 177 (1803).
- 284 *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975).
- 285 *Id.*
- 286 Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 770 (2007).
- 287 The use of this procedure is limited to a narrow set of cases in the modern era, many related to election and voting procedures. *E.g.*, 28 U.S.C. § 2284 (apportionment of congressional districts or statewide legislative bodies).
- 288 Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646, 1646 (1962); Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 YALE L.J. 564 (1975). Judges in the progressive era were wont to invalidate state statutes, and the three-judge court was a means devised by Congress to ensure that they did not do so lightly. As one legislator put it, “at least let it be done on notice and not hastily, and let there be the judgment of three judges to decide such questions, and not permit such dangerous power to one man.” Note, 72 YALE L.J., *supra*, at 1646 n.4 (quoting Statement of Sen. Bacon).
- 289 Solimine, *supra* note 286, at 772; Note, 72 YALE L.J., *supra* note 288, at 1646; *id.* at 1653 (“The addition of two judges ... increases the prestige of the district court and reassures the public as to the breadth and thoroughness of the court’s deliberations. Furthermore, public confidence in the impartiality of the tribunal is likely to be enhanced ... [and] the frustrated parties feel that their case was given a degree of deliberation and concern commensurate with the drastic nature of the relief granted.”).
- 290 Solimine, *supra* note 286, at 772; 85 YALE L.J., *supra* note 288, at 564.
- 291 *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).
- 292 *Id.* 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, Acting Asst. Attorney General, Office of Legal Counsel, to All Heads of Offices, Divisions, Bureaus and Boards of the Dep’t of Justice, Re: Executive Privilege, at 5 (May 23, 1977).
- 293 *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976); *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977).
- 294 *United States v. AT&T*, 567 F.2d at 127.
- 295 This statement of exclusivity is not relevant to personal privileges held by individual executive branch officials, such as the spousal privilege on 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.
- 296 Some attempt, like this report’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 201 (arguing for circumscribed boundaries of executive privilege enforced by judicial action); Prakash, *supra* note 43, at 1187 (arguing that Congress should codify executive privilege by statute); Smith, *supra* note 114, at 604-09 (setting out proposed legislation); Weiner, *supra* note 236, at 806-10 (advocating that Congress enact guidelines to define the contours of executive privilege). Others focus on purely procedural remedies. Miller, *supra* note 268, at 687 (arguing that congressional-executive information disputes present justiciable cases and controversies that the courts should adjudicate, not avoid); Hamilton & Grabow, *supra* note 279, at 157-59 (proposing bill to allow civil enforcement of congressional subpoenas). Both substantive and procedural proposals often include a provision that would submit disputes to

a court. O’Neil, *supra* note 78, at 1129-33; Miller, *supra* note 268, at 679-87; Dorsen & Shattuck, *supra* note 201, at 35 (proposing a new jurisdictional statute to get around the amount-in-controversy problem, which no longer exists). 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 56, 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).

297 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) (same); S. 2073, 93d Cong. (1973) (providing a means for Congress to obtain a judicial determination of the existence of executive privilege and its application); Brand & Connelly, *supra* note 56, at 89 (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).

298 Cox, *supra* note 210, at 1432-34. 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.

299 *E.g.*, Miller, *supra* note 268; Doherty, *supra* note 226. 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 78, at 1137.

300 This report takes the position that Congress already possesses the authority to bring suit to enforce its subpoenas, even as against executive officials. *See Miers*, 558 F. Supp. 2d 53, 56-57 (D.D.C. 2008). Given the Justice Department’s opinions to the contrary, however, *see* Mem. of P. & A. in Supp. of Defs.’ Mot. to Dismiss and in Opp. to Pl.’s Mot. for Partial Summ. J., Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-cv-00409), the statute aims to eliminate any doubt about this threshold question.

SELECTED BRENNAN CENTER PUBLICATIONS

Twelve Steps to Restore Checks and Balances
AZIZ Z. HUQ

Unchecked and Unbalanced: Presidential Power in a Time of Terror
FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ
(New Press 2007)

Ten Things You Should Know About Habeas Corpus
JONATHAN HAFETZ

A Return to Common Sense: Seven Bold Ways to Revitalize Democracy
MICHAEL WALDMAN
(Sourcebooks 2008)

Universal Voter Registration
WENDY WEISER, MICHAEL WALDMAN, & RENEE PARADIS

Fair Courts: Setting Recusal Standards
JAMES SAMPLE, DAVID POZEN, & MICHAEL YOUNG

Restoring the Right to Vote
ERIKA WOOD

The Truth About Voter Fraud
JUSTIN LEVITT

Improving Judicial Diversity
CIARA TORRES-SPELLISCEY, MONIQUE CHASE
& EMMA GREENMAN

Access to Justice: Opening the Courtshouse Door
DAVID UDELL AND REBEKAH DILLER

For more information, please visit www.brennancenter.org

BRENNAN
CENTER
FOR JUSTICE

At New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org