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CONGRESSIONAL-EXECUTIVE INFORMATION ACCESS DISPUTES: A MODEST PROPOSAL—DO NOTHING

Neal Devins

Battles between Congress and the White House over the executive's obligation to respond to congressional demands for information are legion. Starting with George Washington's 1796 refusal to provide the House of Representatives with correspondence relating to the negotiation of the Jay Treaty, the legislative and executive branches have advanced dramatically different articulations of the reaches and limits of Congress' power to investigate executive branch operations. Reflecting deep-seated differences between executive and legislative branch sensibilities, these conflicts seem destined to continue. The Clinton Justice Department, for example, unsuccessfully fought an epic battle with the House Energy and Commerce Committee over the propriety of committee investigators interviewing "line attorneys" of the Department's environmental crimes unit.

A remarkable feature of these battles is that Congress' ultimate weapon to bring the executive branch into compliance with its information requests, the subpoena power, appears very much dependent on executive branch officials. Specifically, were Congress to conclude that an executive branch official was in contempt for failing to comply with a congressional subpoena, the matter would then be turned over to the Justice Department. Were the White House to assert executive privilege, however, as was the case with Reagan's EPA Administrator Anne Burford, the contempt finding almost certainly would go

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unprosecuted, for the Justice Department would never directly challenge a claim of presidential privilege. All of this has led some commentators to call for a revamping of the current system, by either empowering Congress or a judicially appointed independent counsel to prosecute contempt actions against recalcitrant executive officials.\footnote{4}

Congress, however, has declined these invitations to expand its authority. Indeed, Congress has rejected several modest alternative suggestions as well.\footnote{5} An examination of the day-to-day workings of the existing system helps to explain why most congressional members and staffers are satisfied with this seemingly imperfect arrangement. Congressional committees are routinely able to get what they desire from agencies through direct requests and negotiation. While it is inevitable that these procedures will break down from time to time, as was the case when Anne Burford refused to turn over files relating to ongoing Superfund enforcement activities, such cathartic events are rare. They are so rare, in fact, that the Burford controversy is really the only relevant conflict that can be cited to illustrate "the problem."

Asking the question, "What is the problem and how do we fix it?" may thus mislead the true inquiry. It is more appropriate to ask whether the absence of Burford-like controversies demonstrate the workability of the current system? Many factors contribute to the presence of the current arrangement. Longstanding reliance on negotiation, compromise, and resolution have, in the past, resulted in nonjudicial settlement. Countervailing institutional interests have guided this process, balancing congressional oversight and the executive's control of its own officials and agencies. While the terms of these solutions are often defined by how long and how hard each branch is willing to push its institutional agenda, neither the executive nor Congress is willing to trade concrete political solutions for something as abstract as the defense of executive or legislative prerogatives under the separation of powers. For example, rather than delaying confirmation hearings or cutting appropriations, executive agencies prefer to turn over requested information to Congress. As a consequence, it is to be expected that these processes not break down into disputes that result in (at least attempted) judicial resolution. Furthermore, as this essay will show, greater judicial involvement risks more harm than good. This essay therefore argues that, whatever its faults, the current system is far better than reform proposals that would create a judicial end point to conflicts that are now solved without judicial involvement.

\footnote{5} See James Hamilton & John C. Grubow, A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984); Stanley M. Brand & Sean Connolly, Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials, 56 Cath. U. L. Rev. 71 (1986). Three of the authors of these articles, coincidentally, have worked in the legal counsel's offices of the House and Senate.
\footnote{6} See infra notes 99-101.
I. The Competing Interests of Congress and the Executive

Information access disputes between Congress and the executive are animated by two themes: one of tension, which makes disputes likely to occur and one of cooperation, which moderates potentially explosive conflicts between the branches. The theme of tension is rooted in the ongoing tug-of-war between the executive and Congress over whether information access is necessary for Congress to perform its legislative duties or, alternatively, whether information access requests improperly intrude upon the executive’s duty to administer governmental programs. The theme of cooperation speaks to the incentives for Congress and the executive to reach an accommodation over information access, namely, Congress’ desire to maintain controls over executive operations and the executive’s concomitant desire for Congress to delegate authority to it through broadly worded legislative mandates.

A. The Theme of Tension

The Constitution, while it speaks of legislative power being vested in the Congress and executive power belonging to the President, does not specifically demarcate the boundaries that divide executive and legislative powers. Without clear borders separating legislative and executive powers, each branch claims authority for itself that the other sees as its own. For the executive, Congress’ desire to expand its lawmaking function is often characterized as micromanagement, which intrudes upon its power to implement. For the Congress, the executive seeks to expand its implementation authority into the gray area of lawmaking. For both branches, the Constitution—and their inherent powers under it—supports their competing interpretations and bolsters their willingness to engage in conflict with the other.

1. Congressional Right to Access

Congress has broad investigatory powers to fulfill its responsibilities under the Constitution. Article I declares that, “All legislative powers ... shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” A key element of Congress’ ability to carry out this mandate depends on how much information is made available to it as it deliberates and then legislates. Absent access to accurate, relevant information, it would probably be impossible to legislate either effectively or wisely. During his academic life, Woodrow Wilson wrote that Congress’ free exercise of its

7. See generally The Fettered Presidency: Legal Constraints on the Executive Branch (L. Gordon Crovitz et al. eds., 1989).
10. According to Sen. J. William Fulbright, the power to investigate is “perhaps the most necessary of all the powers underlying the legislative function. The power to investigate provides the legislature with eyes and ears and a thinking mechanism.” J. William Fulbright, Congressional Investigations: Significance for the Legislative Process, 18 U. Chi. L. REV. 440, 441 (1951).
investigative power, especially when applied to gain information from the executive branch, is one of the most important protectors of liberty, as well as an indispensable element for wise legislation.

Wilson is not alone in emphasizing the importance of congressional investigations. The Supreme Court, too, has given great weight to the congressional power of inquiry. In *Barenblatt v. United States*, the Court held that the power to inquire and compel response is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." In the words of Chief Justice Warren:

The power of the 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.

Indeed, the subpoena power has been held to be an "indispensable ingredient" of Congress' legislative powers. In *McGrain v. Daugherty*, the Court found 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.

11. For Wilson:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.


13. Id. at 111. In the context of hearings held by the House Un-American Activities Committee during the 1950s, the Supreme Court took a highly deferential view to the scope of congressional investigations. The Court used rational basis language when it said, "we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that "the primary purposes of the inquiry were in aid of legislative processes."" Id. at 133.


