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EXECUTIVE PRIVILEGE AND INTERBRANCH COMITY AFTER CLINTON

Jonathan L. Entin*

Although both constitutional theory and practical considerations offer powerful reasons for Congress and the President to prefer negotiation rather than litigation of separation of powers disputes, the Clinton Administration litigated and lost several important cases dealing with presidential power. Some commentators have suggested that these rulings will undermine the presidency for years after Clinton leaves office. Professor Entin assesses some factors, notably the phenomenon of divided government, that might have contributed to the difficulty of reaching interbranch accommodations in recent years and suggests that the long-term implications of the adverse judicial rulings may be less severe than the pessimists fear.

* * *

INTRODUCTION

The Constitution divides federal power into three separate but overlapping categories: legislative, executive, and judicial.¹ Giving precise content to the powers of these three great departments of the national government has proven difficult. Part of the difficulty has been political. Both Congress and the President are elected by and accountable to the people in whose name the Constitution was adopted, although only the chief executive has a truly national constituency.² On a more basic level, however, the Constitution did not precisely define the powers it vested in the federal

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¹ See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The implications of the linguistic differences in these vesting clauses is beyond the scope of this Article. For a suggestion that these differences imply a very strong presidency, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1186-206 (1992).

² Of course, the people elect the President only indirectly by choosing the members of the Electoral College. See U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XII. This detail does not detract from the notion that the chief executive is nonetheless accountable to the people.

government. Instead, the Framers established a complex set of checks and balances to structure relationships between and among the branches to promote the twin values of governmental efficiency and individual liberty.³ For example, Congress was given the legislative power, but the President received a qualified veto over bills approved by the House and Senate, which may, in turn, override an executive veto by a supermajority vote in both chambers.⁴ The President was made Commander in Chief of the armed forces,⁵ but Congress was granted the power to declare war.⁶ The President was authorized to appoint "Officers of the United States," but subject to "the Advice and Consent of the Senate."⁷

The result was "a government of separated institutions *sharing* powers."⁸ This has provided ample opportunity for turf battles between the political branches, a perennial aspect of American public life. Congress and the President have often sought judicial resolution of separation of powers disputes, because, as Alexis de Tocqueville wrote more than a century and a half ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"⁹ and because, as Chief Justice Marshall observed even longer ago, "It is emphatically the province of the judicial department to say what the law is."¹⁰ Although the Supreme Court has decided a surprisingly large number of these disputes over the past three decades,¹¹ both judges and commentators have urged the

³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."); cf. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.").

⁴ See U.S. CONST. art. I, § 7, cl. 2.

⁵ See *id.* art. II, § 2, cl. 1.

⁶ See *id.* art. I, § 8, cl. 11.

⁷ *Id.* art. II, § 2, cl. 2.

⁸ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960) (footnote omitted).

⁹ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 20 (Phillips Bradley ed., 1945) (1835).

¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act); *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (holding that members of Congress may not exercise direct control over local airports); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of federal sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (rejecting a challenge to the independent counsel provisions of the Ethics in Government Act); *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the central mechanism for reducing federal budget deficits in the Gramm-Rudman-Hollings Act); *Immigration Naturalization Service v. Chadha*, 462 U.S. 919 (1982) (invalidating a legislative veto provision in the Immigration and Nationality Act); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (upholding the Presidential Recordings and Materials Preservation

political branches to find alternative ways of resolving their disagreements.¹² Judges have been reluctant to resolve the "great silences of the Constitution,"¹³ and commentators have maintained that the political system as a whole would be better served if these matters were negotiated rather than adjudicated.¹⁴ Nevertheless, the Clinton Administration litigated several disputes relating to the scope of presidential privilege and lost almost every time.¹⁵ Although the issues arose in the context of lawsuits in which Congress was not a party, the legislative branch might regard the resolution of those cases as grounds for greater assertiveness in future turf battles with the White House.

This Article assesses some of the implications of the Clinton litigation for future executive privilege controversies, with particular emphasis on whether this litigation might have reduced the prospects for interbranch accommodation. Part I summarizes the argument for negotiation rather than litigation of executive privilege disputes between Congress and the President. Next, Part II assesses the possible impact of recent judicial rulings on the White House's negotiating position. Finally, Part III briefly considers the role of divided government that has loomed so large in the impeachment and related controversies.

Act); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (rejecting the original method for appointing members of the Federal Election Commission); *United States v. Nixon*, 418 U.S. 683 (1974) (limiting the scope of executive privilege in criminal investigations).

¹² See, e.g., *United States v. American Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996) [hereinafter Devins, *Congressional-Executive Information*]; Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31 (1991) [hereinafter Entin, *Rethinking Litigation*]; Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987) [hereinafter Shane, *Legal Disagreement*]; Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992) [hereinafter Shane, *Negotiating for Knowledge*]. One prominent commentator has argued that courts should refuse to resolve separation of powers disputes between the legislative and executive branches. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 260-379 (1980). But see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-17 & n.101 (1988) (criticizing the premises of Choper's argument); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 621 n.194 (1984) (noting that Choper's proposal would require significant modification of justiciability doctrines).

¹³ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

¹⁴ See Entin, *Rethinking Litigation*, *supra* note 12, at 53; Shane, *Legal Disagreement*, *supra* note 12, at 465-66.

¹⁵ See *infra* Pt. II.

