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THE CONFLICT BETWEEN EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT: THE GORSUCH CONTROVERSY

Congress, as the arm of the government responsible for making and overseeing the operation of the nation's laws, has the power to inquire into and review the methods by which those laws are enforced.[1] Because the executive branch is responsible for enforcing the laws, Congress necessarily requests evidence from that branch. On occasion, the President has sought to protect himself and his officials from congressional overreaching by arguing that the doctrine of executive privilege protects him from compelled disclosure of information or documents.[2]

The President and his officials have asserted this claim frequently.[3] Most recently, Anne M. Gorsuch,[4] former Administrator of the Environmental Protection Agency (EPA), claimed an executive privilege when she refused to comply with a subpoena issued in connection with the inquiry of a House of Representatives subcommittee.[5] The subcommittee was investigating the EPA's implementation of the Superfund program for the treatment of hazardous waste sites. As a result of Ms. Gorsuch's refusal to produce the documents, Congress held her in contempt—the first time in United States history that the legislative branch has taken such action against

1. This power is known as oversight or right of inquiry. *See infra* text accompanying notes 42-55.

2. *See infra* text accompanying notes 67-99.

3. *See* Berger, *Executive Privilege v. Congressional Inquiry (Part II)*, 12 UCLA L. REV. 1288, 1333 n.627 (1965). President Eisenhower made one of the most notable claims when he refused to surrender evidence that Senator McCarthy requested in connection with McCarthy's investigation into communism. Eisenhower's claim was one of the boldest assertions by an executive of the right to withhold information from Congress. *Id.* at 1309.

4. On February 12, 1983, shortly before Congress dropped the contempt citation, Ms. Gorsuch remarried, changing her name to Anne Gorsuch Burford. She is referred to as Ms. Gorsuch throughout this note.

5. Two House subcommittees, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, and the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, sought information from Ms. Gorsuch. This note will focus on the efforts of the former to obtain documents pertaining to the Superfund.

the head of an executive agency or department.[6] Although the President and the subcommittee eventually arrived at a compromise,[7] this incident illustrates the historical tension between congressional oversight and executive privilege and highlights the lack of formal methods for resolving such disputes.[8]

This note examines the competing claims of the congressional right to information and the executive's need for secrecy, in light of the Gorsuch dispute. It also suggests methods for resolving future disputes. The note begins with an overview of the dispute and the eventual compromise.[9] It then examines the rights of oversight and executive privilege in more detail and describes both Ms. Gorsuch's and the House subcommittee's claims under these doctrines.[10] Finally, it suggests methods for resolving such interbranch conflicts.[11] This note argues that compromise is the preferred method; in most cases the involved parties have sufficient incentives to negotiate their differences and should be allowed to do so. Because, in rare instances, a compromise may not be reached, courts must be ready to settle these clashes, as long as the dispute does not present a nonjusticiable "political" question. The note therefore suggests a framework for the judicial analysis of future disputes.

I. CONGRESS'S CONFRONTATION WITH THE EPA ADMINISTRATOR

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[12] its most recent statutory effort to solve the hazardous waste problem. The Act establishes a 1.6 billion dollar hazardous substance response trust fund, the Superfund, to be used to pay governmental response costs in the amelioration of hazardous waste deposits and spills.[13] The Act also mandates extensive reporting and recordkeeping requirements for both present and former hazardous waste disposal sites.[14] The Act requires

6. *See* Brief for Plaintiff at 2, United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) [hereinafter cited as *Petitioner's Brief*].

7. *See infra* text accompanying notes 35-38.

8. *See infra* text accompanying note 104.

9. *See infra* notes 12-38 and accompanying text.

10. *See infra* notes 39-104 and accompanying text.

11. *See infra* notes 106-49 and accompanying text.

12. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

13. 42 U.S.C. § 9631 (Supp. V 1981). Superfund financing comes largely from excise taxes on companies that generate chemical and petroleum products and on owners of hazardous waste disposal sites. *See* I.R.C. §§ 4611-4612, 4661-4662, 4681-4682 (West Supp. 1983). The disposal site tax is used to finance the monitoring and closure of hazardous waste disposal sites that received operating permits. *See* 42 U.S.C. § 9641 (Supp. V 1981).

14. 42 U.S.C. § 9603 (Supp. V 1981).

that the President establish a National Contingency Plan (NCP) to develop procedures for responding to releases of hazardous wastes, for discovering hazardous waste locations, and for evaluating removal costs and methods.[15] Additionally, the Act empowers the President to respond to actual or threatened releases of hazardous substances.[16]

On August 14, 1981, President Reagan issued Executive Order 12.316, "Responses to Environmental Damage," which delegated to EPA Administrator Gorsuch the "responsibility for the amendment of the NCP and all of the other functions vested in the President by Section 105" of the CERCLA.[17] The EPA Administrator thus assumed responsibility for ensuring that parties responsible for abandoned or inoperative hazardous waste sites would clean them up.[18]

On March 10, 1982, the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation began an investigation to determine the manner in which the EPA was enforcing federal laws addressing the hazardous waste problem, including the CERCLA.[19] The subcommittee held a field hearing in New York City, in which it received testimony from various local government officials,[20] representatives of citizen groups,[21] and officials from the United States General Accounting Office.[22] As a result of this and other hearings,[23] the subcommittee concluded that many of the hazard-

15. *Id.* § 9605. Parties responsible for creating hazardous waste sites or chemical spills are liable for: (1) the costs of removal or remedial action incurred by the federal government or state; (2) private response costs consistent with the National Contingency Plan; and (3) damages for injury to natural resources. *Id.* § 9607(a).

16. *Id.* § 9604. The President may take whatever remedial steps are "necessary to protect the public health or welfare or the environment." *Id.* § 9604(a)(1).

17. Exec. Order No. 12,316, 3 C.F.R. 168, 169 (1982).

18. *Id.*

19. "A central concern in this investigation and review by the Subcommittee was, and continues to be, the efforts being made by the U.S. Environmental Protection Agency to carry out the framework of federal laws that address, in whole or in part, hazardous waste contamination of water resources." H.R. REP. No. 968, 97th Cong., 2d Sess. 7 (1982).

20. The Mayor of Oswego, New York, the town that is the site of the Pollution Abatement Services Company, an abandoned liquid waste incineration operation, expressed concern at the length of time taken to decontaminate that site. *Id.* at 8.

21. Residents of Port Washington, N.Y. testified, speculating that large quantities of toxic chemicals may have been illegally disposed of in the community's domestic waste landfill. *Id.*

22. A representative from the United States General Accounting Office testified that the EPA's efforts to carry out the Superfund law, including the development of implementing regulations and the National Contingency Plan, were significantly behind schedule, and thus were delaying the rate at which toxic waste sites were being cleaned up. *Id.*

23. On March 10, 1982, the subcommittee held a hearing in which it reviewed the EPA's previous decision to suspend a restriction on dumping liquid waste in landfills, an action that had raised the possibility that many new "Love Canals" might be created. *Id.* at 7. The two EPA officials testifying were unable to provide justification for suspending the ban. *Id.* On March 17, the EPA announced that it was partially reinstituting the ban. *Id.* On March 30, 1982, the sub-

ous waste sites were not being fully, or expeditiously, decontaminated. The subcommittee also found that many of the companies responsible for the wastes were not being held fully liable for their share of the cleanup costs.[24]

The subcommittee sought to review the EPA's Superfund enforcement files in order to determine exactly how the EPA was administering the fund. After unsuccessful attempts to obtain these files informally,[25] the subcommittee authorized subpoenas to be issued to the EPA Administrator and other EPA officials, should they continue to deny the subcommittee access to the disputed enforcement files.[26]

On October 29, 1982, EPA enforcement staff officials refused a subcommittee request to provide access to enforcement files on three waste sites.[27] As a result, the House Committee on Public Works and Transportation issued a subpoena to EPA Administrator Anne M. Gorsuch. The subpoena called for her to appear before the Subcommittee

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committee met again to question the same officials further about the landfills. Their testimony conflicted with the earlier testimony, creating suspicion as to whether there had been any need to suspend the ban. *See id.* at 8.

24. *Id.* at 9. As a result of this assessment, the subcommittee conducted additional hearings. Its inquiry, with respect to the Superfund statute, focused heavily on:

> Whether there are statutory requirements and/or administrative policies, practices and procedures that affect the government's (EPA's) ability to function effectively and achieve the objectives of the law, or whether amendments to the statute are needed;
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> Whether the Superfund law's enforcement provisions are being fully and effectively carried out;
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> Whether adequate efforts have been, or are being made to obtain and/or recover the full costs of cleaning up hazardous waste sites from responsible parties;
>
> Whether the Fund, and the existing sources and amounts of revenue for it, particularly the tax on oil and chemicals, is adequate to address both known and potential hazardous waste sites and chemical spills; and
>
> What information is being considered, or not being considered by the EPA, in its administration and management of the Fund, and its execution of responsibilities under the Superfund law.

Id.

25. The EPA was less than cooperative with the subcommittee. On September 14, 1982, the subcommittee staff was told that it would have access to the Agency's Region II Superfund enforcement files in New York City. On September 15, the subcommittee staff travelled to New York, but an EPA official there told them that "any of the engineering and technical studies that were being prepared by the several EPA Region II Superfund priority sites could be made available, but that the Subcommittee could not have access to the enforcement files." *Id.* at 11. On September 16, the subcommittee submitted a written request for the documents in dispute to the EPA Administrator and to others in the Agency, in conformance with section 9604(e)(2)(D) of the Superfund law, which requires that "all information reported to or otherwise obtained by the President (or any representative of the President) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee." 42 U.S.C. § 9604(e)(2)(D) (Supp. V 1981). Department of Justice official Stephen Ramsey indicated his belief that this section did not give the subcommittee the authority to request the kind of information that they were seeking. H.R. REP. No. 968, 97th Cong., 2d Sess. 13 (1982).

26. H.R. REP. No. 968, 97th Cong., 2d Sess. 13 (1982).

27. *See id.* at 14.

on Investigations and Oversight on December 2, 1982 and to produce all books, records, correspondence, memoranda, papers, notes, and documents drawn or received by the Administrator or other EPA officials since December 11, 1980.[28] In short, the subpoena covered all the pertinent enforcement-related documents concerning the 160 designated Superfund cleanup sites.[29]

Prior to her appearance, Ms. Gorsuch received a memorandum from President Reagan instructing her not to make sensitive documents found in active law enforcement files available to Congress or the public except in extraordinary circumstances.[30] She quoted these instructions in her testimony to the subcommittee and informed it that she would not make certain requested documents available.[31] Following her testimony, the subcommittee approved a resolution holding Ms. Gorsuch in contempt.[32] On December 16, 1982, the full House of Representatives, noting the Administrator's "contumacious conduct," passed a resolution citing Ms. Gorsuch for contempt of Congress.[33]

Although the House action created what some have termed an "unprecedented constitutional impasse" between the legislative and executive branches of the government,[34] the parties arrived at a compromise two months later. On February 18, 1983, subcommittee chairman Levitas and President Reagan agreed to procedures under which subcommittee members would be allowed to examine the subpoenaed

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28. *Id.* at 33.

29. *See id.* at 50-53.

30. The memorandum stated that "[b]ecause dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the subcommittee in response to their subpoenas." Memorandum for the Administrator, Environmental Protection Agency (Nov. 30, 1982), *reprinted in* H.R. REP. No. 968, 97th Cong., 2d Sess. 42-43 (1982).

31. H.R. REP. No. 968, 97th Cong., 2d Sess. 16 (1982). Administrator Gorsuch explained, however, that more than 750,000 pages of documents would be made available to the subcommittee. The first five file boxes of such documents were tendered to the subcommittee, but it declined to accept those documents. *See Petitioner's Brief*, *supra* note 6, at 14. Ms. Gorsuch also advised the subcommittee that the subpoena as drawn was defective. *See* H.R. REP. No. 968, 97th Cong., 2d Sess. 17 (1982).

32. The Resolution, approved by a nine to two vote, states:

> *Be it resolved*, That the Subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this Subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

H.R. REP. No. 968, *supra* note 19, at 20.

33. H.R. Res. 632, 97th Cong., 2d Sess., 149 CONG. REC. H10,040 (daily ed. Dec. 16, 1982). House Resolution 632 was approved 259-105 with 69 members abstaining. *Id.* at H10,061.

34. *Petitioner's Brief*, *supra* note 6, at 1.

EPA documents.[35] The subcommittee was to receive edited versions of the requested documents and EPA officials would brief the subcommittee on their contents.[36] After this initial screening, subcommittee members would be permitted to review the unedited versions of the documents in closed session.[37] President Reagan hailed the compromise as "consistent with the doctrine of executive privilege while it also assures that necessary information is made available to the Congress."[38]

II. The Tension Between Congressional Oversight and Executive Privilege

The fact that Congress and the EPA reached a compromise does not diminish the significance of the contempt citation. Congress had never before taken such severe action in order to obtain information from the executive branch. Yet, although Congress's use of the contempt power was unprecedented, the doctrines that had led to its use were not. The subcommittee and the EPA were properly relying upon the conflicting but well-established rights of oversight and executive privilege.

A. *Congress's Claim to the Documents.*

The House subcommittee believed that it had an absolute right to the requested documents.[39] The House of Representatives demonstrated its agreement with the subcommittee's position by issuing the contempt citation. Both the subcommittee and the full House recognized that the President was to "take care that the laws be faithfully executed";[40] they claimed, however, that this constitutional mandate

35. Final details of the compromise were worked out by Levitas, White House Counsel Fred Fielding, and Deputy Attorney General Edward Schmults. Wash. Post, Feb. 19, 1983, at A1, col. 7.

36. Wash. Post, Feb. 20, 1983, at A1, col. 2.

37. *Id.* Representative James H. Scheuer, chairman of an Energy and Commerce subcommittee that was also investigating the EPA, explained the need for this circuitous method of disclosure: "This charade was designed as a face saver for the president to get him off the sticky wicket of insisting on executive privilege. We have to go through this little dog-and-pony show to get to the unexpurgated, unedited documents . . . . *Id.*

38. *Id.* at A12, col. 2.

39. The subcommittee actually relied on two positions. First it claimed that the CERCLA itself empowered Congress to request this information. *See supra* note 25. A member of the subcommittee's staff also advised the EPA that "the Subcommittee's inquiry was being pursued under the general authority of the Congress to conduct oversight and investigations, and the rules of the House granting jurisdiction to the Committee and not simply under the authority granted by Section 104(e)(2)(D) of the Superfund law." H.R. Rep. No. 968, 97th Cong., 2d Sess 13 (1982). (footnote omitted).

40. U.S. Const. art. II, § 3.

empowered the President and his aides only to carry out the laws enacted by Congress and did not authorize those executive officials to withhold documents necessary for Congress to oversee the operation of the laws.[41]

1. *The History of Congressional Oversight.* The subcommittee was relying upon its oversight authority when it subpoenaed the EPA documents. Congress's right to inquire is essentially the right to conduct investigations relevant to its legislative functions.[42] Congress may conduct investigations into departments of the federal government as well as, in some instances, the affairs of private citizens.[43] It may also request information pursuant to these investigations.[44]

Several theories underlie the notion of congressional oversight. The first is that the public is entitled to be informed of the workings of its government.[45] Congress must therefore be able to determine how federal laws are operating in order to be able to report to its constituents.[46] Second, Congress must be able to investigate in order to determine whether remedial legislation is needed.[47] Third, Congress's exercise of oversight protects the liberties of the American people by serving as a check on unbridled executive power. Congress, by "acquainting itself with the acts and dispositions of the administrative agents of the Government,"[48] will be able to uncover corruption, waste, inefficiency, and rigidity[49] and to ensure that the President is enforcing the laws as enacted by Congress.

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41. *See* H.R. REP. No. 968, 97th Cong., 2d Sess. 10-11 (1982).

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

> The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Id.

43. "There is no general authority to expose the private affairs of individuals *without justification* in terms of the function of the Congress." *Id.* at 187 (emphasis added).

44. *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927). "Article I's grant of power to legislate is therefore held to carry implied authority to summon witnesses and to compel the production of evidence." Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1385 (1974).

45. Watkins v. United States, 354 U.S. 178, 200 (1957).

46. President Wilson considered this function to be extremely important: "The informing function of Congress should be preferred even to its legislative function." W. WILSON, CONGRESSIONAL GOVERNMENT 297, 303 (1913), *quoted in* Watkins v. United States, 354 U.S. 178, 200 n.33 (1957).

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

48. Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. REV. 4, 10 (1974)(quoting W. WILSON, CONGRESSIONAL GOVERNMENT 297, 303 (1913)).

49. *See infra* note 148 and accompanying text.

The Supreme Court has described Congress's oversight authority as "an essential and appropriate auxiliary to the legislative function."[50] The Court has, however, placed some limitations upon this power.[51] First, pursuant to the separation of powers doctrine, Congress may not reach into the "exclusive province" of the executive branch.[52] Second, exercise of the investigative power must be related to a legitimate legislative task of Congress;[53] there is no congressional power to expose merely for the sake of exposure.[54] These limitations, however, are not unduly restrictive and leave Congress a great deal of freedom to determine whether the executive branch is properly enforcing the laws.[55]

2. *The Subcommittee's Claims for the EPA Documents.* The subcommittee believed that it was properly invoking its oversight authority in the Gorsuch dispute. It maintained that it had undertaken its

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50. McGrain v. Daugherty, 273 U.S. 135, 174 (1927). Here, the Court was reviewing the propriety of a Senate committee investigation into charges that the Department of Justice had failed to prosecute public corruption, antitrust violations, and other matters relating to the handling of several oil leases. The Court upheld the inquiry as a proper exercise of the legislative function. *Id.* at 180.