17. Id. at 175.
When Congress conducts investigations, the single formal tool it can use to compel the production of information it desires is the subpoena. A subpoena allows Congress to tell the agency unequivocally that Congress is entitled to the information and that any attempt to hinder its access will be futile. At the same time, "[s]ince Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." 18

2. Executive Privilege

The executive, like Congress, has broad authority to fulfill its constitutional responsibilities. The constitutional command to the president to "take Care that the Laws be faithfully executed" 19 has been interpreted by the Justice Department as an "exclusive [grant of] constitutional authority to enforce federal laws." 20 Beginning with George Washington, presidents from time-to-time have claimed that certain categories of information possessed by the executive branch are privileged and not subject to release. 21 Although it is not uncommon for executive branch officials to refer to this privilege in the midst of information disputes between the branches, its definition is more elusive than its use. As is true with Congress' subpoena power, the phrase appears nowhere in the Constitution, and lawyers for Congress and the White House strongly disagree as to its nature and extent. 22 But at least two generalizations can be made about its meaning. First, its existence has been clearly affirmed by the Supreme Court in United States v. Nixon. 23 Second, it is generally defined as the privilege, available only to the president and those acting under his orders, to refuse to release information that falls in one of two categories. The first category includes all communications between the president and his closest advisors that occur during the process of deliberation and debate on matters coming before the president. The second includes information relating to matters that are "within the exclusive province of" the executive branch.

Among the areas protected by the privilege, several are easily identified. These include powers that are constitutionally committed to the executive branch, such as details of foreign policy and treaty negotiation, nominations before they are

18. Borenblatt, 360 U.S. at 112.
20. 1984 OLC opinion, supra note 4, at 113.
made, possible pardons, and matters of current military significance. In these areas, any information released by the president is made available as an exercise of executive discretion and cannot be compelled. It is also the executive’s position that Congress may not inquire into deliberative communications between the president and his advisors so that openness, honesty, trust, and confidentiality will prevail in high-level policy discussions. This rationale was well-stated in a memorandum prepared for the Attorney General William French Smith by the Office of Legal Counsel in 1984. It said that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.”

B. The Theme of Cooperation

The prospect of repeated acrimonious conflicts between the legislative and executive branches is acute. The invocation of executive privilege in response to congressional information requests, as Peter Shane has observed, seems more likely due to post-Watergate changes within the cultures of the executive and legislative branches. “On the executive side, the bureaucracy directly reporting to the president . . . has tried repeatedly to increase centralized control over [executive branch operations]. . . . Correspondingly, the increasing number and complexity of administrative tasks at the national level has prompted a burgeoning of congressional staff and oversight.” Despite this changing culture, however, Congress rarely makes use of its subpoena power and the president rarely invokes executive privilege. The infrequency of such battles is a result of both the availability of alternative mechanisms to resolve disputes between the branches and the benefits that each branch receives by cooperating with the other.

Congress and the executive have strong incentives to work with each other. For Congress, broadly worded statutes that set forth generalized objectives, but are silent on the details of administration, are far easier to enact than highly detailed legislation that specifies the distribution of benefits and burdens. Making use of public choice theory, Harold Bruff has explained this phenomenon: “Selecting a decision rule requires a prospective—and necessarily rough—judgment about which rule will produce the lowest sum of two kinds of costs: the decision costs of obtaining assent from the requisite number of participants and the external costs of decisions that disfavor a given participant.” At the same time, Congress often needs the federal bureaucracy to implement its policies, and the president is saddled with the responsibility of ensuring that the bureaucracy actually works.

25. 1984 OLC opinion, supra note 4, at 116. In 1982, Smith also asserted that “the interest of Congress in obtaining information for oversight purposes is . . . considerably weaker than its interest when specific legislative proposals are in question.” SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., EXECUTIVE PRIVILEGE: LEGAL OPINIONS REGARDING CLAIM OF PRESIDENT RONALD REAGAN IN RESPONSE TO A SUBPOENA ISSUED TO JAMES G. WATT, SECRETARY OF THE INTERIOR 3 (Comm. Print 1981).
26. Shane, supra note 5, at 463–64.
time, while Congress prefers to lower its decision costs by delegating power. Congress conditions that delegation on its ability to protect its institutional priorities "at the operational stage [when] it is much easier to predict the winners and losers from a change in the decision rules." For this reason, Congress has strong incentive to couch its delegation with mechanisms that enable it to "veto" administrative decisions that it disapproves of without enacting legislation. Likewise, Congress has strong incentives to insist that the executive share with it information necessary to monitor the administration of federal programs.

The executive also benefits from these power-sharing arrangements. Witness the White House's participation in the establishment and the growth of the legislative veto, a procedure by which departments or agencies would make proposals that would become law unless Congress rejected them by a majority vote of either one or both houses of Congress. Originally proposed by Herbert Hoover in 1929, the legislative veto enabled Hoover to "make law" and reorganize executive branch operations without subjecting his plan to the cumbersome and uncertain lawmaking process. Over time, the legislative veto grew in popularity but became more controversial. Perceiving that Congress was using this procedure to micromanage its operations, the Reagan administration—while willing to accept the legislative veto as a condition on its discretion by signing onto statutes containing legislative vetoes—successfully challenged the procedure's constitutionality in INS v. Chadha.

Chadha, rather than suggesting that courts are likely to play a large role in resolving disputes between Congress and the White House over the line that separates lawmaking from administration, spoke to the forces that propel the legislative and executive branches to resolve informally their institutional disputes with one another. In the decade after Chadha, 1983-1993, well over 200 legislative vetoes have been enacted into law. Although presidential signing statements sometimes cite Chadha and proclaim that these measures will be treated "as having no legal force or effect," it is quite clear that affected agencies comply with legislative veto provisions. "Agencies cannot risk . . . collisions with the committees that authorize their programs and provide funds." As Louis Fisher observed in his definitive study of this device, "[i]n one form or another, legislative vetoes will remain an important mechanism for reconciling legislative and executive interests." In fact, Fisher argued, "[n]either Congress nor the executive branch wanted the static model of government offered by the Court."

Information access disputes, as the next part details, tell a nearly identical

28. Id. at 221.
33. Id. at 292.
34. Id.
story. Congress and the White House, despite sometimes laying claim to each other's power, are dependent on one another. Congress needs to delegate in order to reduce the costs of legislation. The executive needs to accept conditions on delegated authority in order to facilitate Congress' willingness to transfer power through delegations. "Each branch," as John McGinnis put it, "is both a potential ally and adversary of the others, and is thus involved in . . . a 'bargaining' or 'mixed motive' game in which there is a mixture of mutual dependence and conflict, of partnership and competition." 35

II. The Politics of Information Access Disputes

Cooperation dominates most congressional requests for information, with the executive turning over the requested information as a matter of routine. On rare occasion, however, the executive resists information requests. When this occurs, a generally unworkable statutory enforcement scheme gives way to a negotiation process that brings together the themes of tension and cooperation.