I. ARGUMENTS AGAINST LITIGATING INTERBRANCH DISPUTES

A. *Arguments from Constitutional Structure*

Those who prefer negotiation to litigation of executive privilege and similar disputes emphasize the structure of the Constitution. In particular, the Framers rejected the "pure doctrine" of separation of powers, which assigns each branch a unique and unshared function, in favor of a checks and balances system that gives each branch limited control over the operation of the other branches.¹⁶ This decision reflected Madison's view that separation of powers "did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."¹⁷ Instead of relying on "parchment barriers,"¹⁸ the Framers sought to provide each branch with "the necessary constitutional means and personal motives to resist encroachments of the others."¹⁹ The constitutional design was based on the premise that "[a]mbition must be made to counteract ambition"²⁰ in a way that would channel interbranch relationships in a constructive direction. The constitutional design, in other words, afforded the political branches ample resources with which to defend their positions without relying on the Judiciary to serve as referee. Moreover, that design appears to authorize, if not to require, legislators as well as presidents to make their own judgments about the meaning of the Constitution.

Among the provisions that empower these nonjudicial officials to interpret the Constitution are the oath requirement for both the chief executive²¹ and members of Congress.²² Faithfulness to their oath requires these persons to consider the constitutionality of their actions.²³ Moreover, several other provisions of the

¹⁶ See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13-18 (1967).

¹⁷ THE FEDERALIST No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961). Madison went on to warn that tyranny impended only "where the whole power of one department is exercised by the same hands which possess the whole power of another department." *Id.* at 302-03.

¹⁸ THE FEDERALIST No. 48, *supra* note 17, at 308 (James Madison) (Clinton Rossiter ed., 1961).

¹⁹ THE FEDERALIST No. 51, *supra* note 17, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

²⁰ *Id.* at 322.

²¹ See U.S. CONST. art. II, § 1, cl. 8.

²² See *id.* art. VI, cl. 3.

²³ See LOUIS FISHER, CONSTITUTIONAL DIALOGUES 233-34 (1988); Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 3, 11 (Joseph M. Bessette & Jeffrey Tulis eds., 1981); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 313-14 (1987).

Constitution specifically prohibit some types of legislation,²⁴ whereas others authorize the passage of "appropriate" laws.²⁵ In this regard, the Supreme Court has held that Congress is not strictly bound by judicial interpretations of equal protection for purposes of implementing the Fourteenth Amendment, although any legislation passed under this authority is subject to judicial review.²⁶ Even if they wanted to, therefore, members of Congress and the President cannot avoid passing on some constitutional issues.

Beyond this practical necessity, the courts simply cannot resolve every interesting or important dispute about the meaning of the Constitution. First, the judicial power extends only to cases and controversies.²⁷ This precludes the federal courts from issuing advisory opinions on pending policy issues, something that some state courts may do under certain circumstances.²⁸ This, in turn, means that only those with standing may challenge government actions in court. If too many persons are affected, no private party will have standing to litigate a generalized grievance.²⁹ Furthermore, individual members of Congress rarely will have standing to assert separation of powers claims against the executive branch.³⁰ Even if all the barriers

²⁴ See, e.g., U.S. CONST. art. I, § 9 (prohibiting bills of attainder, *ex post facto* laws, expenditures not authorized by an appropriations statute, and titles of nobility, as well as limiting the grounds for suspending habeas corpus); *id.* amend. I (forbidding laws that establish or limit free exercise of religion, or that abridge freedom of speech, press, and assembly); *id.* amend. V (banning double jeopardy, self-incrimination, or uncompensated takings of private property, as well as deprivation of life, liberty, or property without due process of law).

²⁵ See, e.g., *id.* amend. XIII, § 2); *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

²⁶ See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 644-50 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

²⁷ See U.S. CONST. art. III, § 2, cl. 1.

²⁸ See, e.g., Cynthia R. Farina, *Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS 353* (Russell K. Osgood ed., 1992); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 *ROGER WMS. U. L. REV.* 207, 213-14 (1997); Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 *N.C. L. REV.* 1853 (1992); Terrance A. Smiljanich, Commentary, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 *U. FLA. L. REV.* 328 (1972).

²⁹ See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

³⁰ See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct. 1286 (2000); see also *Department of Commerce v. U.S. House of Representatives*, 119 S.Ct. 765, 779 (1999) (finding no "substantial federal question" in suit filed by one branch of Congress after resolving identical issue in case brought by other plaintiffs). For discussion of recent congressional standing jurisprudence, see Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 *GEO. L.J.* 351 (1997); Jonathan L. Entin, *The*

to standing are surmounted,³¹ other avoidance techniques such as the justiciability and ripeness doctrines could prevent courts from resolving interbranch disputes.³² Where judicial resolution is unavailable, therefore, Congress and the President have no choice but to address some constitutional issues on their own.

As a practical matter, the political branches do interpret the Constitution without guidance from the courts. That document defines important political understandings that typically go unremarked because they are so commonplace. Everyone understood that the Twenty-second Amendment prevented Presidents Eisenhower, Reagan, and Clinton from seeking election to a third term and that Edward Kennedy had to wait until he had turned thirty years old to succeed to his brother John F. Kennedy's Senate seat. Nor is there any doubt that bills must satisfy the bicameralism and presentment requirements to become laws, or that the Senate must confirm officers of the United States.³³ At the same time, members of Congress had to decide for themselves whether there were grounds to impeach President Clinton—and Presidents Nixon and Andrew Johnson before him—with no judicial guidance.