51. Some commentators have argued that Congress's oversight authority is, in fact, absolute. *See, e.g.*, R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). Mr. Berger looked "to the Constitution and its history" rather than to recent practice to determine the scope of congressional control over information, *id.* at 10, and found that the power to inquire is absolute. *Id.* at 36-37.

52. Barenblatt v. United States, 360 U.S. 109, 111-12 (1959). The separation of powers doctrine imposes this limitation on the oversight power. This doctrine was created by the framers of the Constitution, who considered the combination of powers of government to be "the very definition of tyranny." THE FEDERALIST NO. 47, at 336 (J. Madison)(Wright ed. 1961). James Madison expressed his fear that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST NO. 48, at 333 (J. Madison)(J. Cooke ed. 1961). The separation of powers doctrine suggests that when the congressional power of inquiry is directed at the executive branch, it cannot interfere with the executive duties.

53. Watkins v. United States, 354 U.S. 178, 187, 197 (1957). *Watkins* specifically mentions the restraints of the Bill of Rights upon congressional investigations. *Id.* at 198.

The Supreme Court used this restriction to invalidate a House investigation into a private real estate pool that was part of the financial structure of J. Cook & Co. The United States had deposited funds with the company, which went bankrupt. Congress believed that the pool was connected with the bankruptcy. The Court found the inquiry to be judicial in nature because the investigation "could result in no valid legislation on the subject to which the inquiry referred." Kilbourn v. Thompson, 103 U.S. 168, 192-97 (1881). The Court therefore held the inquiry to be in excess of the investigative power conferred on the House by the Constitution. *Id.* at 192.

54. Watkins v. United States, 354 U.S. 178, 200 (1957).

55. Needless to say, congressional oversight produces beneficial results when used properly. In 1927, a Senate committee investigation led to the discovery of the Teapot Dome scandal. *See* Berger, *Executive Privilege v. Congressional Inquiry (Part I)*, 12 UCLA L. REV. 1044, 1049 (1965); 149 CONG. REC. H10,052 (daily ed. Dec. 16, 1982)(remarks of Rep. Dingell); *see also* McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927)(Court permitted congressional investigation into enforcement decisions of the Department of Justice).

investigation in order to determine whether the EPA was properly administering the hazardous waste laws.[56] Many members of Congress and the public believed that the Reagan Administration and the EPA were not carrying out Congress's mandate to aggressively decontaminate the nation's hazardous waste sites.[57] Congress was concerned, therefore, that the Reagan Administration was subverting the intent of the Superfund laws by enforcing them half-heartedly.

In addition to reports of low morale at the EPA, Congress had received specific charges of impropriety. EPA officials alleged that the Administrator had allowed political considerations to enter into her enforcement decisions.[58] The subcommittee also suspected the EPA of giving hazardous waste polluters lenient settlement terms.[59]

The subcommittee believed that the requested documents would

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56. The subcommittee also argued that the documents were necessary if Congress was to make an informed decision whether to alter or repeal the CERCLA when it expires in 1985. 149 CONG. REC. H10,033 (daily ed. Dec. 16, 1982).

57. As the New York Times explained the contempt citation against Administrator Gorsuch, the "immediate cause was her refusal to hand over documents about EPA's clean-up enforcement efforts. The underlying reason for the House's unprecedented action is its belief that her agency is simply uninterested in doing anything about the country's myriad Love Canals, except to claim success and let them fester." N.Y. Times, Dec. 28, 1982, at A22, col. 2.

The New York Times also stated that "the Reagan Administration, in its eagerness to ease the burden of government regulation imposed on industry, had embarked on a systematic reversal of decades of progress in the national effort to protect human health and natural resources from environmental degradation." Shabecoff, *Forecast for E.P.A. Was Stormy From the Start*, N.Y. Times, Feb. 20, 1983, § 4 (The Week in Review), at 2, cols. 4-5.

58. Three EPA officials charged that clean-up of the Stringfellow site in California was held up until after the November, 1982 California senatorial election for fear that then-Governor Edmund G. Brown, Jr. might take credit for obtaining the federal funding and thereby benefit his campaign for the Senate. Russakoff, *White House Acts in EPA Controversy*, Wash. Post, Feb. 10, 1983, at A6, col. 6. Stating that "[p]olitical considerations have not driven any decisions" in the hazardous waste program, Ms. Gorsuch explained that it took time for the EPA to calculate California's contribution to the cleanup, and to decide whether the agency should commence contributing to the cleanup, or bring suit against the polluters first. *See id.* A Justice Department investigation into the charges found a lack of evidence to implicate Ms. Gorsuch. *See* San Francisco Examiner, Aug. 11, 1983, at A6, col. 1.

59. The subcommittee believed that two "sweetheart deals" may have been arranged between the EPA and businesses in violation of the CERCLA.

(1) In the fall of 1982, the EPA agreed to a private settlement for the cleanup of a facility of the Seymour Recycling Corporation near Seymour, Indiana. The settlement, which was concluded over the strong objections of EPA General Counsel Robert M. Perry, may enable 24 major companies to avoid millions of dollars of liability. *See* Wash. Post, Feb. 10, 1983, at A1, col. 2.

(2) In August, 1982, the EPA announced a settlement agreement involving the Chem-Dyne Corporation dumpsite in Hamilton, Ohio; 112 companies agreed to contribute a total of $12.3 million for surface cleanup. The EPA filed a lawsuit against 16 other firms that refused the settlement terms. Critics noted that "the clean-up covered surface contamination only, and that the 112 companies, which settled for an average of just over $20,000 each, will face no further liability if contamination later is found in groundwater or sub-surface soil." Wash. Post, Feb. 8, 1983, at A4, col. 3.

help it determine whether the EPA was properly enforcing the law.[60] These documents would reveal what factors the EPA was and, perhaps more importantly, was not considering in making enforcement decisions.[61] This information would clarify the EPA's Superfund enforcement strategy, a significant indicator of how closely the agency had followed its congressional mandate. Furthermore, the subcommittee believed that the documents would reveal whether any of the specific charges of impropriety were true. Thus, Congress argued that the investigation was related to a legitimate legislative concern[62] and was a proper exercise of its oversight authority.[63] If so, it follows that the subcommittee had the power to compel disclosure of the requested documents, unless the exercise of that power was constrained by some other legal doctrine.

B. *The EPA's Position.*

Balanced against the subcommittee's exercise of the congressional oversight power was the President's claim that Congress was interfering with the executive responsibility to "take care that the laws be faithfully executed."[64] Congress contended that this responsibility could not protect an administrative agency against compelled disclosure.[65] The EPA, however, contended that it was entitled, under the doctrine of executive privilege, to withhold information if disclosure would interfere with the executive's constitutional duties with regard to enforcement of the laws.[66]

1. *The History of Executive Privilege.* The EPA's claim of executive privilege was neither novel nor surprising. Congress, in pursuing its oversight duties, seeks much of its evidence from the executive branch. Courts have interpreted Congress's power of inquiry to require

60. H.R. REP. NO. 968, 97th Cong., 2d Sess. 45 (1982).

61. *Id.* at 20. As the subcommittee explained: "[We] must be able to examine how and why the agency is making its decision to enforce, or not to enforce, to litigate or not to litigate, to settle or not settle with some, or all of the parties that may be involved in the various Superfund cases." *Id.*

The General Counsel to the Clerk of the House analogized to the congressional right upheld by the Supreme Court in *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), *see supra* note 50. He maintained that the right to examine and inquire into specific enforcement decisions within the Department of Justice "applies with equal, if not greater, force to the Environmental Protection Agency." H.R. REP. NO. 968, 97th Cong., 2d Sess. 59 (1982).

62. *See supra* note 53 and accompanying text.

63. *See* 149 CONG. REC. H10,052 (daily ed. Dec. 16, 1982) (statement of Rep. Dingell).

64. U.S. CONST. art. II, § 3.

65. *See supra* text accompanying note 41.

66. *See* 149 CONG. REC. H10,055 (daily ed. Dec. 16, 1982)(statement of Rep. Dannemeyer); *Petitioner's Brief*, *supra* note 6, at 55.

disclosure of executive documents.[67] Nevertheless, cabinet officials have invoked the doctrine of executive privilege to withstand both legislative and judicial probing.[68] The rationale behind the doctrine is that in certain instances disclosure would either significantly impair the performance of the constitutional responsibilities[69] of the executive branch or interfere with its functioning as an independent branch of the government.[70] When disclosure would cause such harm, the executive branch and its officials must be exempt from the disclosure requirements.

Although a claim of executive privilege was raised as early as 1796,[71] the Supreme Court did not recognize a constitutional foundation for the privilege until 1974. In *United States v. Nixon*,[72] the Court stated that "to the extent this interest [President Nixon's interest in withholding incriminating tapes] relates to the effective discharge of the President's powers, it is constitutionally based."[73] The *Nixon* Court recognized that executive privilege was a byproduct of the separation

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67. Cox, *supra* note 44, at 1385-86.

68. For a general discussion of the scope of executive privilege, see J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 224-30 (2d ed. 1983).

69. Underlying this consideration is a concern that without the privilege, officials would be unwilling to engage in frank, open discussion for fear of later reprisals. As the United States District Court for the District of Columbia noted, "the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determination that enables government to operate." Carl v. Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)(footnotes omitted).

70. The Supreme Court recognized this argument as support for the privilege. *See infra* note 74 and accompanying text. President Washington voiced this argument in his Farewell Address:

> It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.

Speech of President George Washington, Sept. 17, 1796, *quoted in* Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 22 U. PITT. L. REV. 755, 758 (1959).

71. President Washington had invoked this doctrine just five months prior to his farewell speech when he refused to turn over papers requested by a House committee formed to examine the failure of a military campaign against the Indians. He maintained that the House had no right to those documents, as they related to matters exclusively within the executive's domain. Younger, *supra* note 70, at 758.

72. 418 U.S. 683 (1974). The case arose out of the now infamous Watergate investigation. The Special Prosecutor had issued a subpoena directing the President to produce tape recordings and documents relating to his conversations with aides and advisors. The documents were requested following the indictment of a number of White House staff members and supporters for violations of federal statutes. President Nixon claimed executive privilege and filed a motion to quash the subpoena. Although the Supreme Court denied the motion, it recognized an executive privilege. The Court held, however, that the privilege was not absolute. *Id.* at 706.

73. *Id.* at 711.

of powers doctrine;[74] if Congress were allowed to inquire into every area of the executive's province it could exert improper influence upon the President's power. The Court also suggested that the privilege could be readily inferred from article II,[75] the constitutional provision that outlines the executive's duties. Confidentiality is necessary for the President to properly carry out his responsibilities, because it fosters the free flow of information and candor necessary for effective decisionmaking.[76]

The *Nixon* opinion recognized that the privilege was not absolute. The Court held that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[77] The opinion was, however, somewhat vague as to when executive privilege would give way to legislative probing. The highest deference is to be given to claims of executive privilege for military and diplomatic secrets. The Court stated that

> Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.[78]

The *Nixon* Court did not state that executive privilege was *never* applicable to protect information other than that which implicates national security. Presidential communications are "presumptively privileged";[79] there is, however, no high degree of deference due a presidential assertion of privilege when there is only a generalized executive interest in confidentiality.[80] Instead the Court seemed to imply that the President, in order to prevail on his privilege claim, had to demonstrate convincingly that confidentiality would be compromised.[81]

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74. *Id.* at 706.

75. *See id.* at 707.

76. *Id.* 708.

77. *Id.* at 713.

78. *Id.* at 706; *see* Henkin, *Executive Privilege: Mr. Nixon Loses But The Presidency Largely Prevails*, 22 UCLA L. REV. 40, 44 (1974).

79. *Nixon*, 418 U.S. at 708.

80. *Id.* at 711.

81. *See id.* The *Nixon* Court's opinion has been criticized, in part, for its failure to establish clear guidelines for future disputes. *See* Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 UCLA L. REV. 76, 91 (1974).

Two Watergate era cases decided by the United States Court of Appeals for the District of Columbia Circuit help to illuminate the factors considered by courts in executive privilege cases. In Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), the court determined that the presumption of privilege premised on the public interest in confidentiality failed in the face of a powerful showing made by the Special Prosecutor of a vital need for the President to produce certain tape recordings pursuant to a grand jury subpoena duces tecum. The court applied a balancing test, stating that

The *Nixon* opinion was concerned with the use of the privilege "as against a subpoena essential to enforcement of criminal statutes,"[82] and the way the privilege interfered with the judiciary's ability to "do justice in criminal prosecutions."[83] The Court explicitly rejected the notion that it was addressing the balance between the President's generalized interest in confidentiality and congressional demands for information.[84] "The opinion nonetheless lends some support to the

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the "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interest that would be served by disclosure in a particular case." *Id.* at 716; *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)(in determining whether the proper balance between the coordinate branches has been upset, the proper inquiry focuses on the extent to which the executive branch is prevented from accomplishing its constitutionally assigned functions); Association for Women in Science v. Califano, 566 F.2d 339, 346 (D.C. Cir. 1977)(executive privilege upheld as the government requirement of secrecy was "the more compelling need"). The *Nixon v. Sirica* court emphasized that the grand jury

> is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority.

487 F.2d at 717.

Although a grand jury proceeding assures the confidentiality of executive officials' testimony and of agency documents, closed congressional committee meetings can probably approximate the secrecy of the grand jury. The second Watergate era case, Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), dealt with an executive refusal to hand over documents subpoenaed by a congressional committee. The court determined that the need demonstrated by the Senate Select Committee on Presidential Campaign Activities for some of President Nixon's tapes was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena." *Id.* at 733. The court noted that the committee could point "to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." *Id.* The subpoenaed materials were in the possession of the House Judiciary Committee and there was no showing that the Select Committee needed access of its own. *Id.* The *Senate Select Committee* opinion noted "the presumption that the public interest favors confidentiality," which "can be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations." *Id.* at 730.

It has been suggested that executive branch officials should have to make a stronger showing to invoke executive privilege when there are accusations of executive wrongdoing. *See* Ratner, *Executive Privilege, Self-Incrimination, and the Separation of Powers Illustration*, 22 UCLA L. REV. 92, 104 (1974). Nevertheless, the propriety of a congressional demand for material must finally turn on the "nature and appropriateness of the function in performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." *Senate Select Comm.*, 498 F.2d at 731. Certainly the inquiry into possible executive wrongdoing is an appropriate function of Congress, and the executive branch will lose its claim of privilege if a House committee can show that "subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." *Id.* The court suggests that it will be more difficult for a congressional committee to demonstrate the requisite need to overcome executive privilege than it would be for a grand jury to do so. *Id.* at 732.

82. 418 U.S. at 707.

83. *Id.*

84. The *Nixon* Court stated:

proposition that the President may, in certain circumstances, withhold information from the Congress."[85]

Professor Laurence Tribe has classified presidential refusals to furnish information as three distinct executive privileges, derived from three distinct considerations.[86] First, presidents have invoked executive privilege in order to protect military or diplomatic secrets.[87] Second, the law of evidence includes an informer's privilege—"the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."[88] Third, courts recognize a privilege extending to "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[89]

In the Gorsuch dispute the latter two types of executive privilege were at issue. The EPA documents concerned law enforcement files that might contain information of EPA's secret informants. The files also contained intra-agency memos and recommendations that EPA personnel compiled for use in making Superfund enforcement policy and decisions.

In the Gorsuch dispute, an agency director invoked the privilege, but she did so at the express request of the chief executive. Executive privilege extends to agency officials, but it may not apply with force equal to that afforded the President's personal assertion of the privilege. In *United States v. Reynolds*,[90] the Court stated that the privilege belongs to the government, and must be asserted in a formal claim

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> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

Id. at 711 n.19.

85. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-15 n.1 (1978); *see also* Henkin, *supra* note 78, at 43.

86. L. TRIBE, *supra* note 85, § 4-14.

87. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971)(Stewart, J. concurring)(Pentagon Papers Case).

88. *See, e.g.*, Rovario v. United States, 353 U.S. 53, 59 (1957).

89. *See, e.g.*, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966)(various applications of executive privilege listed by the court, 40 F.R.D. at 324 n.15).

The Supreme Court in NLRB v. Sears Roebuck & Co., 421 U.S. 149 (1975), noted that the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision-maker on the subject of the decision between predecisional communications, which are privileged, and communications designed to explain a decision already made, which are not. *Id.* at 151.

90. 345 U.S. 1 (1953).

lodged by the head of the department that has control over the matter[91] "after personal consideration by that officer."[92]

Two recent cases interpreting the extent of executive immunity from civil liability may offer some insight into whether executive privilege becomes less compelling when asserted by a cabinet member instead of the President. In *Nixon v. Fitzgerald*,[93] the Supreme Court held that "a former President of the United States is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[94] This absolute immunity exists at least where Congress has not expressly subjected the President to civil liability for his official acts.[95] Yet, in the companion case, *Harlow v. Fitzgerald*,[96] the Court found only a qualified immunity for senior presidential aides and advisers. When these officials claim absolute immunity they "first must show that the responsibilities of [their] office embraced a function so sensitive as to require a total shield from liability."[97] The strength of a derivative claim to presidential immunity thus depends upon the executive function invoked; the claim would be strongest when made by presidential "alter egos" working in

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91. *Id.* at 7-8.