A. The Existing System

Congress has available to it several formal mechanisms to secure enforcement of its subpoenas. The most basic option is its inherent power to punish contempt of Congress. 36 Like the subpoena power itself, inherent contempt is not explicitly provided for in the Constitution. Its validity is, however, well-established as an attribute of Congress' legislative authority. 37 First used to compel information production in 1812, 38 contempt of Congress is invoked by sending the Sergeant-at-Arms to arrest and imprison the offending individual. The offender is then held until she either gives up the information or is tried by the relevant house of Congress. 39 Not used since 1945, this power is of little practical relevance. As a result, refusals to comply with congressional subpoenas are enforced through one of two statutory alternatives, one criminal and the other civil.

Criminal contempt had its origin in 1857, when Congress supplemented its inherent contempt power with a statute providing for criminal contempt. The law held that a witness who fails to appear before a congressional committee, or who appears but fails to testify or produce requested evidence, is guilty of a misdemeanor. Once convicted, the witness may be punished by a fine of not

38. Hamilton, supra note 36, at 87.
less than $100 and not more than $1,000, and imprisonment of not less than
one month and not more than 12 months. The U.S. Code currently contains
the same statute in sections 192 and 194 of Title 2.

Filed by the U.S. Attorney for the District of Columbia, section 192 prosecutions punish a witness for past defiance. Consequently, the defendant cannot
purge herself of contempt by turning over the withheld documents or testimony. In proving its case, the burden rests with the prosecution to demonstrate
that the defendant’s refusal to comply with the subpoena was willful and that
the withheld documents were relevant to the subject matter of the congressional
investigation.

Congress may also enforce its subpoenas under the Ethics in Government Act. Passed in 1978, the Ethics Act included a whole range of provisions to
adjust the balance of power between Congress and the President in the wake
of the Watergate scandal. One of these adjustments authorized the Senate—but not the House—to bring a civil suit on its own behalf to enforce its subpoenas. The civil enforcement option is limited, however, because it authorizes
a suit against any person subpoenaed except an officer or employee of the federal
government. Therefore, the Act cannot be used to subpoena any agency employees as a part of the oversight process.

The procedure for a civil suit is as follows. Once a subpoena is issued, the
Senate may pass a resolution directing the Senate Legal Counsel to bring a
civil enforcement action. The D.C. District Court is then given original juris-
diction and is required to hear the case as expeditiously as possible. Once
the court finds that the subpoena is valid and that the witness has failed to comply,
enforcement is by the court’s contempt power.

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42. See Hamilton & Grabow, supra note 5, at 151 (discussing United States v. Brewster, 154
F. Supp. 126 (D.D.C. 1957)).
43. See Flaxer v. United States, 358 U.S. 147 (1958); Watkins v. United States, 354 U.S. 178
(1957).
(1988).
46. The reason that only the Senate received this power is not entirely clear. The only indication
in the legislative history is that the House had yet to fully consider the question and did not wish
to have the power without giving it more attention. The committee report stated:
The appropriate committees in the House also have not considered the Senate’s proposal to
confer jurisdiction on the courts to enforce subpoenas of House and Senate committees. The
Senate has twice voted to confer such jurisdiction on the courts and desires at this time to confer
jurisdiction on the courts to enforce Senate subpoenas.
47. 28 U.S.C. § 1365(a) (1988). ("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.").
48. Id.
B. THE SYSTEM BREAKS DOWN: THE CASE OF ANNE G. BURFORD

The feasibility of the above statutory scheme was severely challenged in the fall of 1982, when a bitter dispute erupted between the Justice Department and two House Subcommittees on Oversight and Investigation—the Public Works and Transportation Committee and the Committee on Energy and Commerce. The subcommittees had been looking into the EPA’s enforcement of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Specifically, the EPA was asked to turn over some files relating to its enforcement activities. The EPA initially indicated that it would cooperate with the investigation. However, the Justice Department’s Office of Legal Counsel, after concluding that the files were privileged, instructed the EPA to hold onto the files. They took the position that files pertaining to ongoing enforcement activities were too sensitive to release because they contained confidential information regarding evidence and litigation strategy. The EPA was concerned that any information they released to Congress would find its way into the news. Not only would this damage the government’s prospects in litigation, but it would be highly damaging to those suspected of illegal activities when their identities would be released.

After extended negotiations, the EPA indicated that it would allow access to files only after screening them for sensitive documents that would not be released. Unwilling to accept limited access, the subcommittees declined and issued subpoenas on November 22, 1982, against EPA Administrator Anne Burford. The Department of Justice took the view that release of law enforcement-related files would invade executive prerogatives and threaten the successful prosecution of CERCLA cases. Attorney General William French Smith sent a letter to the subcommittees in support of the administration’s position. According to the Attorney General, “sensitive open law enforcement investigative files” could not be released. To that end, President Reagan ordered Burford not to divulge documents from “open law enforcement files, [with] internal deliberative materials containing enforcement strategy and statements of the Government’s position on various legal issues which may be raised in enforcement actions. . . .” The only access offered by the Attorney General was to documents that had been prescreened by the EPA.

The General Counsel to the Clerk of the House, Stanley Brand, responded

51. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993). Under CERCLA, anyone who owns or has owned polluted property or who was ever in any way involved with polluting the property can be held as a “potential responsible party” and made to suffer joint and several liability for the cleanup costs. Under CERCLA a Superfund was established to pay for orphaned cleanups. The fund is replenished periodically by contributions from potentially responsible parties. Passed in 1980, CERCLA was in its early stages of operation when this conflict arose. President Reagan issued an executive order delegating CERCLA administration authority to the EPA Administrator. Exec. Order No. 12,316, 3 C.F.R. 168 (1982), reprinted in 42 U.S.C. § 9615 (1982).
with a letter to the subcommittees answering the Attorney General’s letter and justifying the House position.\textsuperscript{55} The same day, the subcommittees made a settlement offer to the EPA. Their proposal was that staff on the subcommittees would review the documents at the EPA, thereby allowing all the documents to remain in EPA possession at all times. Selected documents would be marked by subcommittee staffers and then given to the EPA staff. The EPA would review them to determine the sensitivity of their content. If the content was acceptable for release, then the documents would be released to the subcommittees. If the documents were too sensitive, however, they would not be released. Instead, subcommittee staffers would only be able to review them at the EPA. All the information in sensitive documents would remain confidential.\textsuperscript{56} This offer was, however, rejected by the EPA.