Finally, history shows that legislative and executive officials feel free to disagree with judicial interpretations of the Constitution. Abraham Lincoln emphasized his opposition to the *Dred Scott* decision³⁴ central to his unsuccessful campaign for the Senate in 1858,³⁵ and he repeated this position in his first inaugural address:

Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate, 47 CASE W. RES. L. REV. 1305, 1308-09 (1997). At the same time, individual members do have standing to litigate personal claims that they have been treated in a discriminatory manner. See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969).

³¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (establishing constitutional requirements for standing); *Air Courier Conference v. Postal Workers*, 498 U.S. 517 (1991) (outlining prudential requirements for standing).

³² On justiciability, see, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring). But see *Davis v. Bandemer*, 478 U.S. 109, 121-27 (1986) (declining to apply the nonjusticiability doctrine); *Immigration Naturalization Service v. Chadha*, 462 U.S. 919, 940-43 (1983) (same); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (same). On ripeness, see, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

³³ See Bessette & Tulis, *supra* note 23, at 9-10; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985). There is room for debate over what constitutes a bill that is subject to bicameralism and presentment, see *INS v. Chadha*, 462 U.S. 919 (1983), or over who is an officer of the United States, see *Morrison v. Olson*, 487 U.S. 654 (1988).

³⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³⁵ See 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 495 (Roy P. Basler ed., 1953) (stating his acceptance of the *Scott* judgment as determinative of the rights of the parties to the case but rejecting the outcome as a "political rule"); see also 3 *id.* at 255.

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers³⁶

Other chief executives have taken similar positions contending that judicial interpretations of the Constitution are not necessarily conclusive. Andrew Jackson vetoed a bill to recharter the Second Bank of the United States, which he regarded as unconstitutional, even though the constitutionality of that institution had been upheld in *McCulloch v. Maryland*.³⁷ Old Hickory explained:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.³⁸

Along the same lines, Thomas Jefferson pardoned persons who had been convicted under the Sedition Act of 1798,³⁹ a law he denounced as infringing First Amendment rights, although lower courts had upheld the measure.⁴⁰ Modern chief executives have also denounced what they regarded as objectionable constitutional interpretations by the Judiciary. Franklin D. Roosevelt went so far as to propose his unsuccessful Court-packing plan,⁴¹ Richard Nixon implied that he would obey only a "definitive" Supreme Court ruling in the Watergate tapes case,⁴² and Presidents Reagan and Bush repeatedly denounced the Court's decision in *Roe v. Wade*.⁴³

³⁶ 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 5, 9 (James D. Richardson ed., Washington: Government Printing Office 1896) [hereinafter MESSAGES AND PAPERS OF THE PRESIDENTS].

³⁷ 17 U.S. (4 Wheat.) 316 (1819).

³⁸ 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 36, at 576, 582.

³⁹ Ch. 74, 1 Stat. 596 (expired 1801).

⁴⁰ Jefferson explained in an 1804 letter to Abigail Adams that "nothing in the Constitution has given [the Judiciary] a right to decide for the executive, more than to the executive to decide for them." 4 THE WRITINGS OF THOMAS JEFFERSON 560, 561 (H.A. Washington ed., Washington, Taylor & Maury 1854).

⁴¹ See FISHER, *supra* note 23, at 209-15.

⁴² See ELIZABETH DREW, WASHINGTON JOURNAL 5, 45, 304-05, 328 (1975).

⁴³ 410 U.S. 113 (1973); see Neal Devins, *Shaping Constitutional Values* 100 (1996). Reagan and Bush sought several times to persuade the Court to overrule *Roe*. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992); Devins, *supra*, at 109-

In short, the structure of the Constitution clearly allows and sometimes mandates that the political branches interpret it without judicial guidance. Beyond these matters of principle, other pragmatic considerations have prompted courts and commentators to encourage Congress and the President to avoid litigation of turf disputes.

B. *Arguments from Practicality*

Political negotiation rather than litigation of executive privilege and similar disputes seems fully consistent with the constitutional design, but it also has important practical advantages. Perhaps the most important of these is that an effective government requires a degree of interbranch comity that is inconsistent with frequent resort to the judicial process. The American governmental system rests on unexpressed understandings and an uncoded but shared sense of limits.⁴⁴ Understandings are unexpressed and the sense of limits is shared, but uncoded because participants in the political process generally recognize the need to avoid open warfare and because both structural and institutional factors dampen inevitable conflicts.⁴⁵

Judicial rulings, on the other hand, raise the stakes of any particular conflict. This happens because lawsuits clearly identify winners and losers. Decisions are accompanied by opinions setting out rationales that not only explain the specific result, but also presumably will control the disposition of analytically similar disputes that might arise in the future.⁴⁶ The prospect of litigation therefore creates incentives for both sides to assert maximum positions for short-term advantage in court and to characterize opposing views as illegitimate.⁴⁷ Greater reliance on negotiation can enable participants to focus on taking each disagreement as a problem to be solved rather than as an opportunity to score rhetorical points.⁴⁸ Moreover, the inherent delays in the court system may exacerbate tension and prevent timely resolution of disputes.⁴⁹ From this perspective, negotiated resolutions of specific disagreements can decide discrete questions in ways that can form the basis for other informal arrangements of subsequent interbranch conflicts while recognizing the contrasting but legitimate interests of both Congress and the White House.