92. The *Reynolds* court explained that the "essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced." *Id.* at 8 n.20 (citing Duncan v. Cammell, Laird & Co., 1942 A.C. 624, 638 (H.L.)).

93. 457 U.S. 731 (1982).

94. *Id.* at 749.

95. The Court noted that granting the President absolute immunity did not remove all constraints upon his power to act:

> There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.
>
> The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

Id. at 757-58 (footnotes omitted).

96. 457 U.S. 800 (1982).

97. *Id.* at 812-13. The *Harlow* Court also concluded that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. *See also* Butz v. Economou, 438 U.S. 478, 506 (1978)("federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope").

such exclusively executive domains as foreign policy and national security.[98] The EPA cleanup function does not qualify as such a sensitive, exclusively executive responsibility. Thus, although Administrator Gorsuch had a claim of executive privilege available to her, the privilege did not provide an absolute shield.

2. *The Executive Branch's Arguments Against Disclosing The Documents.* The EPA contended that disclosure of the documents would have a deleterious effect on pending investigations[99] and interfere with its ability to administer the Superfund.[100] These were, in fact, valid concerns.[101] Many of the documents concerned cases in the early stages of investigation, where disclosure could be particularly harmful. Revealing the information[102] could forewarn depositors of hazardous wastes that they were suspected of illegal activity. Disclosure would also place the EPA at a disadvantage in settlement negotiations with these violators. The requested files included: the EPA's proposed settlement strategies, lists of potential witnesses, detailed descriptions of available evidence, anticipated defenses, the elements of proof required in a given case, the legal issues involved, and the possible precedential impact of certain rulings. If this information became public, the targets of the investigations would know the EPA's bottom-line settlement po-

98. 457 U.S. at 812 nn.18-19.

99. As Attorney General Smith explained in a letter to Representative John Dingell, "[t]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully appraised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Letter to Hon. John H. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, Washington, D.C., (Nov. 30, 1982), *reprinted in* H.R. REP. No. 968, 97th Cong., 2d Sess. 37-38 (1982).

100. *See* 149 CONG. REC. H10,055 (daily ed. Dec. 16, 1982) (statement of Rep. Dannemeyer); *Petitioner's Brief*, *supra* note 6, at 55.

101. The Reagan Administration's additional fears about the precedential effect of full acquiescence to the congressional subpoena, on the other hand, were highly speculative. The Administration worried that President Reagan's willingness to accommodate Congress in this instance might make it harder for future presidents to resist demands for enforcement documents relating to areas outside the environmental protection field. *See* 149 CONG. REC. H10,057-58 (daily ed. Dec. 16, 1982)(statement of Rep. Clausen).

102. The Reagan Administration had good reason for concern that information in the withheld documents might reach unintended parties. As Joseph Bishop, deputy general counsel of the Army from July, 1952 to October, 1953, noted, "there can be no guarantee that information coming into the hands of Congress or the whole membership of one of its major committees will long remain secret. . . . Even legislators of high respectability have been known, in the heat of partisan passion, to place the national interest a very poor second to considerations of faction." Bishop used, as an example, an incident taking place in 1941 when Senator Burton K. Wheeler, an isolationist, had revealed the Navy's occupation of Iceland while the operation was still in progress and the ships involved were vulnerable to attack. Bishop, *The Executive's Right to Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 487 & n.41 (1957).

sition, its negotiation strategy, and the agency's perception of the strengths and weaknesses of its case.[103] This information might enable a violator to negotiate a more favorable settlement. Finally, public disclosure of the documents would make it easier for violators to defend themselves against lawsuits.

Thus, both the subcommittee and the EPA had valid claims to the documents. Neither the legislative nor the executive branch has guidelines for resolving such competing claims. As one Congressman noted during the debate preceding the contempt vote, "the Supreme Court has yet to be called upon to resolve the question of the respective rights of the executive and legislative branches in regard to a claim of privilege as a defense to compulsory legislative process for documents residing within the Executive Branch."[104] Because both parties believed that they had an absolute claim to the documents, a settlement was slow to emerge.

III. Analysis for Future Disputes

The Gorsuch dispute was by no means sui generis. It is likely that this problem will recur. In order to avoid confrontations more severe than that involving Ms. Gorsuch, this note suggests guidelines for weighing the competing claims of the legislative and executive branches.

A. *Compromise Between the Branches.*

Despite the political question doctrine, the judiciary is often available as the final arbiter in interbranch disputes. Judicial solutions should, however, be a last resort;[105] parties should be encouraged to resolve their differences outside of court, as in the Gorsuch dispute.

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103. *Petitioner's Brief*, *supra* note 6, at 67.

104. 149 Cong. Rec. H10,042 (daily ed. Dec. 16, 1982)(statement of Rep. Solomon).

105. In fact, the United States District Court for the District of Columbia demonstrated this restraint in the Gorsuch controversy. The Government had asked the court to declare that Ms. Gorsuch had acted lawfully in refusing to release the requested documents. The court refused. It stated:

> Courts have a duty to avoid unnecessarily deciding constitutional issues. . . . When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . . Judicial restraint is essential to maintain the delicate balance of powers among the branches established by Constitution. . . . Since the controversy which has led to *United States v. House of Representatives* clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

United States v. House of Representatives, 556 F. Supp. 150, 152-53 (D.D.C. 1983)(citation omitted).

Most disputes are susceptible to compromise,[106] and this is the preferred method of resolution.

Informal compromise has several advantages relative to judicial resolution. First, courts are not well equipped to evaluate the conflicting claims of the executive and legislative branches. They have no expertise in weighing the Congress's legislative needs against the President's political imperatives.[107] A court ruling in a *particular* dispute might hamstring either the President or Congress during *future* disputes in perhaps markedly different political environments. For example, such a ruling might unduly limit Congress's ability to investigate. As one scholar has noted:

> The need for access to executive papers and communications arises too seldom in traditional forms of civil or criminal proceeding for the judicial rulings to have much impact upon the effectiveness of the Presidency, but the occasions upon which Congress may demand information are virtually unlimited. Any binding definition of the power of the Senate or House of Representatives to obtain the internal communications of the Executive Branch and of the President to withhold them might greatly affect the relative political power and effectiveness of the Executive and Legislative Branches.[108]

Compromise, as a method of resolution, has worked well in the past. The courts have been hesitant to resolve struggles between the President and Congress, yet Congress has managed to compel the President to hand over information on many occasions.[109] Congress has powerful political weapons capable of compelling disclosure.[110] It controls appropriations and legislation[111] and, perhaps most significantly, commands media attention[112] and with it the ability to mobilize public opinion against the executive. Congress may also obtain information through the now-established device of a special prosecutor, and

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106. *Cf.* Exxon Corp. v. FTC, 589 F.2d 582, 589 (D.C. Cir. 1978)("The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.").

107. Paul J. Mishkin, speaking of *United States v. Nixon*, contended that the "fundamental evil is that the Court was confronted with the issue. The basic failing was that the problem was not resolved by the political system, including the other two branches of government, before it reached the Court." Mishkin, *supra* note 81, at 91.

108. Cox, *supra* note 44, at 1425-26.

109. *See id.* at 1431.

110. *See id.* at 1431-32; Berger, *supra* note 3, at 1320.

111. Bishop, *supra* note 102, at 486.

112. For an example of newspaper reaction to the contempt citation against Gorsuch, see *An Unnecessary Face-Off*, L. A. Times, Dec. 19, 1982, at V-4, col. 1 ("considering Gorsuch's record as the administrator of EPA, it is fair to say that her resistance to disclosure of the documents may have more to do with lack of enforcement than with a theoretical danger of harming the agency's enforcement efforts"). *See also The Superfund Turned Upside Down*, N.Y. Times, Dec. 28, 1982, at A22, col. 1.

through its more drastic powers to issue contempt citations[113] and institute impeachment proceedings. Congress's willingness to use such weapons ensures that the executive will not lightly reject a congressional request for information.

Finally, the imprecision of the demarcation line between conflicting claims of executive secrecy and congressional inquiry encourages both parties to seek a compromise. "Neither the executive nor the Congress is very sure of its rights and both usually evince a tactful disposition not to push the assertion of their rights to abusive extremes. Of such is the system of checks and balances."[114]

The Gorsuch dispute itself is a good example of how effective these forces can be in inducing a compromise. Congress appeared eager to rush into an unseemly confrontation with the executive branch without having fully explored the opportunities for reaching a compromise.[115] The House subcommittee issued a perhaps unnecessarily broad[116] subpoena and did not review the material that Ms. Gorsuch was prepared to turn over prior to undertaking a contempt proceeding against her. Yet despite its apparent intransigence, the subcommittee

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113. Professor Bishop notes that:

> Congress undoubtedly has power to punish contempts without invoking the aid of the executive and the judiciary, by the simple forthright process of causing the Sergeant at Arms to seize the offender and clap him in the common jail of the District of Columbia or the guard room of the Capital Police.

Bishop, *supra* note 102, at 484. In fact, such action was threatened by congressional counsel Stanley M. Brand. *See* Chi. Trib., Feb. 2, 1983, at 14, col. 1.

114. Bishop, *supra* note 102, at 491.

115. The members of the Committee on Public Works and Transportation who did not support the recommendation that Administrator Gorsuch be cited for contempt of Congress noted that "[t]he Committee did not exhaust all means of resolving the dispute before resorting to the contempt citation." H.R. REP. No. 968, 97th Cong., 2d Sess. 73 (1982)(minority views). The dissenting members cited several examples:

> First, prior to the Full Committee meeting, White House officials asked to meet with the Full Committee Chairman and Ranking Minority Member. The meeting was not held.
>
> Second, White House officials offered to show the Chairman and Ranking Minority Member a sampling of the withheld documents so that they would better understand the Administration's position on this matter. This overture was rejected.
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> Third, a compromise proposal was offered which would have given the U.S. District Court in the District of Columbia the jurisdiction to determine the validity of the Subcommittee's subpoena. White House officials indicated that the Administration would not only support this legislation but would work in the House and Senate to enact it during the lameduck session. This proposal was rejected.
>
> And fourth, the Administration, in responding to a compromise proposal made by the Subcommittee Chairman, offered a counter proposal in a letter dated December 9, 1982. No formal response was made to the Administration's proposal prior to the Full Committee meeting to cite Ms. Gorsuch for contempt.

Id. at 74.

116. Representative Michel stated that the subpoena, which covered more than 750,000 pages of EPA documents, "looked like it was based on a fishing expedition." 149 CONG. REC. H10,047 (daily ed. Dec. 16, 1982).

eventually compromised. Both sides were placated and the national hazardous waste disposal effort benefitted.

B. *Judicial Resolution of the Dispute.*

Although interbranch conflicts are best resolved by compromise, courts must be prepared to act when the two branches are unwilling to settle their differences. When a stalemate occurs,[117] the judiciary may have to intervene to avoid "detrimental effects on the smooth functioning of government."[118]

1. *The Political Question Doctrine.* The potential necessity for intervention raises the problem of whether a court *can* resolve such a dispute. The Gorsuch controversy appears, at first glance, to be of the type defined by the Supreme Court as a "political question" and to be therefore nonjusticiable. "The political question doctrine—which holds that certain matters are really political in nature and best resolved by the body politic rather than suitable for judicial review—is a misnomer."[119] The political question doctrine is more aptly characterized as a doctrine of nonjusticiability that applies when the subject matter in dispute is inappropriate for judicial consideration.[120] Nevertheless, the Supreme Court often renders decisions in cases involving "political" issues. The Court has fashioned the following test for determining whether the doctrine should be invoked:

> Prominent on the surface of any case held to involve . . . [a] political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[121]

In *United States v. Nixon*, Chief Justice Burger rejected the argument that President Nixon's claim of executive privilege presented a political question, because the controversy in that case was one that the courts traditionally resolve under their article III power: the production or

117. *See, e.g.*, Drinan v. Nixon, 364 F. Supp. 854, 858 (D. Mass. 1973).
118. United States v. AT&T, 567 F.2d 121, 126 (D.C. Cir. 1977).
119. J. NOWAK, R. ROTUNDA & J.N. YOUNG, *supra* note 68, at 109.
120. *Id.*
121. Baker v. Carr, 369 U.S. 186, 217 (1962).

nonproduction of specified evidence that the prosecutor deemed relevant to and admissible in a pending criminal case.[122]

It is not certain that the Gorsuch controversy would have qualified as a nonjusticiable question.[123] Raoul Berger has argued:

> Neither the Congress nor the nation can be content to have the executive branch finally draw constitutional boundaries when the consequence is seriously to impair a legislative function that is so vital to the democratic process. No more may Congress decide the scope of Executive power. Neither Branch, in Madison's words, has the "superior right of settling the boundaries between their respective powers." That power was given to the courts."[124]

A court would likely consider the Gorsuch case to be closely analogous to *United States v. Nixon*. In both cases the President sought to deny information from an investigating body, be it court or congressional committee, on the basis of executive privilege. Congress's subpoenas and the rules governing their enforcement do not substantially differ from their judicial counterparts. Admittedly, Congress has its own independent mechanisms for enforcing its processes. Yet the *Nixon* Court's decision not to invoke the political question doctrine did not depend on the specific processes available to courts for enforcement of their subpoenas.[125] Instead the court was concerned with the presence of judicially manageable standards, standards that would not be dramatically affected if the requesting body were a congressional committee rather than a court.[126]

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122. 418 U.S. at 696-97. In a case presenting a classic nonjusticiable political question, the court declined to hear a petitioner seeking an end to the Vietnam War. *See* Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973). Such a case is readily distinguishable from the Gorsuch controversy.

123. The District Court seemed to have confronted this issue. In refusing to issue a declaratory judgment, the court noted, "the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege" should the parties be unable to compromise. United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983).

124. Berger, *supra* note 3, at 1361-62; *see* Nixon v. Sirica, 487 F.2d 700, 715 (D.C.Cir. 1973).

125. *Cf.* United States v. House of Representatives, 556 F. Supp. 150, 153 (D.D.C. 1983)("Judicial resolution of this constitutional claim . . . will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress.").

126. Some commentators remain concerned that future disputes between Congress and the executive branch might raise nonjusticiable questions unless some further action is taken. One commentator suggests:

> What is needed is a new statute that would provide the federal courts with undisputed jurisdiction to hear a suit brought by Congress to enforce its subpoenas to executive branch officials: [sic] require that executive officials promptly answer Congress' complaint, and require that the courts, including the Supreme Court, give the case expeditious treatment.

Hamilton, *Settling Inter-Branch Disputes*, New Haven Register, Feb. 8, 1983, at 7, col. 1; *see also* Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1288, 1361-62 (1965); Cox, *supra* note 44, at 1432-35 (1974).

2. *A Framework for Analyzing Future Disputes.* Once a court has satisfied itself that it is not faced with a nonjusticiable issue, it can proceed to the merits of the claim. In analyzing a collision between Congress and the executive branch, a court must first assure itself that both the oversight power and executive privilege are being properly asserted. Congress must be undertaking a legitimate legislative function and the executive branch must be correct that the information is of a type traditionally considered to be privileged. Once the court has made this determination it must determine which claim should prevail. Although the Supreme Court has neither resolved a dispute similar to the Gorsuch controversy nor provided a framework for doing so, the lower courts have developed a test that would be applicable here. In *Nixon v. Sirica*,[127] the United States Court of Appeals for the District of Columbia Circuit stated that a judge, in reviewing a claim for executive privilege, must balance the public interest protected by the privilege against the interests that would be served by disclosure of particular information.[128] One year later that same court suggested, in *Senate Select Committee v. Nixon*,[129] that in weighing these interests a court should begin with a presumption in favor of confidentiality.[130] Congress would then have to rebut the presumption by demonstrating a compelling and specific need for the disputed materials.[131] If Congress satisfied its burden, the court would order disclosure.

In evaluating competing claims, the court must first decide how much weight to accord the presumption in favor of executive privilege. To do so, it must evaluate the type of information being requested. Military and diplomatic secrets have been considered absolutely privileged,[132] so that, no matter how compelling the case for disclosure, Congress will probably never be able to satisfy its burden.[133] Interoffice memoranda, although presumptively privileged, are not given the absolute protection afforded military secrets. Although the Supreme Court in *United States v. Nixon*[134] noted the importance of maintaining confidentiality,[135] the Court also stated that "we cannot conclude that

127. 487 F.2d 700 (D.C. Cir. 1973).

128. *Id.* at 716.

129. 498 F.2d 725 (D.C. Cir. 1974).

130. *Id.* at 730.

131. *Id.*

132. *See supra* text accompanying note 78.

133. *See* United States v. Reynolds, 345 U.S. 1, 11 (1952)("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.")

134. 418 U.S. 683 (1974).

135. *Id.* at 705; *see also supra* text accompanying note 76.

advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."[136] Admittedly, a civil investigation may implicate different concerns than a criminal proceeding and a court should take these differences into account; a court, however, should do so in light of the assumption that such documents are not granted the highest degree of protection possible.