On December 10, 1982, the subcommittees responded to the EPA refusal; the subpoenas would be enforced. The full Public Works and Transportation Committee voted along party lines to recommend that the House resolve to hold Burford in contempt; the House agreed, and on December 16 voted Burford in contempt by a margin of 259 to 105.\textsuperscript{57}

Before the Speaker of the House could certify the contempt to U.S. Attorney Stanley Harris, however, a suit was filed by Burford, the Department of Justice, and Harris, seeking a declaratory judgment that Burford had acted lawfully in refusing to release the subpoenaed documents.\textsuperscript{58} The D.C. District Court refused to hear the suit on the grounds that a judicial resolution would be an improper remedy, concluding that the proper forum to raise a constitutional argument would be as a defense to a section 194 proceeding.\textsuperscript{59} The court’s ruling seemed to promote a resolution, as an agreement was soon reached. Ultimately, the issue turned less on the merits of the information access dispute and more on the public perception that the allegations of lax EPA enforcement were true. Some negotiations and two months later, the information was released to the subcommittees and Burford resigned from her post at the EPA.

Although Congress succeeded in getting the information it requested, the Burford controversy can be seen as evidence that Congress’ subpoena enforcement powers under section 194 are inadequate if the subpoenaed party refuses to cooperate. In order for Congress to satisfy its information needs, it must rely on the cooperation of the U.S. Attorney. But when the request is made of an executive branch official, the Department of Justice may have considerable incentives to refuse to cooperate. Claims of executive privilege, the oath of


\textsuperscript{59} Id. at 152-53.
office, and basic considerations of separation of powers all may persuade the executive that cooperation is inconsistent with its institutional duty to preserve and defend the Constitution. Indeed, in an Office of Legal Counsel opinion issued in the aftermath of this dispute, the Justice Department concluded that "[a]s a matter of statutory construction and separation of powers analysis, a United States Attorney is not required . . . to prosecute an Executive Branch official who carries out the president's instruction to invoke the president's claim of executive privilege before a committee of Congress."\(^{60}\)

Congress, however, did not seek to beef up its subpoena enforcement authority in the wake of this controversy. One explanation is that, throughout the dispute, it was the Justice Department and not the EPA that sought to withhold the documents from Congress.\(^{61}\) In other words, the Burford dispute was a bit of an anomaly. Agency heads, as will be discussed, will be able to (and will have incentive to) skirt Justice Department participation in nearly every instance.\(^{62}\) Furthermore, Congress has available to it effective alternatives to subpoena enforcement actions.

C. Negotiating Information—Current Practices\(^{63}\)

The uniqueness of the Burford dispute is a byproduct of an Office of Legal Counsel decision to treat Congress' information request as a test case in which to push the bounds of executive privilege. Consequently, as James Michael Strine reports in his detailed work on Office of Legal Counsel operations, the Office of Legal Counsel's institutional interests in executive privilege outweighed the organizational and strategic needs of the White House and the EPA.\(^{64}\) By discounting EPA and White House desires to maintain good relations with congressional overseers, the Office of Legal Counsel maximized its longstanding interest in protecting presidential authority. Without the political incentives that make the executive willing to turn over information to Congress, the theme of tension predominated over executive branch conduct in this dispute. Congress responded in kind. The House Energy and Commerce Committee's Subcommittee on Oversight Chairman John Dingell (D-Mich.) aggressively pursued congressional priorities and was quite willing to accentuate the theme of tension.

\(^{60}\) 1984 OLC Opinion, supra note 4, at 101.

\(^{61}\) Burford very much wanted to turn the documents over and bitterly complained that Robert Perry, then EPA's General Counsel, was holding onto the documents because Justice wanted him to and that Perry "my General Counsel, was working more for the Justice Department than for me." Anne M. Burford & John Greenya, Are You Tough Enough: An Insider's View of Washington Politics 154 (1986).

\(^{62}\) See infra notes 137-46.

\(^{63}\) This subsection title is borrowed from Peter Shane's excellent Administrative Conference report on information access disputes between the Congress and executive. Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 ADMIN. L. REV. 197 (1992). Portions of my discussion in this section borrow from Shane's report and I thank Dean Shane for his willingness to share his source material, correspondence, and insights with me.

in his dealings with the executive.\textsuperscript{65} Furthermore, Dingell, a ranking member of the Democratic leadership, had strong incentive to politically embarrass Republican heads of the EPA and Justice Department.\textsuperscript{66} Under these conditions, it is not surprising that the EPA dispute would make its way into court.

The EPA controversy, however, stands outside of the pattern of information access disputes between the executive and legislative branches. No other information access case has made it to court since the EPA controversy. Indeed, in the midst of this controversy, President Reagan issued a memorandum to the heads of executive departments and agencies making it administration policy to "comply with congressional requests for information."\textsuperscript{67} While the memorandum exempts "significant question[s] of executive privilege from this policy," the determination of whether an information access request raises a substantial question of executive privilege is left to the agency or department head.\textsuperscript{68} Given the costs to an agency or department of a protracted executive privilege fight with its congressional overseers, department and agency referrals are quite rare.\textsuperscript{69} For this reason, ethereal concerns of separation of powers typically give way to more immediate pressures of maximizing political capital.\textsuperscript{70} The leadership role played by the Office of Legal Counsel throughout the EPA dispute therefore stands as a counter-example to the normal executive branch practice of turning information over to Congress.

Executive privilege concerns, when raised, are typically resolved through a process of compromise and negotiation. In some instances, the mechanisms for such compromise are formalized. For example, the House and Senate Committees on Intelligence have adopted a standing order that defines the procedures in which information between the branches is shared. Under this modus operandi:

\begin{itemize}
  \item \textsuperscript{65} Shane, supra note 63, at 221.
  \item \textsuperscript{66} For similar reasons, the Republican Congress of 1995 has threatened to make use of its subpoena authority to compel the Clinton White House to turn over potentially embarrassing documents. Paul Beddard, Clinton May Cite Executive Privilege, Travelgate Papers at Center of Tussle, WASH. TIMES, Sept. 6, 1995, at A1; Laurie Kellman, Subpoena Threat Forces White House Hand, Panel Members Could See Waco Papers, WASH. TIMES, July 11, 1995, at A1. Along the same lines, when the same party controls the Congress and the White House, party loyalty checks (but does not prevent) executive-legislative conflicts.
  \item \textsuperscript{67} Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) (on file with author).
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Telephone Interview with John O. McGinnis, former Deputy Assistant Attorney General, Office of Legal Counsel (Mar. 24, 1994) [hereinafter McGinnis Interview].
  \item \textsuperscript{70} Nelson Lund, Lawyers and the Defense of the Presidency, 1995 B.Y.U. L. REV. 17 (arguing that the president is less interested in preserving separation of powers than in achieving the policy outcomes he favors); John O. McGinnis, Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers, 56 LAW \\& CONTEMP. PROBS., Autumn 1993, at 293, 324 (noting that the Office of Legal Counsel, because it is "responsible for the separation of powers that cut across various issues," is far less willing to bargain away presidential authority, whereas the operating divisions of the executive branch "are often more interested in making bargains that will advance the specific part of the president’s policy for which they are responsible.")
\end{itemize}
1. Committee employees must agree in writing to abide by committee rules and must receive an appropriate security clearance before receiving access to classified information;