This nonconfrontational model reflects much of traditional interbranch dispute resolution. The overwhelming majority of congressional requests for information

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⁴⁴ See Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976).

⁴⁵ See NELSON W. POLSBY, CONGRESS AND THE PRESIDENCY 206-09 (4th ed. 1986).

⁴⁶ See ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 18-22 (1989).

⁴⁷ See *id.* at 21; Shane, *Legal Disagreement*, *supra* note 12, at 464-65, 492, 501-14.

⁴⁸ See *id.* at 494-96; Shane, *Negotiating for Knowledge*, *supra* note 12, at 220-22.

⁴⁹ See Devins, *Congressional-Executive Information*, *supra* note 12, at 131, 133.

from the executive branch are honored.⁵⁰ Even when the executive branch initially refuses to provide information to Congress, the dispute typically is resolved without resort to litigation. For example, in 1975, Secretary of the Interior Rogers Morton refused to disclose information about U.S. companies that had been asked to comply with the Arab boycott of Israel. A subcommittee of the House Committee on Interstate and Foreign Commerce voted to hold Morton in contempt.⁵¹ The day before the full committee would have voted on the contempt citation the Secretary made the records available to the subcommittee Chair under an agreement that kept the information confidential.⁵² In 1980, Secretary of Energy Charles Duncan refused to give documents concerning President Carter's imposition of a highly controversial fee on petroleum imports to a subcommittee of the House Committee on Government Operations.⁵³ Several weeks later, following a district court decision in a private lawsuit that invalidated the fee,⁵⁴ the Administration disclosed all of the contested documents.⁵⁵ In 1982, the Reagan Administration allowed members of a House subcommittee restricted access to a dozen documents relating to Secretary of the Interior James Watt's decision in a controversy over Canadian eligibility to hold American mineral leases;⁵⁶ the decision came after seven months of acrimony and with Watt facing an imminent contempt vote.⁵⁷

Although the threat of litigation clearly loomed in some of these cases, other information disputes have been resolved amicably. In 1989, for instance, a House subcommittee investigating allegations of Internal Revenue Service corruption was given limited access to the records of a taxpayer who reportedly had been targeted for

⁵⁰ See *id.* at 114, 135; Shane, *Negotiating for Knowledge*, *supra* note 12, at 201.

⁵¹ See *Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton: Hearings and Related Documents Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong. (1975).

⁵² See Devins, *Congressional-Executive Information*, *supra* note 12, at 125; Shane, *Negotiating for Knowledge*, *supra* note 12, at 202-03.

⁵³ See *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong. (1980). At one point, the Subcommittee on Environment, Energy, and Natural Resources voted to hold Secretary Duncan in contempt. See *id.* at 139.

⁵⁴ See *Independent Gasoline marketers Council v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980).

⁵⁵ See *The Petroleum Import Fee*, *supra* note 53, at 142; Devins, *Congressional-Executive Information*, *supra* note 12, at 125-26; Shane, *Negotiating for Knowledge*, *supra* note 12, at 203-05.

⁵⁶ See Shane, *Legal Disagreement*, *supra* note 12, at 501-08.

⁵⁷ See *id.* at 501-07; Shane, *Negotiating for Knowledge*, *supra* note 12, at 205-07.

an audit after one of his business competitors bribed an IRS agent.⁵⁸ This arrangement was negotiated despite the general prohibition on disclosing taxpayer records to third parties and grand jury information relating to an ongoing criminal probe.⁵⁹ The intelligence committees in both the House and the Senate also have negotiated successfully for access to intelligence information held by the executive branch without resort to litigation or the threat of litigation.⁶⁰

The reluctance to rely on ultimate judicial resolution of information disputes is not confined to legislative and executive officials. Courts have encouraged parties involved in pending litigation to negotiate their differences. Perhaps the most notable illustration of this phenomenon is *United States v. American Telephone & Telegraph Co.*,⁶¹ which involved a congressional subpoena to the telephone company covering information about warrantless domestic wiretaps for national security purposes. The Justice Department obtained an injunction preventing AT&T from turning over the records encompassed by the subcommittee subpoena,⁶² but the United States Court of Appeals for the District of Columbia Circuit instructed the executive branch to negotiate with the subcommittee in hopes of reaching a compromise that would accommodate the interests of both sides.⁶³ Judge Leventhal explained: "A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance."⁶⁴ Because the parties had almost reached such a compromise, "[t]he court may be of assistance in avoiding the broad confrontation now tendered, and in facilitating a complete accord"⁶⁵ After the parties failed to reach agreement after remand to the district court, the court of appeals once more declined to resolve the controversy. Emphasizing that "the coordinate branches do not exist in an exclusively adversary relationship to one another," Judge Leventhal urged "each branch [to] take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation" so as to "avoid[] the mischief of polarization of disputes."⁶⁶ Although the parties had clarified their positions, the court declined to "impose a rigid arrangement" but to "continue [its] approach of

⁵⁸ See *IRS Senior Employee Misconduct Problems: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong. (1989); Shane, *Negotiating for Knowledge*, *supra* note 12, at 213-14.