In determining the weight to accord to a claim of executive privilege, a court should also take into account any relevant statutes. These may indicate congressional recognition, not only that a claim of executive privilege exists in certain areas, but that there is a public interest that would be served by protecting confidentiality. The Court of Appeals for the District of Columbia Circuit utilized this method of analysis in *Black v. Sheraton Corp. of America*.[137] It reviewed a request for law enforcement documents. In evaluating a claim of executive privilege, the court assessed whether there was a public interest in minimizing disclosure.[138] It noted that the Freedom of Information Act, which compels the disclosure of a number of government documents, provides an exemption for documents similar to those requested by the House subcommittee.[139] The court stated that this exemption embodied a congressional recognition of the necessity for the privilege,[140] and it took this conclusion into account in determining whether the plaintiff, in this case a private party, had satisfied its burden of demonstrating an interest outweighing the confidentiality interest.[141]

Finally, a court evaluating a claim of privilege should also consider the identity of the party asserting that claim. As noted previously,[142] the strength of the privilege may be diminished when a cabinet official asserts its protection, as compared to an assertion by the President himself.

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136. 418 U.S. at 712.

137. 564 F.2d 531 (D.C. Cir. 1977). In *Sheraton*, the plaintiff was a private lobbyist affiliated with Robert Baker, Secretary to the Majority of the Senate. Black was indicted, and ultimately convicted, on income tax evasion charges. He claimed that both the indictment and his subsequent difficulty obtaining new employment were caused by government dissemination of information collected by an illegal eavesdrop. He sought discovery, under the Freedom of Information Act, of certain documents associated with the prosecution. The government refused to disclose several of the documents, except to a district court in camera.

138. *Id.* at 545-46.

139. *Id.* at 546; *see* 5 U.S.C. § 552(b)(7) (1982) (exemption for "investigatory records compiled for law enforcement purposes").

140. 564 F.2d at 546.

141. *Id.* at 547.

142. *See supra* text accompanying notes 91-98.

The court must consider these factors in light of the interests asserted by Congress. As the Supreme Court stated in *United States v. Nixon*,[143] a "demonstrated, specific need" for material may be found to be more compelling than a general assertion of executive privilege.[144] The degree of specificity is not the only factor relevant to a court's inquiry. The court should also examine the underlying interest that Congress seeks to protect. For instance, when Congress voices a convincing concern that the health of inhabitants of certain communities is in imminent danger, its request for documents should be accorded greater deference than a request for materials regarding the use of tax money to build public highways. In other words, the magnitude of the danger and its probability are both relevant concerns.

In striking the balance between Congress and the President, a court must be concerned with how much the disclosure would impair or disrupt the President's ability to carry out his consitutional duties. If necessary, the court should establish a system of procedural safeguards to ensure that Congress's access to the documents will be accomplished with minimal infringement on the President's article II powers. For instance, a court could conduct an in camera inspection of the documents.[145] Such private examination would allow a judge to release only those documents necessary to the legislative duty to inquire into the operation of the laws, while minimizing the release of documents genuinely harmful to the presidency. Such a procedure, however, might impose huge burdens on particular federal judges, who would be required to sort putatively privileged material to determine which documents are relevant to Congress's inquiry. As a less burdensome remedy, a court could require that Congress receive the sensitive materials only in executive session, a measure that would promote confidentiality.[146]

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143. 418 U.S. 683 (1974).

144. *Id.* at 713.

145. *See id.* at 730; *cf.* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 330-33 (D.D.C. 1966). "The ultimate question is whether, in the circumstances of the case, the occasion for assertion of the privilege is appropriate. *In camera* inspection is not an end in itself, but only a method that may in given instances be indispensable to decision of that question." *Id.* at 332. *See generally* United States v. Reynolds, 345 U.S. 1 (1952).

146. Under the analysis suggested in this note, judicial resolution of the Gorsuch matter would have led to the release of the Superfund enforcement documents. The President's assertion of executive privilege would have created a presumption in favor of applying the privilege. The presumption would not have been insurmountable, however. First, the documents were not military secrets and were therefore not accorded absolute protection. Second, the privilege was being asserted by a cabinet official, not by the President. Congress's showing of a specific legislative need to inquire into the operation of CERCLA and into allegations of governmental wrongdoing would then have defeated the presumption in favor of the privilege and would have justified a court order requiring the EPA to turn over the disputed documents to the subcommittee. But, in

In utilizing this note's suggested framework for resolving this type of dispute, the courts will be able to maintain the necessary balance between the need for full congressional inquiry into the operation of the laws and the legitimate requirements of secrecy in the executive branch. The courts must protect the integrity of the administrative process from mere unfocused curiosity.[147] For example, few would condone congressional demands made to the Justice Department for transcripts of testimony to a grand jury obtained as part of an ongoing investigation into organized crime. Thus, executive confidentiality in some circumstances must be protected. Yet Congress must be able to guard against governmental deception[148] and to exercise its oversight authority. Its rights should not be limited merely because the President asserts that certain information should not be disclosed.[149] The suggested shifting burden test takes the President's concerns into account. If a court assumes that executive officials have the privilege to withhold information whenever Congress is unable to demonstrate otherwise, the court protects administrators and relieves them from the anomaly of having to make public the reasons for keeping certain information private. Yet such a test does not unduly circumscribe congressional power. In instances where the information is necessary, and requested pursuant to a legitimate legislative need, such as when Congress is

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view of the demonstrated executive need to keep enforcement documents secret, the reviewing court would have been obliged to provide for special procedures that would minimize the infringement on executive duties and powers by preventing improper disclosure of the documents.

147. *See* United States v. Morgan, 313 U.S. 409 (1941). In *Morgan*, the Supreme Court held that a court could not depose the Secretary of Agriculture regarding the process by which he determined the maximum rates to be charged by market agencies for their services at the Kansas City stockyards, because "the integrity of the administrative process must be . . . respected." *Id.* at 422; *see also* Cox, *supra* note 44, at 1429. Raoul Berger makes a distinction between a privilege for "secrets of the cabinet" and

> an unlimited discretion to withhold any document or communications between the several million subordinate employees in the interest of "administrative efficiency." . . . The two are incommensurable. An assumption that information may be concealed from Congress on the plea of "administrative efficiency" would have shielded Fall, Denby and Daugherty from congressional investigation and have enabled them to despoil the nation of Teapot Dome, and all in the guise of taking "care that the Laws be faithfully executed!"

Berger, *supra* note 3, at 1289-90.

148. As Cox explained, the "claim of privilege is a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress." Cox, *supra* note 44, at 1433. He also noted that the "central problem today is how to deal with governmental secrecy and . . . with governmental deception." *Id.* at 1434.

149. As the Court of Appeals for the District of Columbia Circuit stated in *Nixon v. Sirica*, "although the views of the Chief Executive on whether his Executive privilege should obtain are properly given the greatest weight and deference, they cannot be conclusive." 487 F.2d 700, 716 (D.C. Cir. 1973).

properly using its oversight authority, the court will compel disclosure. In short, the integrity of both branches can be preserved.

IV. Conclusion

Congress's citation for contempt of EPA Administrator Anne Gorsuch illustrates a recurring problem in American constitutional history: the clash between the congressional right to inquire into the operation of the laws and the executive right to secrecy in intradepartmental communications—specifically the secrecy of law enforcement records and intra-agency recommendations. Congress's oversight power has long been recognized as an incident of the constitutional grant of legislative power. Executive privilege is based on the need for confidentiality of executive communications and is implied by the separation of powers doctrine. Neither congressional oversight nor executive secrecy is absolute, and it is inevitable that the two doctrines will conflict with one another from time to time.

The two branches should first attempt to resolve any conflict on their own. When compromise is not forthcoming, and a court is not precluded by the political question doctrine from adjudicating the dispute, judicial resolution of a dispute may be necessary in order to end governmental stalemate. In such a case, the court should employ a balancing test that presumes that the executive branch should not ordinarily be compelled to disclose information regarding sensitive matters such as national security affairs and pending law enforcement decisions. Congress may defeat the presumption only if it can demonstrate a specific legislative need. Such an arrangement will assure the integrity of both branches and prevent stalemate in our federal system.

Ronald L. Claveloux

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STATUTE

A LEGISLATIVE PROPOSAL FOR RESOLVING EXECUTIVE PRIVILEGE DISPUTES PRECIPITATED BY CONGRESSIONAL SUBPOENAS

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Disputes between the President and Congress regarding the executive branch's obligation to respond to Congressional demands for information have appeared with disquieting frequency in recent years. These disputes involve what has been called the "clash of absolutes," generating controversy and making political compromise difficult. Congress is forced to rely on its criminal contempt powers as the primary means to obtain compliance with subpoenas it has issued to employees and officials of the executive branch. These powers, however, are ill-suited to ensure adherence to such subpoenas.

In this Article, Mr. Hamilton and Mr. Grabow identify the shortfalls of the powers currently available to Congress to enforce its subpoenas and propose a bill that would provide a civil remedy for the enforcement of Congressional subpoenas issued to executive branch officials. The authors trace the history of similar proposals made in the past and examine alternatives to the proposed bill. Mr. Hamilton and Mr. Grabow conclude by arguing that there are no constitutional or other barriers to a civil action brought under the proposed bill and that it is now time for the bill's enactment.

From the administration of George Washington[1] to that of Ronald Reagan,[2] conflicts have arisen between the President and Congress over the executive branch's obligation to respond to congressional demands for information. To justify witholding information, the executive branch often has couched its claims of executive privilege in the broadest of terms. Thus, lawyers for President Nixon argued in 1973 that "[s]uch a privilege, inherent in the Constitutional grant of executive power, is a

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[1] In 1796 George Washington refused to deliver certain documents concerning the negotiation of the Jay Treaty to the House of Representatives. Washington did, however, supply the information to the Senate, observing that the Senate, not the House, has a constitutional role in the negotiation of treaties. *See* Messages and Papers of the Presidents 194–96 (J. Richardson ed. 1896). *See also* Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 107–09 (1949).

[2] *See infra* notes 6–11 and accompanying text.

matter for Presidential judgment alone."[3] The Supreme Court unanimously rejected the claim that the President had an absolute, unreviewable executive privilege in *United States v. Nixon*.[4] Nonetheless, conflicts between the two branches of government have not abated, but continue to be acrimonious.[5]

In October 1981, President Reagan, asserting executive privilege, directed former Secretary of the Interior James G. Watt to withhold thirty-one documents subpoenaed by the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce.[6] The President asserted that disclosure would interfere with his confidential relationship with his cabinet and violate the doctrine of separation of powers.[7] The Secretary ultimately released the documents, but only after the subcommittee and the full committee had cited Watt for contempt of Congress.[8]

In November 1981, the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation issued a subpoena to the Administrator of the Environmental Protection Agency (EPA), Anne Gorsuch Burford, for documentation concerning EPA's enforcement of the "Superfund" statute.[9] Burford appeared before the subcommittee on December 2, 1982, but, under orders from President Reagan, refused to answer certain questions. She advised the subcommittee that the President was claiming executive privilege as to certain "sensitive documents found in open law enforcement files."[10] After the full committee reported a contempt resolution to the House of Representatives, that body, on December 16, 1982, cited Burford for contempt of Congress and sent the matter to the Justice Department for criminal prosecution.[11] This was an historic first, for never before had a house of Congress held the head of an executive agency or department in contempt.

[3] Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at 16, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973) [hereinafter cited as Nixon Brief].

[4] 418 U.S. 683 (1974).

[5] That the Supreme Court's decision in *Nixon* did not end disputes between the Congress and the executive branch is not surprising, because the case involved a subpoena issued in connection with a criminal trial, not a congressional subpoena. The Court in *Nixon* dealt only with executive confidentiality vis-a-vis the requirements of criminal justice. *Id.* at 711–12. The Court specifically noted that it was "not here concerned with the balance between . . . the confidentiality interest and congressional demands for information . . . ." *Id.* at 712 n.19. The dispute between the Watergate Committee and President Nixon was adjudicated by the lower courts in Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), *aff'g* 370 F. Supp. 521 (D.D.C. 1974), which is discussed *infra* at note 94.

[6] *See* H.R. Rep. No. 898, 97th Cong., 2d Sess. 6 (1982).

[7] *Id.* at 10.

[8] *Id.* at 8.

[9] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9657 (Supp. V 1981).

[10] 128 Cong. Rec. H10,033, H10,037 (daily ed. Dec. 16, 1982).

Following media reports about conflicts of interests, political manipulation of EPA programs and funds, and the purported shredding and destruction of agency documents, Burford resigned on March 9, 1983. That same day the White House agreed to provide the House Energy and Commerce Committee access to the disputed documents if the Committee would protect the confidentiality of certain documents identified by the EPA as "enforcement sensitive."[12]

The Watt and Burford controversies dramatically highlight the problem on which this Article will focus—the pitfalls of using Congress's criminal contempt powers as the primary means to obtain compliance with congressional subpoenas issued to employees and officials of the executive branch.[13] As an alternative procedure, we propose a new statute that gives the United States District Court for the District of Columbia original jurisdiction to hear, on an expedited basis, a suit brought by either house of Congress, or by an authorized committee or subcommittee, to enforce subpoenas issued to executive branch officials.

I. Congress's Current Contempt Powers

The Supreme Court has affirmed that Congress's power to conduct investigations is "inherent in the legislative process."[14] The scope of this power of inquiry is "as penetrating and far-

[11] *Id.* at H10,033–61.

[12] *See* Washington Post, Mar. 10, 1983, at 1, col. 1.

[13] This Article will not review the variegated history of executive privilege claims. Nor will it discuss the Supreme Court's conclusion in United States v. Nixon that there is an executive privilege that, although not absolute, is grounded in the Constitution. Both subjects already have received widespread attention. On executive privilege generally, see, e.g., R. Berger, Executive Privilege: A Constitutional Myth (1974); J. Hamilton, The Power To Probe: A Study of Congressional Investigations (1976); Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1 & 2), 12 U.C.L.A. L. Rev. 1044 (1965); Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383 (1974); Dorsen & Shattuck, *Executive Privilege, the Congress and the Courts*, 35 Ohio St. L.J. 1 (1974). On the *Nixon* case, see the comments by Professors Berger, Gunther, Henkin, Karst & Horowitz, Kurland, Mishkin, Ratner, and Van Alstyne in *Symposium on* United States v. Nixon, 22 U.C.L.A. L. Rev. 1 (1974).

[14] Watkins v. United States, 354 U.S. 178, 187 (1957).

reaching as the potential power to enact and appropriate under the Constitution."[15] In the words of Chief Justice Warren:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[16]

Among the tools of inquiry available to Congress, none is more important than the power to subpoena witnesses and materials. The Constitution, however, does not expressly grant Congress this power. But the Supreme Court has found the subpoena power to be an "indispensable ingredient"[17] of the legislative powers granted to Congress by the Constitution.[18] The rationale for this implied subpoena power is that:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[19]

The traditional "means of compulsion" used by Congress to ensure compliance with its subpoenas is punishment for contempt.[20] Although the Constitution does not expressly grant Congress the power to punish recalcitrant witnesses for contempt,[21] that power also has been deemed an inherent attribute

[15] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[16] Watkins v. United States, 354 U.S. at 187.

[17] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975). *See also* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[18] *See* U.S. Const., art. 1, §§ 1, 8.

[19] McGrain v. Daugherty, 273 U.S. at 175.

[20] For a more detailed discussion of Congress's contempt powers, see generally C. Beck, Contempt of Congress (1959); E. Eberling, Congressional Investigations (1928); R. Goldfarb, The Contempt Power (1963); J. Hamilton, *supra* note 13; T. Taylor, Grand Inquest (1955); Landis, *Constitutional Limitations in the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691 (1926).

[21] The sole exception is the power of each House of Congress to remedy contempts committed by its own members. *See* U.S. Const., art. 1, § 5, cl. 2.

of Congress's legislative authority.[22] Congress first exercised this power in 1795[23] and the first contempt citation arising from a refusal to produce evidence occurred in 1812.[24] These early examples involved Congress's "self-help" contempt power, which allows either house of Congress to send its Sergeant-at-Arms to arrest an offender for trial before that house. The offender also faces possible imprisonment, historically in the District of Columbia jail or the guard house in the Capital basement. Prior to the adoption of the Constitution, the colonial assemblies and the Continental Congress exercised such powers, as did England's House of Lords and House of Commons.[25] A prisoner can challenge the legality of the confinement by a writ of habeas corpus.[26]

Under this self-help enforcement procedure, imprisonment is limited to the duration of the pending session of Congress.[27] Feeling that harsher penalties were necessary to obtain the cooperation of recalcitrant witnesses,[28] Congress supplemented its inherent contempt powers in 1857 by enacting a statute providing that a witness who fails to appear before a congressional committee, or who appears but fails to give testimony or to produce requested evidence, is guilty of a misdemeanor punishable by a fine of not less than $100 and not more than $1000 and imprisonment of not less than one month and not more than twelve months.[29] That statute (Section 192) remains essentially unchanged in the current Federal Code.[30]

Although Congress continued to exercise its self-help powers after enacting the 1857 criminal statute, reliance on the statutory procedure soon predominated as increased legislative responsibilities made full-scale congressional trials impractical. Although Congress still retains its self-help powers,[31] it last resorted to this procedure in 1945.[32]

[22] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 233 (1821).

[23] *See* Jurney v. MacCracken, 294 U.S. 125, 148 (1935).

[24] J. Hamilton, *supra* note 13, at 87.

[25] Jurney v. MacCracken, 294 U.S. at 148–49.

[26] Kilbourn v. Thompson, 103 U.S. 168, 177 (1881).

[27] Jurney v. MacCraken, 294 U.S. at 151.