2. Members of the committees are forbidden to disclose information individually if the rules provide that such information may be released only pursuant to committee vote;

3. The president may object to a committee vote to disclose properly classified information submitted to it by the executive branch, in which case the information may be disclosed only pursuant to a vote of the entire House; and

4. The committees may regulate and must record the sharing of information made available to them with other committees or with any member of Congress not on the committees.71

In a 1990 interview with Peter Shane, Britt Snider, then-general counsel to the Senate Select Committee on Intelligence, heralded this standing order as a means for ensuring smooth relations between the branches by establishing an orderly, predictable process and setting forth a reasonable set of congressional expectations.72

Outside of foreign relations, where the possibility is substantial that information access requests will raise executive privilege concerns, formalized procedures are unnecessary. In some instances, the executive will waive executive privilege claims in order to accomplish its political objective. In other instances, an intermediate solution is reached. Types of intermediate options include the executive providing the requested information in timed stages, the executive releasing expurgated or redacted versions of the information, the executive preparing summaries of the information, Congress promising to maintain confidentiality regarding the information, and Congress inspecting the material while it remains in executive custody.73

D. WAIVERS OF EXECUTIVE PRIVILEGE

It is hardly unusual for the president to forego an executive privilege claim by releasing information in order to advance his political agenda. This was seen when Congress demanded copies of internal memoranda written by William Rehnquist when he served in the Department of Justice under President Nixon between 1969 and 1971.74 Congress demanded access when Rehnquist was nominated by President Reagan in 1986 to be advanced from Associate Justice to Chief Justice of the Supreme Court.75 The president initially refused to release the memoranda on the grounds that they were protected by the deliberative process privilege.76 A strong argument could be made that no obligation existed on the part of the president to release these memoranda, as they constituted

71. Shane, supra note 63, at 215 (footnotes omitted).
72. Id. at 215-16.
73. Id. at 218-19.
74. FISHER, supra note 24, at 173.
76. Id.
the sort of deliberative remarks among the president and his advisors that can receive the protection of executive privilege. But despite his right to assert the privilege, Reagan decided to release them anyway. By giving them up, the executive was able to ease the effect of confirmation politicking and to move Rehnquist’s nomination through the Senate.

The president’s failure to advance an executive privilege claim, however, does not ensure swift, nonadversarial resolution of an information access dispute. This is a lesson from the recent imbroglio over environmental crimes prosecutions between the Justice Department’s Environmental Crimes Section (ECS) and the House Energy and Commerce Committee’s Subcommittee on Oversight, chaired at that time by John Dingell.

This dispute originated in 1992 when complaints were made to Congress over the ECS’s handling of six environmental prosecutions that were later identified by Dingell’s subcommittee as examples of improper interference by ECS officials. A different congressional subcommittee had already investigated the matter and concluded that the ECS had displayed a “pronounced failure to prosecute environmental crimes” to the same degree as conventional crimes. EPA officials and others had complained that ECS supervisors had intervened in prosecutorial decisions by urging lower charges and fines instead of the more severe charges preferred by the non-ECS prosecutors. This issue was raised in Bill Clinton’s presidential campaign when he charged that, “[t]he Bush administration is letting criminals off the hook after they pollute our air and our water and our land.” But “[w]orse still,” the candidate said, “the Bush administration is letting politics get in the way of prosecutions.”

When Attorney General Janet Reno was confirmed to her post in 1993, she promised to investigate the allegations and make a report of her findings. Then-Associate Attorney General Webster Hubble was assigned the task of managing the investigation. To assuage congressional concerns, Reno allowed Dingell’s subcommittee greater access to DOJ documents and personnel. Dingell’s staff even interviewed the ECS attorneys who had been involved with the six cases at the center of the allegations. Once the internal investigation was initiated in June 1993, little occurred through the end of the year.

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78. The same thing happened in 1988 when Stephen Trott’s nomination to the Ninth Circuit Court of Appeals was helped by the release of some Justice Department papers. Ruth Marcus, Impasse Over Justice Documents Ends: Papers Turned Over; Senate Confirms Trott to Court of Appeals, WASH. POST, Mar. 25, 1988, at A23.
81. Id.
82. Such openness is rarely allowed by DOJ because of the risk that prosecutors would be influenced to prosecute where otherwise they might not when they know that congressional committees may call them in for interrogation. On congressional oversight of the Justice Department, see generally Memorandum from Morton Rosenberg, Specialist in American Public Law, American
Then, in a January 1994 letter to the Attorney General, Dingell alleged that the Department of Justice had been dragging its feet in a way that "repudiates the spirit of cooperation which you personally promised me." The president bowed out of the dispute with a letter from communications director Mark Gearan stating that "[t]he White House has decided to have the Department of Justice make a determination in this matter." In addition, the letter stated that the president "will not assert any privilege or waiver" in the matter.

The controversy resurfaced on Friday, March 11, 1994, when Dingell’s subcommittee served subpoenas on the ECS officials, naming Attorney General Reno and Acting Assistant Attorney General for the Environment and Natural Resources Division Lois Schiffer. The subcommittee demanded internal documents relating to the six cases at the center of the controversy. In addition, the panel sought information relating to changes in policy in the U.S. Attorney’s manual that took effect on January 12, 1993. The manual was changed in a way that gave ECS in Washington even more control over environmental litigation around the country.

The final step taken by the subcommittee came in the form of two letters to the Senate Judiciary Committee, one from Dingell and one from Dan Schaefer (R-Colo.). The letters requested the Judiciary Committee to put a halt to Ms. Schiffer’s confirmation hearings to her post as head of the Environment Division.

The subpoenas and the confirmation delay apparently had their desired effect. By Monday, March 14, the DOJ report, which had been in the works for nine months, was released. In it, the authors rejected charges of intentional interference with criminal environmental prosecutions. Instead, the report found that the decisions made were within the range of normal prosecutorial discretion. It did note that two Republican appointees, in particular, took a less aggressive view on prosecutions, but concluded that their differing view did not amount to interference. The report further concluded that there was a pervasive distrust and "frequent absence of teamwork and mutual respect" between the DOJ and the EPA and that this resulted in the allegations.