⁵⁹ See Shane, *Negotiating for Knowledge*, *supra* note 12, at 213-14.

⁶⁰ See *id.* at 214-17.

⁶¹ 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977).

⁶² See *id.*

⁶³ See *id.* at 395.

⁶⁴ *Id.* at 394.

⁶⁵ *Id.* at 395.

⁶⁶ *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977).

gradualism."⁶⁷ Thereafter the Justice Department and the subcommittee reached a settlement and the case was dismissed.⁶⁸

Several years later, a federal district court declined to resolve a highly contentious dispute involving a House subcommittee and Anne Gorsuch, the administrator of the Environmental Protection Agency, and a House subcommittee. She was cited for contempt after refusing, on instructions from President Reagan, to comply with a subpoena to turn over records relating to the Agency's enforcement of the Superfund program.⁶⁹ In *United States v. House of Representatives of the United States*,⁷⁰ Judge Smith dismissed the Justice Department's suit seeking a declaration that Gorsuch had acted lawfully in withholding the subpoenaed records. Instead, he encouraged the parties to negotiate their differences: "The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties."⁷¹ Gorsuch resigned a month later. The White House subsequently turned over all of the disputed records, although, some sensitive documents were disclosed subject to confidentiality provisions.⁷²

Finally, even when the courts actually rule on disputes, the political branches sometimes work out their own accommodations to circumvent the judicial resolutions. The most notable example of this phenomenon is the legislative veto, which supposedly was invalidated in *Immigration and Naturalization Service v. Chadha*.⁷³ Despite the Court's ruling in *Chadha*, Congress during the following decade passed

⁶⁷ *Id.* at 131.

⁶⁸ See Devins, *Congressional-Executive Information*, *supra* note 12, at 131.

⁶⁹ For more details on this dispute, see *id.* at 118-20; Shane, *Legal Disagreement*, *supra* note 12, at 508-14; Shane, *Negotiating for Knowledge*, *supra* note 12, at 207-10.

⁷⁰ 556 F. Supp. 150 (D.D.C. 1983).

⁷¹ *Id.* at 153.

⁷² See Shane, *Legal Disagreement*, *supra* note 12, at 513-14.

In addition to encouraging parties involved in interbranch disputes to negotiate rather than litigate their disagreements, the District of Columbia Circuit has sometimes denied legislators judicial relief under the doctrine of equitable discretion. Under this doctrine, plaintiffs with standing to sue had their cases dismissed even when no alternative avoidance device was available. This practice provokes considerable controversy. For a careful analysis, see Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990). The Supreme Court's restrictive approach to standing for congressional plaintiffs may well have sounded the death knell for this doctrine. See *supra* note 30 and accompanying text.

⁷³ 462 U.S. 919 (1983). See also *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983), *aff'g mem.* *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (invalidating one-house legislative veto of administrative regulations); *United States, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (invalidating two-house veto of administrative regulations).

over two hundred legislative veto provisions, mostly in appropriations bills.⁷⁴ The executive branch acquiesced, largely because these devices afford greater flexibility than strict compliance with the legislative formalities purportedly required by *Chadha*.⁷⁵

In sum, both constitutional theory and practical considerations provide powerful arguments that Congress and the White House should avoid litigating over executive privilege and similar disputes. The political branches must negotiate some of these disputes because judicial review may be unavailable. Even when the courts are theoretically accessible, the Judiciary still may avoid resolving such disputes. The cost, delay, and uncertainty of litigation also afford powerful incentives to prefer compromise.⁷⁶

II. THE IMPACT OF THE CLINTON LITIGATION

The Clinton Administration has been involved in several lawsuits in which presidential power was at least indirectly in question. One of these cases concerned the chief executive's temporary immunity from private lawsuits regarding events that occurred before he took office; the others, decided in the appellate courts rather than the Supreme Court, concerned testimonial privileges for Secret Service agents and White House lawyers. Although executive privilege was not directly at issue in these rulings, the rejection of the executive branch's position might have implications for future relationships between Congress and the President.

A. Clinton v. Jones

In *Clinton v. Jones*,⁷⁷ a unanimous Supreme Court rejected the argument that a

⁷⁴ See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 288-91; but see JESSICA KORN, THE POWER OF SEPARATION 39-40 (1996) (contending that provisions in appropriations should not be regarded as legislative vetoes).

⁷⁵ See Fisher, *supra* note 74, at 292.

⁷⁶ The sophistication, knowledge, and resources of parties to interbranch disputes suggests that compromise will not systematically disadvantage one side. The possibility of such inequalities in other settings has prompted dissents from the general enthusiasm for alternative dispute resolution. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Because lawyers representing the legislative and executive branches have different roles than do attorneys for private litigants, see Shane, *Legal Disagreement*, *supra* note 12, at 493-94, concerns that government attorneys will be adversely affected by negotiated resolution of interbranch disputes have little validity in this context, whatever cogency they might have in other contexts. See Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 848-77 (1990).