[28] *See* Cong. Globe, 34th Cong., 3d Sess. 405 (The 1857 Act was passed "to inflict a greater punishment than the Committee believes the House possesses the power to inflict.").

[29] Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

[30] *See* 2 U.S.C. § 192 (1982).

[31] *See In re* Chapman, 166 U.S. 661, 671–72 (1897).

[32] *See* C. Beck, *supra* note 20, at 7.

Congress recently provided for civil enforcement in some instances of Senate, but not House, subpoenas. The 1978 Ethics in Government Act[33] gives the United States District Court for the District of Columbia jurisdiction over any civil action brought by the Senate, or by an authorized committee or subcommittee, to enforce, obtain a declaratory judgment concerning, or prevent a threatened noncompliance with, certain Senate subpoenas.[34] The Ethics in Government Act, however, specifically excludes from its coverage actions to enforce subpoenas directed at officials of the federal government.[35]

Congress also has a variety of other means that can be marshaled to compel the executive branch to produce requested materials. An administration's bill may be shelved in committee until relevant information is provided. Similarly, Congress may exercise its power over the purse to reduce or deny appropriations sought by an administration until the information is forthcoming. Such tactics, however, may prove ineffective in many situations. The recent controversies where Congress sought information from Watt and Burford about the alleged failure of the administration to execute existing legislation highlight the need for concern.

Congress, of course, retains the power to impeach an executive official—including the President—for failure to provide subpoenaed information.[36] In all but the most extraordinary situations, however, that power is not a credible threat and it does not provide a practical solution for resolving most interbranch

[33] 2 U.S.C. § 288(d) (1982); 28 U.S.C. § 1364 (Supp. V 1981).

[34] 28 U.S.C. § 1364 (Supp. V 1981).

[35] *Id.* § 1364(a). ("This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity."). *See also* S. REP. No. 170, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 4216, 4307–08 [hereinafter cited as Senate Ethics Act Report]. Congress evidently excluded actions to enforce subpoenas directed at executive officials from the Ethics in Government Act because of the strong objections raised by the Justice Department to a similar provision in an earlier proposal, the Watergate Reorganization and Reform Act of 1975, S. 495, 94th Cong., 1st Sess. § 101, 121 CONG. REC. 1828–32 (1975). *See also* 123 CONG. REC. 2961 (1977) (remarks of Sen. James Abourezk). Senator Ervin's proposal for a civil mechanism to enforce subpoenas against executive officials is discussed *infra* in greater detail at note 96 and accompanying text.

[36] Article II, § 4 of the Constitution provides that "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST., art. II, § 4. On impeachment generally, see R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); C. BLACK, IMPEACHMENT: A HANDBOOK (1974).

disputes.[37] The House has voted only three articles of impeachment against executive branch officials[38] and the Senate has convicted only four individuals of impeachable offenses.[39]

Congress thus is forced to rely upon Section 192 criminal contempt proceedings as the primary means to obtain compliance with subpoenas it has issued to executive branch officials. For various reasons, however, this statutory method is ill-suited to ensure adherence to such subpoenas.

Section 192 is a criminal provision under which a witness faces a jail term for noncompliance.[40] The sanction is directed not at enforcing compliance, but at punishing a contumacious witness for past defiance and deterring future contempts.[41] Once court proceedings begin,[42] the defendant cannot purge himself of contempt merely by producing withheld documents or testimony.[43] The witness's inability to expunge a contempt citation severely limits the usefulness of Section 192 as a means to secure compliance with a congressional subpoena, since the witness has little incentive to comply once a court proceeding begins.[44]

[37] *See In re* Subpoena to Nixon, 360 F. Supp. 1, 5 n.9 (D.D.C. 1973) ("impeachment may be the final remedy, but it is not so designed that it can function as a deterrent in any but the most excessive cases").

[38] Two were voted against presidents and one against a cabinet official (Secretary of War William Belknap in 1876). *See* Fenton, *The Scope of the Impeachment Power*, 65 N.W. L. REV. 719, 748–58 (1970).

[39] All four were federal judges. *Id.*

[40] The section provides for a fine of not less than $100 and imprisonment for not less than one month. 2 U.S.C. § 192 (1982). *See also* United States v. Tobin, 195 F. Supp. 588, 617 (D.D.C. 1961), *rev'd*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962). *But see infra* note 43.

[41] *See, e.g.*, Cheff v. Schnackenberg, 384 U.S. 373, 377 (1966); Shillitani v. United States, 384 U.S. 364, 368–71 (1966); McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

[42] The House of Representatives could drop its contempt citation against EPA Administrator Burford because the United States Attorney for the District of Columbia, Stanley S. Harris, had refused to present the House's contempt citation to the grand jury. *See infra* notes 55–58 and accompanying text. Contempt proceedings thus never had been formally instituted against Burford in court. The House took action to drop the contempt citation by a voice vote on August 3, 1983, after receiving access to the documents previously withheld. *See* Washington Post, Aug. 4, 1983, at 4, col. 4.

[43] *See, e.g.*, United States v. Brewster, 154 F. Supp. 126, 136–37 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958); United States v. Greyhound Corp., 363 F. Supp. 525, 533–34 (N.D. Ill. 1973). A few courts have attempted to temper the severity of this result by suspending sentence upon compliance with the subpoena by the defendant. *See, e.g.*, United States v. Tobin, 195 F. Supp. at 617. Although imprisonment and other punishment is avoided, the witness nevertheless remains guilty of a criminal act.

[44] This was critical to Congress's decision to provide for civil enforcement of certain Senate subpoenas in the Ethics in Government Act, 2 U.S.C. § 1346 (1982). *See* Senate Ethics Act Report, *supra* note 35, at 4257 ("Indeed, the major problem in instituting a

In addition, the Supreme Court has held that in a contempt prosecution "the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases."[45] Accordingly, the burden rests on the prosecution to establish that the defendant's refusal to comply with the subpoena was willful,[46] and that the withheld documents are pertinent to the subject matter of the investigation.[47] All elements of the offense must be proven beyond a reasonable doubt,[48] and the defendant is entitled to a jury trial.[49] Moreover, as with any criminal procedure, Congress may not appeal an acquittal. These basic protections make convictions difficult, as was demonstrated by the recent acquittal of EPA official Rita M. Lavelle in what many thought was an "easy" case for the government.[50] Thus, Section 192 is of limited use to Congress as a means of ensuring compliance with its subpoenas.

More fundamentally, however, Section 192 is an unsuitable mechanism for obtaining compliance with subpoenas issued to executive officials because the power to control prosecutions

criminal contempt of Congress proceeding is that, once the initial refusal has occurred and a criminal contempt proceeding has begun, the recalcitrant witness has no incentive to comply with the subpoena.").

[45] Watkins v. United States, 354 U.S. 178, 208 (1957). *Accord* Russell v. United States, 369 U.S. 749, 755 (1962).

[46] Flaxer v. United States, 358 U.S. 147, 151 (1958). The requirement of willfulness is satisfied if "the refusal was deliberate and intentional and was not a mere inadvertence or an accident." Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

[47] Watkins v. United States, 354 U.S. at 208. A committee also has the duty, upon specific objection by the witness, to provide an explanation on the record of the subject matter of the investigation and the relationship of the subject matter to the requested information. *Id.* at 214–15. In addition, an indictment charging the defendant with violation of Section 192 must include a statement of the subject matter of the investigation. Russell v. United States, 369 U.S. at 771–72.

[48] *See, e.g.*, Flaxer v. United States, 358 U.S. at 151; Quinn v. United States, 349 U.S. 155, 165 (1955).

[49] *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); United States v. Brewster, 154 F. Supp. at 136.

[50] The Lavelle case arose from her refusal to testify before the Subcommittee on Investigations and Oversight of the House Energy and Commerce Committee. *See* New York Times, July 23, 1983, at 1, col. 1. Lavelle, who had left EPA when subpoenaed by the Subcommittee, did not refuse to testify on executive privilege grounds.

The difficulty of resolving executive privilege claims in the context of a criminal contempt proceeding was expressed by the United States Court of Appeals for the District of Columbia Circuit as follows: "A contempt of Congress prosecution is not the most practical method of inducing courts to answer broad questions broadly. Especially is this so when the answers sought necessarily demand far reaching constitutional adjudications." Tobin v. United States, 306 F.2d at 274. The district court in *Tobin* expressed a similar sentiment: "[W]here the contest is between different governmental units, . . . to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interests of two sovereigns." 195 F. Supp. at 617.

lies not with Congress, but with the executive branch itself. The procedure for initiating criminal contempt proceedings for violation of Section 192 is set forth in 2 U.S.C. § 194 (Section 194). Section 194 provides that the President of the Senate or the Speaker of the House will certify a contempt resolution reported by the respective House to the United States Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."[51]

The conflict of interest inherent in assigning prosecutorial control to the U.S. Attorney, an executive branch official, where the action is against another executive official was illustrated trenchantly by the House's inability to secure the prosecution of EPA Administrator Burford. On December 16, 1982, the House, by a vote of 259 to 105, cited Burford for contempt of Congress.[52] Pursuant to Section 194, the Speaker of the House certified the contempt resolution to the United States Attorney for the District of Columbia, Stanley S. Harris, for presentment to the grand jury.[53] The U.S. Attorney not only refused to present the contempt citation to the grand jury, but joined the Justice Department and Burford in an unprecedented legal action against the House and a number of its officials.[54] The ex-

[51] Section 194 provides in full:

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

2 U.S.C. § 194 (1982).

[52] H.R. Res. 632, 97th Cong., 2d Sess., 128 CONG. REC. H10,061 (daily ed. Dec. 16, 1982).

[53] *See* 128 CONG. REC. H10,268 (daily ed. Dec. 17, 1982).

[54] The named defendants were the House of Representatives, the Committee on Public Works and Transportation, Rep. James J. Howard (D-N.J.), Chairman of the Committee on Public Works and Transportation, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; Rep. Elliott J. Levitas (D-Ga.), Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; Rep. Thomas P. O'Neill (D-Mass.), Speaker of the House of Representatives; Edmund L. Henshaw, Jr., Clerk of the House of Representatives; Jack Russ, Sergeant-at-Arms of the House of Representatives; and James T. Molloy, Doorkeeper of the House of Representatives. In its motion to dismiss, the House sardonically noted that "[t]he complaint does not name the Chaplain or the

ecutive officials sought a declaratory judgment that Burford had acted lawfully in refusing to turn over certain allegedly "enforcement sensitive" documents to the Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation. The District Court dismissed this suit on February 3, 1983.[55]

Harris's refusal to present the contempt citation to the grand jury appears to contravene Section 194, which provides that it shall be the "duty" of the U.S. Attorney to bring the matter before the grand jury.[56] At least one court has so ruled. For example, in *Ex parte Frankfield*,[57] the United States District Court for the District of Columbia declared that Congress "left no discretion" to the U.S. Attorney and that he "is required, under the language of the statute, to submit the facts to the grand jury."[58]

Postmaster, the two remaining elected constitutional House officers." Brief of the House of Representatives at 7 n.2, United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) [hereinafter cited as House Burford Brief].

[55] 556 F. Supp. at 150. Judge Smith dismissed the action, stating his belief that, given the existence of Sections 192 and 194, the "preferred" method to resolve the executive privilege claim was a criminal contempt proceeding. Recognizing the "difficulties apparent" in prosecuting an executive official for contempt, Judge Smith encouraged "the two branches to settle their differences without further judicial involvement." *Id.* at 153.

[56] 2 U.S.C. § 194 (1982). U.S. Attorney Harris, in later testimony before the House Committee on Public Works and Transportation, argued "that the use of the word 'shall' in a statute like 2 U.S.C. § 194 is directory rather than mandatory. Courts quite wisely have held that a legislature's use of the word 'shall' does not deprive a prosecutor of his normal prosecutorial discretion." Statement of Stanley S. Harris, United States Attorney for the District of Columbia, Before the Committee on Public Works and Transportation of the House of Representatives at 5, June 16, 1983 (on file with the HARVARD J. ON LEGIS.) [hereinafter cited as Harris Testimony]. Harris cited no authority for these statements.

[57] 32 F. Supp. 915 (D.D.C. 1940).

[58] *Id.* at 916. *Accord* United States v. Brewster, 154 F. Supp. 126, 136 (D.D.C 1957) ("United States Attorney [has] . . . duty . . . to bring the matter before the grand jury for its action . . . ."); R. GOLDFARB, *supra* note 20, at 42; J. HAMILTON, *supra* note 13, at 94; Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 G.W. L. REV. 399, 401 (1954); Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 257.

In its suit against the House, the Justice Department justified the U.S. Attorney's decision not to report the contempt citation to the grand jury by citing the court's statement in Anasara v. Eastland, 442 F.2d 751, 754 n.6 (D.C. Cir. 1971), that "perhaps . . . the executive branch . . . may decide not to present the matter to the grand jury (as occurred in the case of the officials of the New York Port Authority)." It is unclear what case the D.C. Circuit was referring to in this rather cryptic statement, for it cited no case involving the New York Port Authority. The D.C. Circuit did decide a case involving contempt by a Port Authority official, United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), but the U.S. Attorney there did not refuse to present the matter to the grand jury. Rather, "[t]he charge was brought through an information, [the Port Authority official] having waived his right to Grand Jury presentment and prosecution by indictment . . . ." *Id.* at 592 n.2.

Adherence by the U.S. Attorney to this requirement would not, however, seriously limit Justice Department control[59] over a Section 192 proceeding. The U.S. Attorney has considerable influence on the grand jury and could attempt to convince it that no indictment should issue because a valid executive privilege defense exists.[60] Although a grand jury has the power to present an indictment despite the U.S. Attorney's opposition,[61] the indictment will not be valid, and no criminal prosecution may proceed, unless it is signed by the U.S. Attorney[62] who has absolute discretion in deciding whether to affix his signature.[63]

Even if the U.S. Attorney signs the indictment, both he and the Attorney General have the power later to enter a nolle

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[59] Although Section 194 refers to the U.S. Attorney, U.S Attorneys are officers of the Justice Department, and therefore subordinate to the Attorney General. The conflict this may impose on the Attorney General is plain, since the President likely will have received the Attorney General's advice before asserting executive privilege. In fact, in recent years such involvement by the Attorney General has become a formal requirement. A directive, issued by President Nixon in 1969, and still in effect, provides that the invocation of executive privilege is subject to the following procedural steps:

> 1. If the head of an Executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a Congressional agency addressed to his department or agency raises a substantial question as to the need for invoking Executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.
> 2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that Executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring Congressional agency.
> 3. If the department head and the Attorney General agree that the circumstances justify the invocation of Executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

R. Nixon, Memorandum for the Heads of Executive Departments and Agencies: Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969).

[60] In House testimony, U.S. Attorney Harris stated that "[t]he fact is that a prosecutor has an obligation to present exculpatory evidence as well as inculpatory evidence to a grand jury . . . . [T]he grand jury would be entitled to know that [Burford] was following the orders of the President of the United States in conducting herself as she did." Harris Testimony, *supra* note 56.

[61] *See, e.g.*, United States v. Smyth, 104 F. Supp. 283, 294 (N.D. Cal. 1952) ("Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or not."); *In re* Miller, 17 F. Cas. 295 (C.C.D. Ind. 1878) (No. 92,552) (instructing the grand jury that it has the power to return an indictment against the accused despite instructions from the President to the U.S. Attorney not to proceed with the investigation).

[62] *See* FED. R. CRIM. P. 7(c).

[63] *See, e.g.*, United States v. Cox, 342 F.2d 167, 171–72 (5th Cir. 1965) *cert. denied*, 381 U.S. 935 (1967).

prosequi dismissing it.[64] The U.S. Attorney also can decline to bring the case to trial within the time limits of the Speedy Trial Act,[65] thus mandating dismissal.[66] In addition the prosecutor might refuse to resist a motion to dismiss based on executive privilege grounds. Finally, if the prosecution proceeds and culminates in conviction, the President can always pardon the convicted official. Indeed, President Franklin D. Roosevelt pardoned an individual convicted of contempt of Congress.[67]

Finally, the use of the criminal contempt sanction in executive privilege disputes may be unfair to an executive official following the President's orders. A witness "acts at his own peril"[68] because a mistaken view of the law is no defense.[69] The fact that a witness was acting under the orders of a superior authority does not appear to constitute a valid defense.[70] This unfairness

[64] At common law, a prosecutor had absolute discretion to enter a nolle prosequi. *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868). Presently, under Rule 48 of the Federal Rules of Criminal Procedure, court approval is required to terminate prosecution once trial has begun. FED. R. CRIM. P. 48(a) This requirement was added to protect the defendant from prosecutorial harassment, e.g., charging, dismissing, and recharging the defendant. *See* Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). Leave of the court is denied only where the U.S. Attorney's motion is "tainted with impropriety" and not "motivated by considerations . . . 'clearly within the public interest.'" *Id.* at 34. Examples of such improprieties include a motion motivated by a bribe, antipathy to the victim of the crime, or the like. *See* United States v. Hamm, 659 F.2d 624, 630 (5th Cir. 1981). However, even if the court denies the U.S. Attorney's nolle prosequi motion, the court is powerless to compel the prosecutor to pursue the case vigorously. The U.S. Attorney, for instance, can indicate to the grand jury the considerations that counsel no indictment or acquittal. *See* 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 812 (1982).

[65] 18 U.S.C. § 3161 (Supp. V 1981).