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85. Id.
This confrontation illustrates how a dispute such as this can be handled. The underlying issue was ECS’s enforcement of criminal environmental laws. The Department of Justice, having promised to investigate and report back, had yet to tell the committee of its conclusions. Dingell’s subcommittee, then, had Ms. Schiffer’s confirmation delayed until it received the cooperation it demanded. The final result is that the executive’s recalcitrance washed away under the pressure of the confirmation delay tactics. Of at least equal significance, the department modified its Attorney’s Manual to bring it in line with subcommittee demands and Neil Cartusciello, the Justice Department official who headed ECS during this dispute, resigned from his post.88

Information access, in the end, was only the tip of the iceberg for the Oversight Subcommittee-Justice Department dispute. Although the subcommittee staff was eager to teach the Justice Department a lesson about Congress’ oversight powers, oversight ultimately played a subordinate role to the merits of ECS’s enforcement.89 The bottom line for subcommittee staffers, as revealed by then-committee staff director Reid P.F. Stuntz, was to bring ECS’s practices in line with U.S. Attorney-driven criminal enforcement.90

E. Intermediate Solutions to Information Access Disputes

Rather than having the executive unconditionally turn over all requested information to Congress or having the Congress withdraw its request for information altogether, information access disputes are typically worked out through one of several intermediate options.91 Sometimes these accommodations seem little more than a device enabling one or the other branch (usually the executive) to save face. For example, when Ford Secretary of Commerce Rogers Morton released copies of all boycott requests filed by U.S. companies under the Export Administration Act, the House Committee on Interstate and Foreign Commerce agreed to protect the confidentiality of the demanded documents.92 This agreement, however, was a symbolic concession to Morton, who feared an imminent contempt of Congress resolution.93 Carter Secretary of Energy James B. Edwards likewise sought to escape a contempt citation by agreeing to present to the House Committee on Governmental Operations all requested documents concerning their petroleum import fee program.94 Unlike Morton, the committee


89. Stuntz Remarks, supra note 79.

90. Id.

91. For overview treatments, see Stathis, supra note 1; History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, 6 Op. Off. Legal Counsel 751 (1982) [hereinafter 1982 OLC opinion].

92. See Shane, supra note 63, at 292-293; Elder Witt, Oil Import Fee Dispute: Carter Foiled in First Tilt With Executive Privilege, 38 CONG. Q. WEEKLY REP. 1352 (1980).


refused to promise confidentiality and agreed only to review the materials in executive session.\textsuperscript{95}

Many intermediate approaches represent true compromises between the branches. The Standing Order of the Intelligence Committees, discussed above,\textsuperscript{96} represents one such intermediate approach. Most intermediate options, rather than being formally memorialized, are ad hoc solutions to legislative-executive conflicts. In a dispute between Reagan Secretary of Interior James Watt and the House Energy and Commerce Subcommittee on Oversight, materials related to the implementation of the Mineral Lands Leasing Act were “made available for one day at Congress under the custody of a representative from the Office of Counsel to the President. Minimal note-taking, but no photocopying, was permitted; the documents were available for examination by Members Only.”\textsuperscript{97} Another intermediate solution was reached in a Bush-era dispute between a subcommittee of the House Committee on Governmental Operations and the Internal Revenue Service; the conflict arose out of a congressional examination of alleged corruption in IRS auditing. The subcommittee and the Service agreed to an elaborate procedure in which “(1) [subcommittee] staff would have access at IRS to all the information requested, (2) staff could take [sic] notes on the documents, (3) the documents would remain within IRS custody, and (4) the subcommittee would not publicly rely on any data garnered from the documents unless it was confirmed from another source.”\textsuperscript{98}

Intermediate approaches, while avoiding much of the acrimony of Burford-like controversies, are hardly a panacea. Dispute resolutions can eat up a great deal of staff resources (from both sides) and can take several months.\textsuperscript{99} Furthermore, negotiations, since they are principally done on an ad hoc basis, are as dependent on the skills of the negotiators and the political climate as much as they are on the strengths of the executive’s claim of privilege and the Congress’ claim of relevancy.\textsuperscript{100}

\section*{III. The Workability of the Current System}

Perhaps the most remarkable feature of the current system is its persistence. Established in 1857, the formal mechanism of the U.S. Attorney’s prosecution of contempt of Congress violations remains in place today. While legal commentators, congressional staffers, and members of Congress sometimes call for an adjustment to this statutory scheme, all efforts to modify the 1857 law, at least with respect to executive branch officials, have failed.

\textsuperscript{95} See Shane, supra note 63, at 204–205.
\textsuperscript{96} See supra notes 71–72 and accompanying text.
\textsuperscript{97} 1982 OLC opinion, supra note 91, at 780.
\textsuperscript{98} Shane, supra note 63, at 214.
\textsuperscript{99} See Shane, supra note 63, at 228; Telephone Interview with Reed P.F. Stuntz, former counsel to the Oversight Subcomm. of the House Energy and Commerce Comm. (Mar. 24, 1994) [hereinafter Stuntz Interview].
\textsuperscript{100} See Shane, supra note 63, at 220–22.
What makes the failure of reform proposals all the more surprising is that reform efforts are almost always an outgrowth of a fierce executive-legislative conflict, a conflict that calls into question the workability of the current system. Watergate, the Reagan-EPA dispute, Iran-Contra, and now the environmental crimes conflagration are examples of this phenomenon. In each instance, however, Congress has failed to amend the 1857 scheme. This failure is a result of two interrelated phenomena. First, most proposals for change, by envisioning a broader judicial role in the policing of executive-legislative conflicts, raise problems of their own. Second, whatever its pitfalls, congressional and executive interests are generally satisfied with the current arrangement. 101

A. Judicial Intervention in Information Access Disputes

Statutory reform proposals, for the most part, are premised on judicial enforcement of executive branch refusals to turn over information to the Congress. Proposals either strengthen criminal law enforcement, by authorizing the appointment of a special prosecutor in executive privilege disputes, or civil enforcement, by modifying or lifting altogether the exemption to executive branch officials under the Ethics in Government Act.

1. Criminal versus Civil Enforcement

The logic of expanding criminal enforcement through the use of special prosecutors is that the current statutory scheme treats contempt as a crime and, consequently, it makes little sense to decriminalize contempt simply because U.S. Attorneys are unwilling to bring such cases against executive branch officials. The solution, under this reasoning, is to follow the court-appointed, independent counsel model used to prosecute executive officials in other contexts. 102 This argument has been effectively criticized on two distinct grounds. First, whereas a civil enforcement mechanism only requires that the plaintiff prove her case by the preponderance of the evidence standard, a criminal case must be proved by the prosecutor to the beyond a reasonable doubt standard. 103 This higher burden of proof makes conviction considerably more difficult. Also, the government cannot appeal a criminal acquittal, while both the plaintiff and defendant in a civil suit have a right of appeal after a loss.