⁷⁷ 520 U.S. 681 (1997).

sitting President is entitled to defer lawsuits relating to his private conduct before taking office. Former Arkansas state employee Paula Corbin Jones sued President Clinton for allegedly boorish sexual advances that occurred during Clinton's tenure as governor of Arkansas.⁷⁸ Clinton sought to delay proceedings until his presidential term of office had ended.⁷⁹

The Court rejected his request for several reasons. First, no precedent supported the request. Only three sitting chief executives had been subjected to civil suits for their pre-presidential conduct.⁸⁰ Second, absolute presidential immunity from civil damages relating to official conduct was intended to prevent the Chief Executive from being intimidated by extraneous influences in the performance of his official duties. However, Clinton based his request for delay on potential distraction rather than intimidation.⁸¹ Moreover, whatever potential for distraction actually existed would not interfere with the Chief Executive's performance of his constitutional duties. Allowing this private lawsuit to proceed would hardly overwhelm the presidency in light of the historical paucity of civil tort claims against sitting presidents' private behavior before taking office.⁸² The Court also held that even "quite burdensome interactions" with the judicial branch do not impermissibly burden the President.⁸³ Courts may review official presidential conduct, subject the Chief Executive to judicial process under the right conditions, and even compel the President to testify or provide information.⁸⁴ Having concluded that the Constitution did not entitle Clinton to a delay in the trial, the Court further held that the district judge abused her discretion in deferring the trial while allowing discovery to proceed.⁸⁵ The district judge failed to give adequate weight to Jones's interest in avoiding prejudice arising from the passage of time and gave too much weight to the possibility that other unrelated lawsuits might prevent Clinton from performing his official duties.⁸⁶ Any actual burden on the chief executive's schedule could be handled as it arose.⁸⁷ Finally, the Court discounted the prospect of politically inspired lawsuits designed to hinder or distract the President because of the availability of sanctions for vexatious litigation.⁸⁸ Also, such cases typically are resolved before trial and therefore would make few demands on his time.⁸⁹

⁷⁸ See *id.* at 684-85.

⁷⁹ See *id.* at 686-87.

⁸⁰ See *id.* at 692.

⁸¹ See *id.* at 693-94.

⁸² See *id.* at 702.

⁸³ *Id.*

⁸⁴ See *id.* at 703-05.

⁸⁵ See *id.* at 705-07.

⁸⁶ See *id.* at 708.

⁸⁷ See *id.* at 707-08.

⁸⁸ See *id.* at 708-09.

⁸⁹ See *id.* at 708.

Only Justice Breyer questioned this analysis, but even he concurred in the judgment, concluding because Clinton failed to justify his request for a trial postponement.⁹⁰ Breyer was skeptical of the Court's assumption that presidents have little reason to fear hostile private lawsuits initiated by political enemies,⁹¹ and warned that if his fears were vindicated, the Judiciary would have to develop rules to accommodate the chief executive in such cases.⁹²

B. *The Secret Service Case*

During the course of investigating Clinton's relationship with Monica Lewinsky, Independent Counsel Kenneth Starr sought to compel the testimony, before a grand jury, of Secret Service agents assigned to guard the President.⁹³ The Treasury Department, of which the Secret Service is a part, resisted the subpoenas on the basis of a protective function privilege.⁹⁴ A unanimous panel of the U.S. Court of Appeals rejected this privilege claim.

The court noted that this was apparently the first time that agents guarding the President had ever been compelled to testify about their work.⁹⁵ The court also emphasized that the case arose under Rule 501 of the Federal Rules of Evidence, rather than under the Constitution.⁹⁶ While agreeing that protecting the Chief Executive was "a public good of the utmost importance,"⁹⁷ the court found that the government had provided insufficient reason to believe that rejection of the asserted privilege would place the President at risk.⁹⁸ Moreover, the very narrowness of the proposed privilege, the government's inability to enforce a gag rule against agents who do not have to agree to confidentiality are not sworn to secrecy as a condition of employment, and the expiration of the privilege at the end of the presidential term effectively vitiated whatever utility the privilege may have.⁹⁹ Accordingly, the court left the question of recognizing such a privilege to Congress.¹⁰⁰

⁹⁰ See *id.* at 724 (Breyer, J., concurring).

⁹¹ See *id.* at 722 (Breyer, J., concurring).

⁹² See *id.* at 723 (Breyer, J., concurring).

⁹³ *In re Sealed Case*, 148 F.3d 1073, 1074-76 (D.C. Cir.) (per curiam), *cert. denied sub nom.* Rubin v. United States, 525 U.S. 990 (1998).

⁹⁴ See *id.* at 1074.

⁹⁵ See *id.* at 1076.

⁹⁶ See *id.* at 1075.

⁹⁷ *Id.* at 1076.

⁹⁸ See *id.* at 1078.

⁹⁹ See *id.* at 1077-78.

¹⁰⁰ See *id.* at 1079. This point is reminiscent of the Supreme Court's suggestion that Congress might act to allow the President to obtain a postponement of private damage actions relating to his conduct before taking office. See *Clinton v. Jones*, 520 U.S. 681, 709 (1997).