[66] *See* United States v. N.V. Nederlandsche Combinatie Voir Chemische Industrie, 453 F. Supp. 462, 463 (S.D.N.Y. 1978).

[67] Dr. Francis E. Townsend in 1938. *See* 83 U.S.C. 8425 (1938). *See also* Townsend v. United States, 95 F.2d 352 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938).

[68] Chapman v. United States, 5 App. D.C. 122, 136 (1898), *aff'd*, 166 U.S. 661 (1899). *See also* Sinclair v. United States, 279 U.S. 749, 767 (1929).

[69] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 208 (1957) ("An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him.").

[70] No case directly has held that the defense of superior orders justifies a government official's noncompliance with a congressional subpoena. United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), rejected such a defense raised by the Executive Director of the Port of New York Authority, who disregarded a House subpoena upon orders from the Governors of New York and New Jersey. *Id.* at 613–16. Although holding that the defense provides no legal justification for failure to comply, the court left open the possibility that an order from a superior, if unsolicited by the disobedient official, might demonstrate a lack of the willfulness required by Section 192 for conviction. *See supra* note 46 and accompanying text.

In *Tobin*, the court of appeals reversed the lower court on the ground that the subpoenaed documents were not relevant under the House's authorizing resolution to the committee. Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962). *See also* Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir. 1951), *rejected as moot*, 344 U.S. 806 (1952) (defense of superior orders no justification for failure to comply with civil contempt order of court). *But cf.* United States v. Ragen, 340 U.S. 462 (1951) (upholding refusal to comply with court's criminal contempt order because of order of U.S. Attorney General under the Federal Housekeeping statute, 5 U.S.C. § 22 (1982)).

may, however, work against *Congress*, as the courts may be disinclined to permit or uphold a prosecution when they believe a defendant is being treated unjustly.

II. THE PROPOSED BILL—A CIVIL ALTERNATIVE

As an alternative to bringing a criminal contempt action under Sections 192 and 194, the proposed bill (Section 1364a)[71] would provide a civil remedy for the enforcement of congressional subpoenas issued to executive officials. The procedure suggested is similar to that presently available under the Ethics in Government Act to enforce Senate subpoenas[72] directed at persons other than federal employees.[73]

Subsection (a) of the proposed Section 1364a would give the United States District Court for the District of Columbia jurisdiction over civil actions brought by either house of Congress, or an "authorized" committee or subcommittee, to enforce or secure a declaratory judgment as to the validity of a subpoena directed at an executive branch official acting in his or her official capacity.[74] The requirement that a committee or a subcommittee be "authorized" ensures that a house of Congress concurs in all civil actions brought under this section, even if the action is brought in the name of the committee or subcommittee issuing the subpoena. The serious nature of interbranch executive privilege disputes justifies this requirement.[75] A similar requirement is imposed by the Ethics in Government Act,[76]

[71] This proposed addition to 28 U.S.C. is set out in full in the Appendix to this Article.

[72] Congress has enacted analogous enforcement procedures authorizing numerous independent and executive agencies to seek the aid of federal courts to obtain compliance with agency subpoenas. *See, e.g.*, 15 U.S.C. § 49 (1982) (Federal Trade Commission); 15 U.S.C. § 687a(e) (1982) (Small Business Administration); 19 U.S.C. § 1333(b) (1976) (International Trade Commission); and 42 U.S.C. § 405(e) (1976) (Social Security Administration).

[73] *See supra* notes 33–35 and accompanying text. The Senate Report accompanying the Ethics in Government Act states, however, that "a future statute might specifically give the courts jurisdiction to hear a civil legal action brought by Congress to enforce a subpoena against an executive branch official." Senate Ethics Act Report, *supra* note 35, at 4305.

[74] Conduct by an executive official not acting in an official capacity presumably would not be based on executive privilege and thus would not present the kind of interbranch conflicts that Section 1364a covers. The Ethics in Government Act, 28 U.S.C. § 1364 (Supp. V 1981), covers executive officials acting in private capacities.

[75] *Accord* Cox, *supra* note 13, at 1434.

[76] *See* 28 U.S.C. § 1364 (Supp. V 1981).

and the procedure is consistent with Section 194, which requires that a criminal contempt resolution be voted by a full house of Congress. To ensure that actions brought by Senate committees or subcommittees are specifically authorized by the Senate, subsection (e) of Section 1364a provides that the Standing Order of the Senate "authorizing suits by Senate Committees"[77] does not permit suit under the section.

Two remedies provided in the Ethics in Government Act—a civil contempt proceeding and an action to prevent a threatened refusal to comply with a subpoena—have not been included in our proposal because Section 1364a would deal exclusively with executive branch officials. A contempt action normally should not be required to force subpoena compliance by executive branch employees; a declaratory judgment or injunction should suffice.[78] There also appears to be no significant need to create an action to prevent a refusal to comply by a federal official since an existing criminal statute already prevents obstructions of congressional investigations.[79]

Subsection (a) also would require that the District Court "shall hear" an action brought by a congressional body under this section. In the past, some courts have been reluctant to enter into interbranch disputes.[80] The requirement that the courts "shall hear" actions brought under Section 1364a instructs the District Court to resolve these disputes on the merits and not dismiss them on discretionary grounds.[81]

Subsection (b) would expedite consideration of actions brought under this section. Without prompt adjudication, civil subpoena enforcement would be of minimal value to a body in

[77] In 1928, the Senate passed a resolution authorizing its committees to "bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate or other law." S. Res. 262, 70th Cong., 1st Sess., 69 CONG. REC. 10,596 (1928). The Senate passed this resolution in response to the Supreme Court's holding in Reed v. Board of County Comm'rs, 277 U.S. 376, 388 (1928), that a Senate committee was without power to bring a civil suit to enforce its subpoena because the Senate had not authorized it to do so. Resolution 262 is now part of the Standing Orders of the Senate. *See* S. JOUR. NO. 572, 70-1, May 28, 1928. The House of Representatives has not granted its committees a comparable general authorization to sue.

[78] Noncompliance with a court order under Section 1364a could, however, subject the noncomplying official to the *court's* inherent contempt powers.

[79] *See* 18 U.S.C. § 1505 (1982).

[80] *See, e.g.*, United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977); 551 F.2d 384 (D.C. Cir. 1976); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

[81] Congress has inserted similar requirements in other statutes. *See, e.g.*, Federal Employees' Compensation Act, 5 U.S.C. § 8125 (1982); Sugar Act of 1948, 7 U.S.C. § 1115(e) (omitted 1974); 28 U.S.C. § 2361 (1976) (federal interpleader provision).

immediate need of materials or testimony. Congress has placed such a provision in numerous statutes,[82] including the Ethics in Government Act.[83]

Subsection (c) provides that an action or remedy brought or imposed under this section will not terminate upon sine die adjournment at the end of a Congress if the committee or subcommittee issuing the subpoena certifies to the court that its interest in the subpoenaed information or testimony continues. This subsection forecloses potential problems that might arise because the House of Representatives is not a continuing body.[84]

Subsection (d) ensures that the civil remedies contained in this section are available without precluding other remedies available to Congress to enforce its subpoenas—in particular, its self-help and statutory contempt powers. While enactment of this proposal could not eliminate Congress's traditional remedies, the civil remedy could be employed to resolve these interbranch disputes in the great majority of cases.

Subsection (f) provides that Congress may be represented in an action under this section by counsel of its choice—e.g., the Senate Legal Counsel, the Counsel to the Clerk of the House of Representatives, committee counsel, or appointed counsel. Subsection (g) would permit an action under the section to be brought by any authorized standing, select, joint, or special committee or subcommittee. Subsection (h) would establish that Section 1364a applies to all officers or employees of the federal government—including the President and Vice President.

III. PREVIOUS PROPOSALS

Various proposals for federal court jurisdiction over civil actions brought by Congress to enforce subpoenas issued to executive officials have been made in the past.[85] While none became law, they have received serious support and consideration.

[82] *See, e.g.*, Federal Election Campaign Act, 2 U.S.C. § 437d(b) (1982); Federal Employees' Compensation Act, 5 U.S.C. § 8125 (1982); Sugar Act of 1948, 7 U.S.C. § 1115(e) (omitted 1974); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1366 (1982).

[83] 28 U.S.C. § 1364(c) (Supp. V 1981).

[84] *See* Rules of the House of Representatives, H.R. Doc. No. 416, 93d Cong., 2d Sess., Rules XI, 2(m)(1)(A), Rule XXVI and ¶¶ 386, 388, 710, 901. The Senate, on the other hand, is a continuing body. *See* Riddick's Senate Procedure, S. Doc. No. 21, 93d Cong., 1st Sess., Rules XXV(4), XXII(2).

[85] Several commentators also have proposed a civil mechanism to enforce congressional subpoenas. *See, e.g.*, J. HAMILTON, *supra* note 13, at 199; R. BERGER, *supra* note 13, at 1334; Dorsen & Shattuck, *supra* note 13, at 33–40; Cox, *supra* note 13, at 1434; Sky, *supra* note 58.

Representative Kenneth B. Keating (R-N.Y.) introduced the first such proposal in 1953.[86] His bill provided for either House, and any committee or subcommittee, upon a majority vote of its members, to "invoke the aid of the United States district courts in requiring the attendance and testimony of witnesses and the production of evidence."[87] Although directed generally at compliance with congressional subpoenas and not specifically targetted to reach members of the executive branch, Keating's proposed bill did not exclude executive officials from its scope. The bill passed the House,[88] but the Senate took no action. Keating reintroduced the bill in the Eighty-fourth, Eighty-sixth, and Eighty-seventh Congresses, but in no case was any action taken.[89]

More recent proposals arose out of the Watergate controversy. In its final report, the Senate Watergate Committee recommended that "Congress enact legislation giving the United States District Court for the District of Columbia jurisdiction to enforce congressional subpoenas issued to members of the executive branch, including the President."[90] Confronted by President Nixon's refusal to comply with its subpoena duces tecum for White House tape recordings of five conversations between President Nixon and his associates, including former counsel John W. Dean, III, the Watergate Committee sued in the District Court for the District of Columbia seeking a declaration that President Nixon's claim of executive privilege was unlawful. Chief Judge John J. Sirica dismissed that action, ruling that no existing statutes gave the federal courts jurisdiction to hear it.[91]

[86] H.R. 4975, 83d Cong., 1st Sess. (1953).

[87] *Id.*

[88] *See* 100 CONG. REC. 13,338–40 (1954).

[89] *See* H.R. 780, 84th Cong., 1st Sess., 101 CONG. REC. 47, 2934 (1955); S. 1515, 86th Cong., 1st Sess., 105 CONG. REC. 5024–25 (1959); S. 2074, 87th Cong., 1st Sess., 107 CONG. REC. 10,221–22 (1961). Keating's proposed bill, essentially the same in the House and Senate versions, provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) either House, any committee or subcommittee of either House, any joint committee of the two Houses of Congress may, by an affirmative vote of a majority of its actual membership, invoke the aid of the United States district courts in requiring the attendance and testimony of witnesses and the production of evidence, in furtherance of any inquiry such House, committee, subcommittee, or joint committee is authorized to undertake.

Id.

[90] The Final Report of the Senate Select Committee on Presidential Campaign Activities, S. REP. NO. 981, 93d Cong., 2d Sess. 1084 (1974).

[91] *See* Senate Select Comm. v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). The Watergate Committee primarily had relied on two statutory bases for jurisdiction, 28 U.S.C. § 1345 (1976) ("Except as otherwise provided by an Act of Congress, the District Court shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States."), and 28 U.S.C. § 1331(a) (1976 & Supp. V 1981), the federal question jurisdictional provision, which at the time provided that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . arises under the Constitution, laws or treaties of the United States." Judge Sirica found both provisions inapplicable.

In response, Senator Sam J. Ervin, Jr. (D-N.C.) introduced a bill similar to what we propose.[92] Some senators, however, objected because they felt that the bill was too broad.[93] To ensure prompt passage, Ervin offered a compromise that Congress enacted. The substitute statute gave the District of Columbia District Court jurisdiction over suits brought by the Senate Watergate committee to enforce subpoenas issued to executive branch officials.[94]

[92] S. 2641, 93d Cong., 1st Sess., 119 CONG. REC. 35,718 (1973).

[93] *See* J. HAMILTON, *supra* note 13, at 206.

[94] Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736 (1973). The debate and a record of the passage of this statute appear at 119 CONG. REC. 36,472–77, 39,220–23 (1973).

The District Court for the District of Columbia, in an opinion by Judge Gesell, found the case justiciable and ruled that the court had authority to hear the suit under the jurisdictional statute enacted by Congress. *See* Senate Select Comm. v. Nixon, 370 F. Supp. 521 (D.D.C. 1974). However, Judge Gesell, in an opinion affirmed on other grounds by the United States Court of Appeals for the District of Columbia Circuit, *see* Senate Select Comm. v. Nixon, 498 F.2d 775 (D.C. Cir. 1974), dismissed the suit on the merits. That holding is discussed and criticized in J. HAMILTON, *supra* note 13, at 182–89.

The proper standard for judicial resolution of such interbranch disputes is beyond the scope of this Article. The subject has received considerable attention, however, and suggested standards can be categorized into three general groups. The first approach is illustrated by the decision in Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). There the court, adopting the standards it had earlier found applicable in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), held that presidential conversations are "presumptively privileged," 498 F.2d at 730, and that the privilege can be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of the institution cannot responsibly be fulfilled without access to records of the President's deliberations." *Id.*

A second approach, proposed by former Watergate Special Prosecutor Archibald COX, is that "the Legislative right should prevail in every case in which either the Senate or House of Representatives votes to override the Executive's objections, provided that the information is relevant to a matter which is under inquiry and within the jurisdiction of the body issuing the subpoena, including its constitutional jurisdiction." COX, *supra* note 13, at 1434. Under this standard, "the President should have no constitutional right to withhold [information] and the judiciary should not go beyond the voted demand except to decide questions of relevance and jurisdiction." *Id.*

A third approach that has been suggested is "[a] simple balancing of the needs of Congress and the executive—unaffected by the application of any presumption." J. HAMILTON, *supra* note 13, at 192. This approach has also been advocated by the current Solicitor General of the United States, Rex Lee. Lee describes this "nonweighted balancing" as "a genuine balancing approach without any predetermined preference for either side, with the victor to be determined on the basis of a simple preponderance of relevant considerations." Lee, *supra* note 58, at 293.

The appropriate standard arguably might differ depending on the grounds for the assertion of executive privilege, i.e., preserving the confidentiality of presidential con-

That same year Senator Edward M. Kennedy (D-Mass.) introduced a bill that would have given the same District Court jurisdiction "with respect to any claim of executive privilege asserted before either . . . House or any . . . joint committee or committee."[95] The Senate passed that legislation, but the House took no action.

The Ninety-third and Ninety-fourth Congresses considered the Watergate Reorganization and Reform Act, which incorporated many of the Watergate Committee's recommendations.[96] The Senate Government Operations Committee, however, decided to deal with the subpoena power issue separately from the overall Watergate Reform Act. Consequently Senator Edmund S. Muskie (D-Me.) introduced an alternative bill[97] similar to Kennedy's proposal,[98] but no action was taken on it.

IV. Alternative Proposals

Congress is now considering two bills designed to avoid the difficulties experienced in attempting to secure the criminal contempt prosecution of EPA Administrator Burford. One bill—introduced by Representative James J. Howard (D-N.J.), Chairman of the House Public Works and Transportation Committee that reported the Burford contempt resolution to the House—

versations (as in the Nixon cases) as opposed to protecting investigative files (as in the Watt and Burford controversies). *See generally* J. Hamilton, *supra* note 13, at 189–96.

[95] That bill provided:

> The District Court for the District of Columbia shall have original, exclusive jurisdiction of any civil action brought by either House of Congress, a joint committee of Congress, or any committee of either House of Congress with respect to any claim of executive privilege asserted before either such House or any such joint committee or committee.

S. 2073, 93d Cong., 1st Sess., (1973). *See also* 119 Cong. Rec. 21,435, 21,442–43 (1973).

[96] This bill was introduced by Senators Ervin (D-N.C.) and Ribicoff (D-Conn.), respectively. *See* S. 4227, 93d Cong., 2d Sess., 120 Cong. Rec. 39,007 (1974); S. 495, 94th Cong., 1st Sess., 121 Cong. Rec. 1821, 1826–32 (1975). The bill provided that:

> The District Court for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, over any civil action brought by either House of Congress, any committee of such House, or any joint committee of Congress, to enforce or secure a declaration concerning the validity of any subpoena or order issued by such House or committee, or by any subcommittee of such committee, to any officer, including the President and Vice President, or any employee of the executive branch of the United States Government to secure the production of information, documents, or other materials.

121 Cong. Rec. 1831 (1975).

[97] S. 2170, 94th Cong., 1st Sess., 121 Cong. Rec. 24,597 (1975).