Second, the imposition of criminal penalties may well be too harsh for the circumstances. In the context of congressional oversight, a recalcitrant executive branch witness or evidence-holder would not, in all likelihood, make an indepen-

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101. McGinnis Interview, supra note 69; Telephone Interview with Michael Davidson, Senate Legal Counsel (Mar. 29, 1994) [hereinafter Davidson Interview]; Telephone Interview with Linda Gustitus, Staff Director and Chief Counsel, Senate Oversight Subcomm. of Government Management and Washington, D.C. (Mar. 25, 1994) [hereinafter Gustitus Interview].

102. Brand & Connelly, supra note 5, at 89.

103. The prosecution must prove that the defendant's refusal to comply with the subpoena is willful. Flaxer v. United States, 358 U.S. 147, 151 (1958); Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948). Additionally, the prosecution must prove that the subpoenaed material is pertinent to the subject matter of the investigation. Watkins v. United States, 354 U.S. 178, 208 (1957).
dent decision to withhold the requested information from Congress. It is more likely the case that a witness would be uncooperative when the president orders her not to comply with the subpoena. Using a criminal sanction in such a situation amounts to punishing the witness for a political decision made by the president. This result may lead members of Congress to decide, at the outset, that a criminal prosecution should not be pursued at all, despite its availability. Furthermore, as James Hamilton and John C. Grabow have argued, the use of criminal contempt sanctions in executive privilege disputes:

may be unfair to an executive official following the President’s orders. A witness ‘acts at his own peril’ because a mistaken view of the law is no defense. The fact that a witness was acting under the orders of a superior authority does not appear to constitute a valid defense.\(^{105}\)

Compounding this unfairness, as the Office of Legal Counsel has argued, criminal prosecution of a witness who claims executive privilege would undercut the privilege altogether, for executive officials would be confronted with significant disincentive to cooperate with the president’s order to protect information.\(^{105}\) Because of these and other difficulties, it is also possible that courts will resist upholding such prosecutions.\(^{106}\)

For the reasons stated above, Hamilton and Grabow have proposed that civil enforcement under the Ethics in Government Act be augmented to allow enforcement against officials of the federal government.\(^{107}\) Under their proposal, either house, not just the Senate, would be able to bring a civil enforcement suit in the D.C. District Court. Once a subpoena is issued by an authorized committee or subcommittee, the committee could report a resolution to the whole house to have the subpoena enforced. Once the whole body had voted to enforce the subpoena, an attorney chosen by that house would be authorized to bring suit to enforce the subpoena.

A modified version of this civil enforcement proposal was considered by the Congress in the aftermath of the Iran-Contra affair. During Iran-Contra, the system of sharing information between Congress and the executive broke down.

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104. Hamilton & Grabow, supra note 5, at 156 (footnotes omitted).
105. 1984 OLC opinion, supra note 4, at 136.
106. Hamilton & Grabow, supra note 5, at 157.
107. They suggest that civil enforcement under the Ethics in Government Act could be augmented by adding a section. Section 1364(a) would read as follows:

The United States District Court for the District of Columbia, without regard to the amount in controversy, shall have original jurisdiction 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.

Id. at 171-72.
The congressional committees investigating this episode were unanimous in concluding that "officials of the National Security Council misled the Congress and other members of the Administration about their activities in support of the Nicaraguan Resistance." Among a spate of proposals designed to improve congressional operations in the wake of Iran-Contra, the majority report of the Iran-Contra committee proposed that the Senate’s civil enforcement authority be augmented to allow for suits against government officials, thereby making subpoena enforcement available as a tool in the oversight process.

The Justice Department opposed this measure, arguing that the judicial branch should play a limited role in settling information access disputes since the Framers of the Constitution intended that these conflicts would be fought predominately in the political arena. Through negotiations between the Senate Committee on Governmental Affairs and the Justice Department, this proposal was modified. Under the reformulated proposal, an exemption to Senate enforcement would apply whenever an agency head, with the approval of the Attorney General, ordered the individual in possession of the requested information not to comply. When the amendment came to a vote on August 9, 1988, it passed the Senate on a voice vote. The House voted on October 6, 1988, giving the amendment strong support with a 245-172 vote in favor. For procedural reasons, though, this was not enough for it to pass. The measure came up as unfinished business on a motion to suspend the rules and, as a result, required a two-thirds supermajority to pass. After this, no further action was taken by either house.

Proposals to modify the Ethics in Government Act avoid the principal pitfalls of criminal enforcement save one, namely, the increasing participation of federal courts in resolving information access disputes. The question of whether judicial enforcement should be expanded in information access disputes therefore must be addressed.

2. Is Judicial Enforcement Appropriate?

There is intuitive appeal to expanding judicial enforcement of executive-legislative information access disputes. Reform proposals, as noted, are invariably the outgrowth of divisive conflicts between the elected branches. Nevertheless, reform proposals fade away as the controversies that prompted them are resolved through political means. Post-Watergate reforms, granting jurisdiction to courts with respect to any claim of executive privilege asserted before either

109. Id. at 426 (recommendations of the majority).
110. Letter from Thomas Boyd, Acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, to John Glenn, Chairman, Senate Committee on Governmental Affairs (Jun. 24, 1988) (on file with author) (hereinafter Boyd letter).
House or any joint committee or committee,113 suffered this fate. More modest reforms proposed in the wake of Iran-Contra likewise faded out of sight with the passage of time.

Congress’ failure to reform the 1857 scheme does not necessarily mean that expanded judicial enforcement is inappropriate. Much the same can be said of executive branch opposition to a broader judicial role in information access disputes. Nonetheless, judicial enforcement is problematic. To begin with, courts may be unwilling to assume a broad role in the resolution of information access disputes, especially those raising executive privilege issues. Furthermore, political resolution of information access disputes may well serve the needs of both elected branches better than judicial determinations.