C. *Government Attorney-Client Privilege*

The last of the Clinton-related cases involved the assertion of attorney-client privilege by Bruce Lindsey, Deputy White House Counsel, when he testified before the grand jury empaneled by the independent counsel.¹⁰¹ Lindsey invoked executive privilege at one point to avoid answering some questions, but he abandoned that claim on appeal after it was rejected by the district court.¹⁰² The court of appeals rejected Lindsey's attorney-client privilege claims on the basis that a government lawyer has an obligation not to withhold information relating to possible criminal activities from a grand jury.¹⁰³ The majority recognized that its ruling might "chill some communications between government officials and government lawyers," but emphasized that those officials seeking complete confidentiality could always talk with private counsel instead.¹⁰⁴ The court went on to reject several arguments that Lindsey was functioning as the President's personal attorney, so the privilege still did not apply.¹⁰⁵

D. *Implications*

Assessing the significance of these cases for future executive privilege disputes between Congress and the White House is complicated by several factors. The most obvious of these factors is that *Jones* and the Secret Service case did not involve any claim of executive privilege. The third case, *Lindsey*, did have an executive privilege component, but that argument fell by the wayside after the district court concluded that, in the context of a criminal investigation, the independent counsel had shown both a strong need for the information and the unavailability of that information from any other source.¹⁰⁶

As Justice Breyer suggested in his *Jones* concurrence, however, the import of these decisions might be less in the details of judicial rationale than in the bottom line: in all these cases, what many regarded as the President's position was rejected. Because the chief executive appears more vulnerable to suit, his adversaries might be emboldened to try their luck.¹⁰⁷ Moreover, the weakness of the executive privilege claim in *Lindsey* could encourage Congress to resist presidential assertions of privilege even more strongly than the legislative branch already does. Indeed, one

¹⁰¹ See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.) (per curiam), cert. denied sub nom. Office of the President v. Office of Indep. Counsel, 525 U.S. 996 (1998).

¹⁰² See *id.* at 1267.

¹⁰³ See *id.* at 1282-83.

¹⁰⁴ *Id.* at 1276.

¹⁰⁵ See *id.* at 1278-83.

¹⁰⁶ See *id.* at 1267 (citing *In re Sealed Case (Espy)*, 121 F.3d 729, 754 (D.C. Cir. 1997)).

¹⁰⁷ See *Clinton v. Jones*, 520 U.S. 681, 722-23 (1997) (Breyer, J., concurring in the judgment).

lesson of the post-Watergate era has been the practical difficulty that presidents face in asserting executive privilege.¹⁰⁸

On this view, one legacy of the Clinton Administration is the weakening of the presidency. There are, however, reasons to doubt the magnitude of the harm that the executive branch has suffered at Clinton's hands. To be sure, *Lindsey* might well complicate the White House's deliberative processes by subjecting staff lawyers to outside interrogation into potential criminal misconduct. Because of increased media and congressional concern over executive illegality and the personalization of much contemporary political discourse, presidents might choose to rely less on government lawyers and more on personal attorneys who can assert attorney-client privilege.¹⁰⁹ Moreover, the prospect that government lawyers will be required to testify about possible official illegalities might well discourage presidential advisors from making notes about policy deliberations.

But the impact on executive branch relationships with Congress is likely to be rather less bleak than this overall picture suggests. A major factor here is that Congress does not have law enforcement authority. Although legislators might want to expose executive misbehavior, the denouement of the Iran-Contra hearings might give pause to thoughtful members of Congress. The two highest officials tried in the wake of those congressional hearings had their convictions overturned because of the prosecution's inability to demonstrate that it had not relied on their immunized testimony on Capitol Hill.¹¹⁰ As for the reluctance of presidential aides to write down their candid views during policy deliberations, this unfortunate problem did not begin with the Clinton litigation.¹¹¹ Administrators in various agencies and departments have noted that what the executive branch regards as overly intrusive congressional oversight had been adversely affecting the quality of deliberation for years before Clinton's troubles.¹¹² Finally, both Congress and the President retain many incentives to reach workable accommodations about information disputes.¹¹³ Litigating such disputes will continue to have costs in time, money, and flexibility. If, as Judge

¹⁰⁸ See MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 83-141 (1994); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 670-79 (1997); Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999).

¹⁰⁹ See *In re Lindsey*, 158 F.3d at 1286-87 (Tatel, J., concurring in part and dissenting in part); Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 673-74 (1999).

¹¹⁰ See *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *modified on reh'g*, 920 F.2d 940 (D.C. Cir. 1990).

¹¹¹ See Shane, *Negotiating for Knowledge*, *supra* note 12, at 225.

¹¹² See *id.* ("Executive employees also believe that Congress underweighs the negative impact of oversight on executive branch deliberations . . .").

¹¹³ See Devins, *Congressional-Executive Information*, *supra* note 12, at 114.

Posner has written, the impeachment process demonstrated the resiliency of American government,¹¹⁴ perhaps the less epic disputes over presidential privilege will do less long-term harm than proponents of a strong presidency might now fear.

III. ON DIVIDED GOVERNMENT AND EXECUTIVE PRIVILEGE DISPUTES

The acrimonious relationship between President Clinton and Congress is widely attributed to the fact that, for most of his administration, the legislative branch has been controlled by the political opposition. Divided government is widely believed to be undesirable. Divided government certainly played a major role in the Clinton impeachment, and in the Nixon and Andrew Johnson impeachments as well. We should hesitate, however, before attributing too much additional significance to partisan division.