[98] *See supra* note 95.

would amend Section 194 to specify that presentation of a certified contempt resolution by the U. S. Attorney to the grand jury "is not discretionary", and that the U.S. Attorney must bring the matter before the grand jury within sixty days.[99]

Although this bill might prevent a refusal to present a contempt citation to the grand jury (as happened in the Burford case), it would have little effect on Congress's ability to obtain compliance with its subpoenas. For the reasons discussed in Section I above, the U.S. Attorney still would retain control over all prosecutions for criminal contempt. Moreover, that official could attempt to convince the grand jury that no indictment should issue because of executive privilege. Further, if an indictment was returned, the U.S. Attorney could refuse to sign it, or could sign it and later enter a nolle prosequi, or could frustrate prosecution in other ways.[100]

A second pending House bill, introduced by Representative Barney Frank (D-Mass.), would eliminate the U.S. Attorney's control over criminal contempt actions sought by Congress against executive officials.[101] His bill would amend the Ethics in Government Act to require the Attorney General to apply to the appropriate court for the appointment of a special prosecutor within five days after Congress has certified a criminal contempt action against certain high-level executive officials.[102] This proposal, although more sweeping than the bill introduced by Representative Howard, would not transform criminal contempt proceedings into a suitable means to obtain compliance with congressional subpoenas. The criminal sanction would remain a measure primarily directed not at enforcing compliance, but at punishing an insubordinate witness for past defiance.[103]

Another alternative would be case-by-case enactment of jurisdictional statutes similar to that enacted to allow the Senate Watergate Committee to proceed with its action against President Nixon.[104] The executive branch has favored this approach in the past. Testifying before the Senate Government Operations

[99] H.R. 3456, 98th Cong., 1st Sess., 129 Cong. Rec. 4788 (1983).

[100] *See supra* notes 59–66 and accompanying text.

[101] H.R. 2684, 98th Cong., 1st Sess., 129 Cong. Rec. H2313 (daily ed. Apr. 21, 1983).

[102] The proposed bill would only apply to contempt actions initiated against executive officials compensated at or above a rate equivalent to level 5 of the Legislative Schedule under section 5316 of Title V, i.e., officials at roughly the Assistant Secretary level or above. 5 U.S.C. § 5316 (1982).

[103] *See supra* notes 69–70 and accompanying text.

[104] *See supra* note 94 and accompanying text.

Committee on the 1975 Watergate Reform Act, Assistant Attorney General Michael M. Uhlmann argued that, because "a generic and permanent statute" might provide a disincentive for compromise between Congress and the President, the executive branch favored a "very tightly and specifically drawn statute to accommodate that particular situation."[105]

While political resolution of executive privilege disputes is preferrable to judicial intervention,[106] we doubt that enactment of Section 1364a would reduce Congress's motivation to reach a compromise before seeking judicial redress. The legislative and the executive branches both should desire to accommodate their competing interests rather than yield power to a judge who may be unfamiliar with or unsympathetic to either of the opposing concerns. Congress should have a particular interest in compromise because the courts may resolve such disputes after in camera inspection of the disputed materials. In this circumstance, congressional litigants—who would not have seen the materials and would have only limited knowledge of their contents—would be less able than the executive branch to influence the court's determination.

While negotiated resolution between the executive and legislative branches in subpoena disputes may be desirable, compromise can be difficult because these disputes often involve what one court has called the "clash of absolutes."[107] Such disputes, as occurred during Watergate and the recent Watt and Burford controversies, generate considerable controversy. In such a highly-charged climate, Congress will have difficulty enacting a special jurisdictional statute that could survive presidential veto. To rely on such problematical ad hoc remedies would be perilous and unwise.

A fourth choice for Congress is to attempt to bring a civil enforcement action without the aid of a special jurisdictional provision. Jurisdiction for such a suit likely exists now under the general federal question jurisdictional provision.[108] In *Senate Select Committee v. Nixon*, the court dismissed the Senate Watergate Committee's action against President Nixon for lack of subject matter jurisdiction.[109] In so doing, it rejected federal question jurisdiction because the then-applicable $10,000 amount-in-controversy requirement was not met. Congress, however, eliminated the amount-in-controversy requirement for federal question litigation in 1980,[110] thereby removing that barrier to jurisdiction.[111]

There are, however, two fundamental problems with bringing an action using federal question jurisdiction to enforce a congressional subpoena that point to a need for the enactment of a special jurisdictional provision such as this bill. First, the civil docket backlog in the federal courts is often substantial. Subsection (b) would require the district court to expedite consideration of actions brought under Section 1364a.[112] Without such a requirement, the effectiveness of a civil enforcement remedy would be substantially diminished.

Second, enacting a separate jurisdictional provision would counteract judicial reluctance to decide interbranch disputes. The proposed Section 1364a provides the courts with a clear mandate to exercise jurisdiction and to resolve these disputes. Although Section 1364a could have no effect on any constitutional barriers to congressional enforcement actions, courts could not avoid them by relying on prudential considerations.[113]

V. The Justiciability of Actions Under the Proposed Section 1364a

In the past, the executive branch and various commentators have questioned the validity of civil actions to enforce congressional subpoenas directed at executive officials. They have

[105] *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 22–23 (1976) (statement of Michael M. Uhlmann, Ass't Att'y Gen., Office of Legislative Affairs, Justice Dep't); *accord* Lee, *supra* note 58, at 265.

[106] *See generally* Lee, *supra* note 58, at 264; Levi, *Some Aspects of the Separation of Powers*, 76 Colum. L. Rev. 371, 389–90 (1976); Freund, *On Presidential Privilege*, 88 Harv. L. Rev. 13, 39 (1974); Comment, United States v. AT&T: *Judicially Supervised Negotiation and Political Questions*, 77 Colum. L. Rev. 466, 483–84 (1977).

[107] United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976).

[108] 28 U.S.C. § 1331 (1976).

[109] 366 F. Supp. 51, 59–61 (D.D.C. 1973).

[110] 28 U.S.C. § 1331 (1976), *as amended* Dec. 1, 1980, Pub. L. No. 96-486, § 52(a), 94 Stat. 2369.

[111] Moreover, even before the amount-in-controversy requirement was eliminated, the court in 1976 in United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976), held that such a subpoena dispute presented claims arising under the Constitution and that subject matter jurisdiction was present under § 1331. The court in *AT&T* found the then applicable amount-in-controversy requirement satisfied, stating that "[w]here fundamental constitutional rights are involved, this court has been willing to find satisfaction of the jurisdictional amount requirement for federal question jurisdiction." *Id.* at 389. The Watergate Committee had urged this position on Judge Sirica, but to no avail. *See* Senate Select Comm. v. Nixon, 366 F. Supp. at 58.

[112] *See supra* notes 82–83 and accompanying text.

[113] In recent years such considerations have played an important role in precluding jurisdiction. *See, e.g.*, United States v. AT&T, 551 F.2d 384, 394–95 (D.C. Cir. 1976); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983).

raised four kinds of objections: (1) that such an action does not present a "Case or Controversy" cognizable by the federal courts under Article III of the Constitution; (2) that Congress has no standing to bring such an action; (3) that such an action presents a nonjusticiable political question; and (4) that such an action by Congress usurps the executive's law enforcement responsibilities. Judicial decisions during and subsequent to the Watergate era, however, reject these arguments and indicate quite clearly that there are no constitutional or other barriers to an action brought under the proposed Section 1364a.[114]

A. *Article III Case or Controversy*

The threshold requirement for bringing a federal action, the existence of an Article III "Case or Controversy,"[115] imposes no obstacle to such a Section 1364a action. At one time, a suit between Congress and the executive branch might have been deemed non-justiciable; no real case or controversy would have been found present, because the same party—the United States—was both plaintiff and defendant.[116] More recent decisions, however, recognize that "justiciability does not depend on such a surface inquiry,"[117] and courts now commonly entertain such interbranch disputes.[118]

B. *Standing to Sue*

While the Case or Controversy requirement is grounded in the Constitution, standing is a judicially created concept that focuses on a litigant's capacity to sue, limiting the exercise of

[114] Although not the subject of this Article, it should be noted that any suit brought *against* Congress to challenge a congressional subpoena faces considerable obstacles, in particular the Speech or Debate Clause of Article I, Section 6. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). On the Speech or Debate Clause generally, see Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

[115] *See* U.S. CONST., art. III, § 2, cl. 1.

[116] *See, e.g.*, The Gray Jacket, 72 U.S. (5 Wall.) 342, 371 (1886).

[117] United States v. Nixon, 418 U.S. 683, 693 (1974).

[118] *See, e.g., id.* at 697; United States v. ICC, 337 U.S. 426, 430 (1949) ("Courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented"); ICC v. New Jersey, 322 U.S. 503, 523–24 (1944); Senate Select Comm. v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). *See generally*, R. BERGER, *supra* note 13, at 313–20.

jurisdiction.[119] Recent decisions leave little doubt that a house of Congress or authorized committee or subcommittee has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues,"[120] and that as a result standing to bring a Section 1364a action to enforce a subpoena would exist.[121] Moreover, any uncertainty as to standing would be dispelled by Congress's enactment of the section, which itself confers standing.[122]

C. *Political Question Doctrine*

The Supreme Court's decisions in the 1960's in such cases as *Baker v. Carr*[123] and *Powell v. McCormack*,[124] and decisions of the courts of appeals in the 1970's, demonstrate that interbranch executive privilege-congressional subpoena disputes do not present a nonjusticiable "political question."[125] In *Baker v. Carr*, the Court emphasized that because a case is viewed as a "political case" or involves a "political controversy" does not itself indicate that it presents "political questions" beyond the jurisdiction of the federal courts.[126] The Court in *Baker* delineated six factors to determine the existence of a political question,[127]

[119] *See generally* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961).

[120] The Supreme Court has stated that this is the "gist of the question of standing." Baker v. Carr, 369 U.S. 186, 204 (1962).

[121] *See, e.g.*, United States v. AT&T, 551 F.2d 384, 391 (1976) ("It is clear that the House as a whole has standing to assert its investigatory powers, and can designate a member to act on its behalf.").

[122] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("[T]he question whether the litigant is a 'proper party to request adjudication of a particular issue' . . . is within the power of Congress to determine.").

[123] 369 U.S. 186 (1962).

[124] 395 U.S. 486 (1969).

[125] A finding that the dispute presents a political question would foreclose judicial resolution of the dispute, notwithstanding Congress's enactment of Section 1364a, since Congress is precluded from conferring jurisdiction on federal courts to resolve political questions. *See* Sierra Club v. Morton, 405 U.S. at 737 n.3.

[126] 369 U.S. 186, 217 (1962).

[127] The Court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

but gave preponderant weight to the "commitment" factor—that is, to the question whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[128] The Court in *Powell v. McCormack* discussed this factor in detail and confirmed that the commitment factor is paramount, stating that the other elements set forth in *Baker* "depend in great measure on a textual commitment resolution of the question."[129]

The few courts that have dealt with an assertion of executive privilege against a congressional subpoena uniformly have found that such disputes are not political questions under the standards set forth in *Baker* and its progeny. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[130] the D.C. Circuit Court of Appeals, relying on its earlier decision in *Nixon v. Sirica*,[131] declined to rule that the dispute between the Senate Watergate Committee and Nixon was a nonjusticiable political question. The court rejected the claim that the President has an absolute, unreviewable executive privilege,[132] a position later upheld by the Supreme Court in *United States v. Nixon*.[133]

The same result was reached in *United States v. AT&T*,[134] where the court stated that:

> The simple fact of a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution . . . . Indeed, disputes between two branches of the government are inherently different from those to which the political question abstention doctrine has traditionally been applied . . . . Normally, when the court abstains on political question grounds it acquiesces in a "commitment of the issue" to one of the political branches

potentiality of embarrassment from mutlifarious pronouncements by various departments on one question.

Id.

[128] *Id.*

[129] 395 U.S. 486, 521 n.43 (1969). Many commentators understandably conclude that, after *Powell*, the six categories of political questions set forth in *Baker* in effect have been reduced to one. *See, e.g., Comments on Powell v. McCormick*, 17 U.C.L.A. L. REV. 1, 102 (1969); Sandalow, *id.* at 173.

[130] 498 F.2d 725 (D.C. Cir. 1974).

[131] 487 F.2d 700 (D.C. Cir. 1973). *Nixon v. Sirica* concerned a grand jury subpoena issued to Nixon by Special Prosecutor Archibald Cox.

[132] 498 F.2d at 725.

[133] 418 U.S. 683, 706–07 (1974).

[134] 567 F.2d 121 (D.C. Cir. 1977). AT&T was only nominally a party. The Justice Department brought the action to enjoin AT&T on national security grounds from complying with a congressional subpoena. The court allowed the Chairman of the House subcommittee that issued the subpoena to intervene and recognized that AT&T was a mere stakeholder.

> for resolution of the merits . . . . That branch is recognized as having the constitutional authority to make a decision that settles the dispute. *Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute.* No one branch is identified as having final authority in the area of concern.[135]

Finding that there were manageable standards for resolution of the controversy, the court concluded: "In our view, neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title."[136]

In the recent EPA controversy the House of Representatives and the Justice Department recognized that such disputes do not present political questions. Although President Nixon during the Watergate controversy had argued strenuously that the controversy raised such an issue,[137] the Justice Department in the Burford litigation flatly stated that "the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action."[138]

D. *Improper Exercise of the Executive's Law Enforcement Powers*

A final objection previously raised to Congress's ability to bring a civil action to enforce its subpoenas is that such an action would usurp the executive's constitutionally granted law enforcement responsibilities. This was the Justice Department's primary objection in 1976 to an earlier version of the Ethics in Government Act that included executive officers in its coverage.[139]

[135] *Id.* at 126 (emphasis added).

[136] *Id.* Even before *Baker* and *Powell*, the Supreme Court had resolved disputes concerning the allocation of power between the branches. *See, e.g.*, Youngstown Sheet & Tool Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926).

[137] Nixon Brief, *supra* note 3, at 10–21.

[138] Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss at 37, United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) [hereinafter cited as Burford Brief].

[139] One of the Act's co-sponsors, Senator James Abourezk (D-S.D.), noted in the floor debate that "[d]uring the subcommittee hearings, the Department [of Justice] argued vigorously that bringing such suits would be unconstitutional in light of *Buckley v. Valeo*, 424 U.S. 1, 138 (1976)." 123 CONG. REC. 2970 (1977).

Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."[140] In *Buckley v. Valeo*,[141] the Supreme Court stated that "a lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfuly executed' Art. II § 3."[142] However, the enforcement power struck down in *Buckley* was that of the Federal Election Commission—four of whose six members were to be appointed by Congress without Presidential involvement—to institute a civil action for injunctive and other relief to enforce the Federal Election Campaign Act.[143] The Court in *Buckley* specifically held "that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the Courts of the United States for vindicating *public rights*, violate Art. II, § 2, cl. 2, of the Constitution."[144] A civil enforcement action under the proposed Section 1364a would not be a suit vindicating "public rights" within *Buckley*'s meaning. Rather, such a suit would serve to protect Congress's own legislative and oversight authority and thus would not constitute an infringement on the executive's Article II law enforcement powers.[145]

VI. Conclusion

Section 1364a should be enacted now. For the first time, the executive branch has recognized and vigorously expounded on the need for a civil mechanism to resolve congressional subpoena-executive privilege disputes. This policy shift is dramatic. Lawyers for President Nixon in 1975 declared that judicial resolution of the Senate Watergate Committee's civil action against

[140] U.S. Const. art. II, § 3.
[141] 424 U.S. 1 (1976).
[142] *Id.* at 138.
[143] 2 U.S.C. §§ 431–456 (1982); 18 U.S.C. §§ 592–607 (1976 & Supp. V 1981).
[144] 424 U.S. at 140 (emphasis added).
[145] Then Assistant Attorney General, now Solicitor General, Rex E. Lee, reached the same conclusion in testimony before the Senate Subcommittee on Separation of Powers of the Committee on the Judiciary. Lee testified that "Congressional enforcement of its own subpoenas . . . is such a part of the legislative function, particularly after *Eastland*, that there would not be serious constitutional problems." *Representation of Congress and Congressional Interests in Court, 1975: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. of the Judiciary*, 94th Cong., 2d Sess., 4, 61–62 (1975) (statement of Rex E. Lee, Ass't Att'y Gen., Civil Division, Justice Dep't); *see also* Lee, *supra* note 58, at 261.

Nixon "flies in the face of the role of the courts in our Constitutional system of government"[146] because the "invocation of executive privilege . . . is a matter of Presidential judgment alone."[147] But in the EPA controversy, the Justice Department, attempting to obtain a declaratory judgment that Burford's assertion of executive privilege was valid,[148] declared that "[o]nly judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of governmental operations."[149] The Department concluded that "[t]he purely legal issue giving rise to this controversy should be resolved now in a civil lawsuit, as in [*United States v.*] *Nixon*, in order to resolve and thereby render unnecessary further protraction of this constitutional confrontation."[150]

Justice Jackson once stated that "[s]ome arbiter is almost indispensable when power . . . is . . . balanced between different branches, as the legislative and the executive . . . . Each unit cannot be left to judge the limits of its own power."[151] While both Congress and the executive branch should attempt to resolve these interbranch disputes through political compromise, rather than relying on judicial decision, political compromise will not always be obtainable, particularly if Congress has no credible, effective means to obtain compliance with its subpoenas. The proposed civil remedy would not remove Congress's traditional remedies, including its self-help and statutory contempt powers, but in the great majority of cases would provide the appropriate mechanism for resolving these interbranch controversies that are appearing with disquieting frequency.

Appendix

Title 28 of the United States Code is amended by adding the following new section:

1364a.—Civil Enforcement of Congressional Subpoenas to Officers and Employees of the Federal Government

(a) The United States District Court for the District of Columbia, without regard to the amount in controversy, shall have original juris-

[146] *See* Nixon Brief, *supra* note 3, at 10.
[147] *Id.* at 16.
[148] *See supra* notes 54–55 and accompanying text.
[149] Burford Brief, *supra* note 138, at 1–2.
[150] *Id.* at 2.
[151] R. Jackson, The Struggle For Judicial Supremacy (1941).

diction over, and shall hear, any civil action brought by either House of Congress or any authorized committee or subcommittee of such House, or any joint committee of Congress, to enforce or secure a declaratory judgment concerning the validity of any subpoena or order issued by such House, or any such committee or subcommittee, to any officer or employee of the Federal Government, acting within his or her official capacity, to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony of any combination thereof. Either House of Congress, or any authorized committee or subcommittee, may prosecute a civil action under this section in its own name.

(b) The District Court shall assign any civil action brought pursuant to this section for hearing at the earliest practicable date and cause the action in every way to be expedited. Any appeal or petition for review from any order or judgment in such action shall be expedited in the same manner.

(c) An action or remedy brought or imposed pursuant to this section shall not abate upon adjournment sine die by either House at the end of a Congress if the House, committee, or subcommittee which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

(d) The civil actions authorized by this section are in addition to any other remedies available to enforce a subpoena or order of a House of Congress, committee, or subcommittee, including but not limited to the certification of a criminal contempt proceeding under Section 194 of Title 2.

(e) A civil action commenced or prosecuted under this section by a Senate committee or subcommittee may not be authorized pursuant to the Standing Order of the Senate "authorizing suits by Senate Committees" (S. Jour. 572, May 28, 1928).

(f) The House of Congress or authorized committee or subcommittee commencing or prosecuting a civil action under this section may be represented in such action by such attorneys as it may designate.

(g) For the purposes of this section, the term "committee" includes standing, select, or special committees of either House of Congress, or any joint committee of Congress, established by law or resolution, and the term "subcommittee" includes any subcommittee of such committees.

(h) For the purposes of this section, the term "officer or employer of the Federal Government" includes all officers or employees of the Federal Government, including the President and Vice President.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Ralph Tarr	Take necessary action ☐
	Approval or signature ☐
	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐
FROM John Cooney (395-5600)	**DATE** 4/17

REMARKS

1. Revised letter to Congress, with marked revisions on page 2 reflecting additional factors that distinguish 1985 from subsequent years; and

2. Draft to Weiss letter, to be sent ASAP, in order to forestall issuance of a subpoena when the Subcommittee convenes on Thursday morning.

cc: John Roberts

OMB FORM 4
Rev Aug 70

Honorable Ted Weiss
Chairman, Intergovernmental Relations and
Human Resources Subcomittee
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in further response to your letters of March 6, 1985, to several agencies requesting that they provide the Subcommittee with copies of regulatory plans which they submitted to OMB in February 1985 pursuant to Executive Order No. 12498 and OMB Bulletin No. 85-9.

We are in the process of clearing through the inter-agency consultation process a final response to your letters on behalf of all the agencies. Due to the need to work out the formal wording of our response to the Subcommittee, the official notification letter is not yet available for release. In fact, however, I am in a position to certify that the official letter will satisfy the Subcommittee's request and will provide for the immediate transmittal of the regulatory plans received by the Office of Management and Budget.

I trust that this letter, as it should, fully satisfies the Subcommittee's request of March 6, 1985.

If their are any further questions, please do not hesitate to call.

Sincerely,

Michael J. Horowitz

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On February 19, 1985, you wrote to four agencies, the Department of Health and Human Services, the Department of Energy, the Department of Transportation and the Environmental Protection Agency, and requested, among other things, that each agency supply the Subcommittee with copies of the material it submitted to the Office of Management and Budget pursuant to Executive Order No. 12498 and OMB Bulletin No. 85-9, which established the Administration's Regulatory Program for 1985. Your request asked that copies of the material be submitted to the Subcommittee within three days of the date it was submitted to OMB. Subsequent to the receipt of your letter, we advised the Department of Health and Human Services and the Department of Energy that we would attempt to meet the Subcommittee's need for information in a manner that facilitated the completion and publication of the Administration's Regulatory Program and asked them to refrain from furnishing their draft plans until we had discussed the matter with the Subcommittee. The Department of Transportation and the Environmental Protection Agency have not submitted their materials to us, so that they are not yet, by its terms, subject to your request, to furnish materials to the Subcommittee.

As you know, we have been unable to agree to procedures concerning the disclosure of information that the Subcommittee has requested. Therefore, we have advised the four agencies that we would not object to their disclosure to you of the materials required of them pursuant to OMB Bulletin No. 85-9. Each agency has advised us that it will make such material available to the Subcommittee upon its request.

As we have each acknowledged upon the resolution of previous requests by the Subcommittee for access to documents of the executive agencies, the right of access to information made by one Branch of the Federal Government to another is not unlimited, nor is the right of confidentiality of any Branch unlimited in

response to requests for information from another Branch. Instead, each such request and each response requires a balancing of often competing interests and responsibilities. In this instance, and on balance, we have determined that the materials required by OMB Bulletin No. 85-9 will be made available as requested.

As you know, to avoid the possibility of the premature public release of the agency draft plans and the potential complications such disclosure could have before the final Program is published, we urged that you ask the agencies to submit their draft plans to the Subcommittee after the publication of the Administration's Regulatory Program. Nonetheless, we do not believe that during this initial year of the program established by Executive Order No. 12498 that we should allow a dispute over the time of the release of agency draft plans to the Subcommittee to detract from the accomplishment of the important purposes of Executive Order No. 12498. This issue already has delayed the scheduled publication date of the final Program.

Our decision here is also influenced by our view that in this initial year of this process, it is important that your Subcommittee and the public understand the process and how it relates to other processes and programs that pertain to rulemaking in the Executive Branch. Certain of the draft plans have already been made available to Congress by the agencies on an informal basis. Furthermore, due to the short lead time associated with initiation of the process in 1985 and the agencies' lack of experience with the requirements of the OMB Bulletin, the agency submissions this year constitute, in great part, compilations of pre-existing information already available to Congress in other formats and do not reflect preparation of new material for this regulatory planning process.

For next year, we intend to make refinements to OMB Bulletin No. 85-9 and, if necessary, we can make changes to the procedures on the basis of the experience gained during this initial year. And, of course, in the furnishing of documents as you have requested in this instance, we retain the right in other situations to exert any privilege that may apply to documents requested in such other situations.

The Administration's Regulatory Program is an important initiative intended to help ensure that each major step in the process of rule development is carefully considered by the agency and consistent with Administration policy. Like Executive Order No. 12291, this Program will operate within the terms of applicable law and consistent with all statutory requirements. We believe that the Regulatory Program also will be valuable to the Congress in exercising its oversight responsibilities regarding agency implementation of regulatory statutes, because, for the first time, agencies will be required to disclose in advance, in one document and in a common format, all significant regulatory action they plan to take in the next year, at both the rulemaking and pre-rulemaking stages. The Regulatory Program thus will serve to make agency heads more closely accountable for

with a broad range of information not previously available, and provide a formal basis for consideration by the Congress, the President and the public of the result of regulatory efforts.

I appreciate your interest and cooperation in this important undertaking.

Sincerely,

David A. Stockman
Director

Honorable Ted Weiss
Chairman, Intergovernmental Relations and
Human Resources Subcomittee
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

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Sincerely,

Michael J. Horowitz

Honorable Ted Weiss
Chairman, Intergovernmental Relations and
Human Resources Subcommittee
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am enclosing a copy of my Memorandum to the Heads of Certain Departments and Agencies that should be dispositive of your letters of March 6, 1985, to several of these agencies requesting that they provide the Subcommittee with copies of regulatory plans that they submitted to OMB in February 1985 pursuant to OMB Bulletin No. 85-9.

As you know, we have been working to develop a coordinated response to those letters on behalf of the Administration. We have prepared the enclosed memorandum and transmitted it to all agencies involved in the Regulatory Review Program. ~~in consultation with the Office of Counsel to the President and the Department of Justice.~~ You will note that the memorandum advises those agency heads that an affirmative response to your requests for copies of the regulatory plans would be appropriate given the unique circumstances of this initial year of the program. ~~The Relevant agenies have advised us that they will promptly provide you with access to the plans that they have provided us.~~

Accordingly the agency plans will be promptly made available to the subcommittee.

Sincerely,

David A. Stockman
Director

Enclosure

MEMORANDUM TO HEADS OF CERTAIN DEPARTMENTS AND AGENCIES

SUBJECT: Congressional requests for draft regulatory plans submitted pursuant to Executive Order No. 12498

Many of you have received requests from one or more Members of Congress to provide a copy of your draft regulatory plan submitted to this Office under Executive Order No. 12498. Some of you have refrained from submitting your plans to us pending consideration of a coordinated response to these requests. We have consulted with the Department of Justice and the Office of Counsel to the President regarding the appropriate response to these requests and are hereby advising you that, under the unique circumstances of this first year of the program, you may provide access to your draft regulatory plan in response to an appropriate request from Congress.

This advice is based upon the fact that because the process set forth in Executive Order 12498 has been instituted relatively late in the planning period during this first year, agencies, in an effort to meet new requirements and demanding deadlines, have transmitted to us what often appears to be compilations of pre-existing materials already available to Congress and the public in other formats. In other words, much of what we have received does not reflect the more considered and deliberative regulatory planning process that the Order called for and that we anticipate will be developed in future years of the program. Furthermore, it appears that some of the draft plans have already been made available to Congress, resulting in some Members of Congress and Committees having access to some of the plans and others not.

Given these unique circumstances, and during this initial year to which the OMB Bulletin is limited, the program is not being conducted as the Executive Order contemplated that it would be over the long run. Therefore, although the draft regulatory plans are clearly within the deliberative process, disclosure of them this year is not likely to impair significantly that process within the executive branch or other aspects of the executive branch's constitutional duties. At the same time, it may be helpful in this initial year for Congress and the public to gain a general understanding of the process during this first year in order to alleviate concerns about it in this initial year and in future years, when refinements to the program and a better understanding among the agencies of its purposes and procedures could well require a withholding of all draft plans until the final regulatory plan is developed and issued.

The Administration's Regulatory Program is an important initiative intended to help ensure that each major step in the process of rule development is carefully considered by the agency and consistent with Administration policy. For next year, we intend to review OMB Bulletin No. 85-9 and make such modifications and changes to the procedures, as necessary, on the basis of the experience gained during this initial year. We intend to complete the process early so that the program can be fully implemented next year on a more timely and informed basis.

~~Any agency that has not yet submitted its draft regulatory program to us should do so immediately so that we can complete the program for this year and continue to complete the process to to discover any further refinements that are necessary in changing the program for next year.~~

David A. Stockman
Director

4/18/85

THE WHITE HOUSE
WASHINGTON

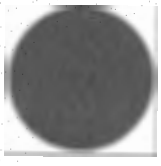
TO: John Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: _____

COMMENT: _____

ACTION: _____



DRAFT

Honorable Ted Weiss
Chairman, Intergovernmental Relations
and Human Resources Subcommittee
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in further response to your letters of March 6, 1985, to several agencies requesting that they provide the Subcommittee with copies of regulatory plans that they submitted to OMB in February 1985 pursuant to Executive Order No. 12498 and OMB Bulletin No. 85-9.

As you know, we have been working to develop a coordinated response to those letters on behalf of the Administration. In consultation with the Office of Counsel to the President and the Department of Justice, we have prepared the attached memorandum and transmitted it to all agencies involved in the Regulatory Review Program under Executive Order No. 12498. You will note that the memorandum advises agency heads that an affirmative response to your request for copies of the regulatory plans would be appropriate given the unique circumstances of this initial year of the program. I trust that this action, as it should, fully satisfies the Subcommittee's request of March 6, 1985

If their are any further questions, please do not hestiate to call.

Sincerely,

David A. Stockman

Enclosure

DRAFT

TO : Heads of Agencies

FROM: David Stockman
Director
Office of Management and Budget

RE : Congressional requests for draft regulatory programs submitted pursuant to Executive Order No. 12498

Many of you have received requests from one or more Members of Congress to provide a copy of your draft regulatory plan submitted to this Office under Executive Order No. 12498. Some of you have refrained from submitting your plans to us pending consideration of a coordinated response to these requests. We have consulted with the Department of Justice and the Office of Counsel to the President regarding the appropriate response and are hereby advising you that under the unique circumstances of this first year of the program you may make arrangements to provide access to your draft regulatory plan in response to an appropriate request from Congress.

This advice is based upon the fact that the program under Executive Order No. 12498 has been instituted so late in the planning period this first year that agencies, in an effort to meet deadlines, have largely transmitted to us compilations of pre-existing materials already available to Congress in other formats, rather than undertaking to prepare, as we would anticipate in future years of the program, new materials reflective of a more deliberative regulatory planning process. It is also a fact that we at OMB have had to organize the program so rapidly that various unanticipated problems have arisen that will need to be alleviated in future years based upon the experience of this initial year. In addition, some of the agencies in the confusion have provided copies of their draft plans to Congress already, resulting in some Members and Committees having access to some of the plans and others not.

Given these unique circumstances, the program cannot be considered to be fully operative in the manner envisioned by the President in issuing Executive Order No. 12498. Therefore, although the draft regulatory plans are clearly within the deliberative process, disclosure of them this year is not likely to impair significantly that process within the Executive Branch or other aspects of the Executive Branch's constitutional duties. At the same time, it may be helpful in this initial year for Congress and the public to gain a general understanding of the proposed process in order to alleviate concerns in

future years when refinements to the program and a better understanding among the agencies of its purpose and operation could well require a withholding of all draft plans until the final regulatory plan is developed and issued.

The Administration's Regulatory Program is an important initiative intended to help ensure that each major step in the process of rule development is carefully considered by the agency and consistent with Administration policy. For next year, we intend to review OMB Bulletin No. 85-9 and make such modifications and changes to the procedures, as necessary, on the basis of the experience gained during this initial year. We intend to complete that process early so that the program can be fully implemented next year on a more timely and informed basis.

Any agency that has not yet submitted its draft regulatory program should do so immediately so that we can complete the program for this year and continue to work through the process to discover any further refinements that are necessary in designing the program for next year.

4/18

JGR:

RA Hauser wanted you to see this.

Ger

MEMORANDUM TO HEADS OF CERTAIN DEPARTMENTS AND AGENCIES

SUBJECT: Congressional requests for draft regulatory ~~plans~~ programs submitted pursuant to Executive Order No. 12498

Many of you have received requests from one or more Members of Congress to provide a copy of your draft regulatory plan submitted to this Office under Executive Order No. 12498. ~~Some of you have refrained from submitting your plans to us pending consideration of a coordinated response to these requests~~. We have consulted with the Department of Justice and the Office of Counsel to the President regarding the appropriate response to these requests and are hereby advising you that, under the unique circumstances of this first year of the program, you may provide access to your draft regulatory plan in response to an appropriate request from Congress.

This advice is based upon the fact that because the process set forth in Executive Order No. 12498 has been instituted relatively late in the planning period during this first year, agencies, in an effort to meet new requirements and demanding deadlines, have transmitted to us what often appears to be compilations of pre-existing materials already available to Congress and the public in other formats. In other words, much of what we have received does not reflect the more considered and deliberative regulatory planning process that the Order called for and that we anticipate will be developed in future years of the program. Furthermore, it appears that some of the draft plans have already been made available to Congress, resulting in some Members of Congress and Committees having access to some of the plans and others not.

~~Given these unique circumstances, and during this initial year to which the OMB Bulletin is limited, the program is not being conducted as the Executive Order contemplated that it would be over the long run~~. Therefore, although the draft regulatory plans are clearly within the deliberative process, disclosure of them this year is not likely to impair significantly that process within the executive branch or other aspects of the executive branch's constitutional duties. At the same time, it may be helpful in this initial year for Congress and the public to gain a general understanding of the process ~~during this first year in order to alleviate concerns about it in~~ this ~~initial~~ year and ~~in~~ future years, when ~~refinements~~ to the program ~~and~~ a better understanding among the agencies of its purposes and procedures. ~~could well require a withholding of all draft plans until the final regulatory plan is developed and issued.~~

Honorable Ted Weiss
Chairman, Intergovernmental Relations and
Human Resources Subcommittee
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

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As you know, we have been working to develop a coordinated response to those letters on behalf of the Administration. We have prepared the enclosed memorandum and transmitted it to all agencies involved in the Regulatory Review Program in consultation with the Office of Counsel to the President and the Department of Justice. You will note that the memorandum advises those agency heads that an affirmative response to your requests for copies of the regulatory plans would be appropriate given the unique circumstances of this initial year of the program. ~~The Relevant agenies have advised us that they will promptly provide you with access to the plans that they have provided us.~~

Sincerely,

David A. Stockman
Director

Enclosure

ACCORDINGLY THE AGENCY PLANS WILL BE PROMPTLY MADE AVAILABLE TO THE SUBCOMMITTEE.

The Administration's Regulatory Program is an important initiative intended to help ensure that each major step in the process of rule development is carefully considered by the agency and consistent with Administration policy. For next year, we intend to review OMB Bulletin No. 85-9 and make such modifications and changes to the procedures, as necessary, on the basis of the experience gained during this initial year. We intend to complete the process early so that the program can be fully implemented next year on a more timely and informed basis.

~~Any agency that has not yet submitted its draft regulatory program to us should do so immediately so that we can complete the program for this year and continue to complete the process to to discover any further refinements that are necessary in changing the program for next year.~~

David A. Stockman
Director