Divided government has been a common feature of American politics since Andrew Jackson's time. For almost half the period since 1832, the United States has lacked unified partisan control of the political branches.¹¹⁵ Focusing more specifically on the years since World War II, an era during which divided government has been even more common, political scientists have raised questions about the conventional wisdom deploring the phenomenon. For example, David Mayhew has shown that Congress has passed about as many important laws during times of divided government as during unified government.¹¹⁶ Mayhew defined these measures as those that were so regarded at the time by knowledgeable journalists and those that have been so regarded in retrospect by policy specialists.¹¹⁷ Mayhew's landmark study has stimulated an outpouring of further literature, most of which has generally confirmed his conclusions.¹¹⁸ His work has been extended in two significant respects. First, Mayhew focused only on bills that passed, not on bills that failed. Although passage of significant legislation is unaffected by divided government, major legislative proposals are more likely to fail under divided government than under unified government.¹¹⁹ Second, Mayhew viewed the decline in the absolute number

¹¹⁴ See RICHARD A. POSNER, *AN AFFAIR OF STATE* 263-64 (1999).

¹¹⁵ See Morris P. Fiorina, *An Era of Divided Government*, 107 *POL. SCI. Q.* 387, 388 (1992). For a comparative perspective, see Matthew Soberg Shugart, *The Electoral Cycle and Institutional Sources of Divided Presidential Government*, 89 *AM. POL. SCI. REV.* 327 (1995).

¹¹⁶ See DAVID R. MAYHEW, *DIVIDED WE GOVERN* 76 (1991).

¹¹⁷ See *id.* at 37-50.

¹¹⁸ See, e.g., DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK* (1998); MORRIS FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996); KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998).

¹¹⁹ See Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-76*, 93 *AM. POL. SCI. REV.* 519 (1999); George C. Edwards et al., *The Legislative Impact of Divided Government*, 41 *AM. J. POL. SCI.* 545 (1997).

of important laws passed since 1980 as evidence of greater reliance on omnibus legislation during recent years.¹²⁰ It is possible, however, that the national parties have become more polarized over the past two decades; one study shows strikingly greater output of important legislation with unified government than with divided government during this period.¹²¹

Executive privilege disputes between Congress and the President typically do not arise in the context of debating proposed legislation. Rather, they occur primarily in oversight and investigation.¹²² Mayhew, unlike most other political scientists who have investigated divided government lately, examined the incidence of high-profile congressional investigations of executive misconduct between 1946 and 1990.¹²³ Of the thirty-one investigations that met Mayhew's criteria, almost exactly as many occurred during periods of unified government as occurred during times of divided government.¹²⁴ These findings suggest that partisan differences are unlikely to affect the incidence of executive privilege disputes. On the other hand, if the trend toward increasing polarization between the parties suggested by data on legislative output over the past two decades is accurate,¹²⁵ we might expect to see higher levels of interbranch conflict over executive privilege during times of divided government. This, in turn, suggests that the Clinton Administration's judicial defeats might indeed encourage a more assertive Congress to press even harder for executive branch information than it has done in the past. How far this trend will go remains uncertain due to the institutional incentives to reach accommodation that have already been discussed.¹²⁶ There were, apparently, only about thirty information disputes per year between 1964 and 1973, while perhaps hundreds of thousands of requests for information were processed amicably during the same era.¹²⁷ Even if some members

¹²⁰ See MAYHEW, *supra* note 116, at 76.

¹²¹ See Bruce I. Oppenheimer, *The Importance of Elections in a Strong Congressional Party Era: The Effect of Unified vs. Divided Government*, in DO ELECTIONS MATTER? 120, 126-34 (Benjamin Ginsberg & Alan Stone eds., 3d ed. 1996).

¹²² See Miller, *supra* note 109, at 632 ("Over the past two decades, Congress and the President have engaged in increasingly bitter constitutional warfare over access to information."); Matthew Cooper Weiner, Note, *In the Wake of Whitewater: Executive Privilege and the Institutionalized Conflict Element of Separation of Powers*, 12 J.L. & POL. 775, 776 (1996) ("[T]he Executive branch has either invoked or threatened to invoke executive privilege in nearly all of the major political 'scandals' of modern times . . .").

¹²³ To qualify, an investigation must have generated at least 20 front-page stories in the *New York Times* during any Congress in the relevant time period. The story must have involved a charge of executive misconduct by a congressional committee member, committee staffer, witness, or informant, or a response to such a charge by a current or former executive official. See MAYHEW, *supra* note 116, at 9-11.

¹²⁴ See *id.* at 31-32.

¹²⁵ See *supra* text accompanying note 123.

¹²⁶ See *supra* text accompanying note 76.

¹²⁷ See *supra* note 50 and accompanying text.

of Congress take a more confrontational approach in the wake of the judicial rulings adverse to the Clinton Administration, the legislative branch might well lack the institutional capacity to handle an enormous increase in the number of disputes with the White House and the executive establishment. Indeed, many supporters of the legislative veto backed off from using that device as often as they might have desired in the years before *Chadha* precisely because that prospect threatened to leave Congress with no time to do anything but review administrative regulations.¹²⁸

CONCLUSION

Proposals to avoid judicial resolution of constitutional issues may strike many people as subversive of the rule of law. After all, courts are supposed to decide legal disputes. Nevertheless, there are strong arguments against resort to the judicial process to determine once and for all the frontier between congressional and presidential power in executive privilege and related matters. Although Bill Clinton might have weakened his office, it remains unclear to what extent his legal defeats will have long-term consequences. Both Congress and the White House will have good reason to try to reach workable arrangements to promote an effective government in the future.

¹²⁸ See BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 49-50, 56-57 (1988).