A. JUDICIAL PARTICIPATION IN THE RESOLUTION OF INFORMATION ACCESS DISPUTES

Executive branch officials and academic commentators, on occasion, have suggested that information access disputes are nonjusticiable political questions.114 For example, in testifying against the 1975 Congressional Right to Information Act, Antonin Scalia, then-Assistant Attorney General for the Office of Legal Counsel, argued that Act provisions allowing congressional enforcement of subpoenas were unconstitutional.115 Specifically, Scalia claimed that such lawsuits were nonjusticiable under the political question doctrine. For Scalia, “...several tests may be applicable here, but the clearest is the lack of judicially discoverable and manageable standards for assessing the relative importance of a Congressional need for information and an Executive requirement of secrecy.”116 In recent years, however, the Justice Department has shied away from this claim. In the Reagan-EPA dispute, the Justice Department conceded that “the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action.”117 In testifying against Iran-Contra reform proposals, the Department similarly recognized that, under Article III of the Constitution, the courts have authority to decide legislative-executive controversies.118

This revised position is supported by case law. In United States v. AT&T,119 the D.C. Circuit Court of Appeals rejected Scalia’s absolutist political question argument. Noting that “judicial abstention does not lead to orderly resolution of the dispute,” the AT&T court concluded that “...the simple fact of a conflict

114. See Hamilton & Grabow, supra note 5, at 165 (citing authority).
116. Id. at 117.
118. See Boyd letter, supra note 110.
119. 567 F.2d 121 (D.C. Cir. 1977).
between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution.\textsuperscript{120} That courts will not throw out information access disputes on political question grounds, however, does not mean that courts will become willing policemen of such disputes. The \textit{AT&T} decision, for example, speaks of the Framers' intention that such disputes be resolved politically and that the constitutional design anticipated that "a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system."\textsuperscript{121} Indeed, rather than resolve the \textit{AT&T} dispute, D.C. Circuit Judge Harold Leventhal pressured both sides to reach a compromise. "[E]ach branch," wrote Leventhal, "should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."\textsuperscript{122} This they did and the case was dismissed after the Justice Department and the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce reached a political settlement of their differences. Similar arguments were advanced by D.C. District Judge John Lewis Smith, Jr., in the Reagan-EPA dispute. Claiming that judicial intervention in executive-legislative disputes "should be delayed until all possibilities for [political] settlement have been exhausted,"\textsuperscript{123} the Department of Justice's challenge to the subpoena was thrown out on ripeness grounds. In the end, recourse to the judiciary accomplished little else than delaying political settlements between the executive and Congress. While such delays may encourage an already recalcitrant executive branch to resist information action requests, Congressional committees are not well served by time-consuming and often ineffective court proceedings.\textsuperscript{124}

This judicial reluctance comes as no surprise. For better or worse, the courts are extremely hesitant to play a leading role in defining executive-legislative relations. On such issues as war powers, the veto power, the incompatibility clause, and recess appointments, the courts have used justiciability and other devices to sidestep resolution of executive-legislative disputes. In this way, "the Court maximizes utility among the branches and, thus, minimizes the chance of retaliation against its own interests."\textsuperscript{125} Specifically, by ducking the substantive issues raised in these disputes, the courts have found a "graceful way" of avoiding substantive decisions against one or the other elected branch. While legislation calling on the courts to participate in information access disputes might change the present calculus, this judicial hesitancy nonetheless calls into

\textsuperscript{120} Id. at 126. The focus of the \textit{AT&T} dispute was on Justice Department objections to \textit{AT&T} compliance with a congressional subpoena.

\textsuperscript{121} Id. at 127.

\textsuperscript{122} Id.

\textsuperscript{123} \textit{House of Representatives}, 556 F. Supp. at 152.

\textsuperscript{124} In the \textit{AT&T} dispute, the subpoena was issued in June 1976. The final binding decision was not made until December 1977, a full 18 months later. \textit{AT&T}, 567 F.2d at 123.

\textsuperscript{125} McGinnis, supra note 35, at 307.
question the ultimate usefulness of elected government delegating to the courts the power to resolve information access disputes.

8. THE POLITICS OF SHARED POWER

Judicial resolution of legislative-executive information access disputes is problematic for other reasons. The formal enforcement mechanism of the current system—U.S. Attorney prosecution of an executive official for contempt of Congress—is of symbolic, not practical, consequence. Specifically, congressional determinations of contempt and executive claims of presidential privilege are extraordinarily rare. Instead, the executive and legislative branches negotiate with each other in an atmosphere in which each branch is aware of the other’s ability to raise the stakes and complexity of the negotiating process. Were the formal enforcement mechanism to change so that the courts would play a leadership role in resolving information access disputes, there would be a risk that political negotiations would be replaced by contentious winner-take-all battles between the branches.

The Justice Department has opposed various proposals to expand judicial authority in this area for precisely this reason. Assistant Attorney General Scalia testified in 1975 that such reform proposals are "bound to multiply the instances in which the executive . . . will be constrained to conclude it is his duty to [invoke executive privilege and] withhold the information." Scalia, moreover, perceived that such an increase in executive privilege claims would prompt Congress to respond in kind, invoking its enhanced civil subpoena enforcement authority. Similar concerns were raised in 1989 by Acting Assistant Attorney General Thomas Boyd. In expressing Justice Department opposition to proposed civil subpoena reforms with a limited executive privilege exception, Boyd argued that to compel the President to assert executive privilege to avoid judicial involvement, the bill would prematurely involve the president in controversies that should be settled by congressional committees and executive officials, obviating any need to involve the President and the full House or Senate.

Congress too has been sensitive to these concerns. The 1989 Iran-Contra reforms, for example, were modified to exempt executive branch officials acting under the direction of their department or agency. Although this weakened reform proposal undermined the statutory intent to limit executive branch control of subpoena enforcement to instances where the president is willing to assert executive privilege claims, the bill sponsors nonetheless saw this as a step in the right direction; it signaled to agency heads and the Attorney General, who under the bill needed to sign off on agency refusals to withhold information, the presumptive impropriety of executive branch refusals to share information. That Congress was willing to drastically moderate its original proposal, as well

126. The title of this subsection is borrowed from LOUIS FISHER, THE POLITICS OF SHARED POWER (2d ed. 1987).
127. Executive Privilege, supra note 115, at 70-71 (testimony of Antonin Scalia).
as its eventual failure to enact any reform measure, speaks to Congress' recognition of the pitfalls of an expanded judicial role.\textsuperscript{129}

House and Senate oversight committee staffers, as well as counsel for the House and Senate, prefer the current arrangement to a system of increased judicial enforcement, especially when possible executive privilege claims are at issue. For former Senate counsel Michael Davidson: "Members do not want courts to weight the executive's claim of privilege against Congress' claim of need. This would vest enormous powers in the courts to determine and balance Congress' needs and the executive privilege. Congress needs to determine its needs for itself."\textsuperscript{130} Linda Gustitus, former Staff Director and Chief Counsel of the Senate Oversight Subcommittee of Government Management, offered a somewhat more pragmatic explanation of Congress' reluctance to expand civil enforcement through the courts. Noting that Congress is "well served by nonjudicial enforcement because its available powers are sufficient," Gustitus thought judicial enforcement less desirable because "of the risks [of determinations that favor executive interests] and delays."\textsuperscript{131} Reed P. F. Stuntz, former counsel to the Oversight Subcommittee of the Energy and Commerce Committee, echoed these concerns. For Stuntz, the issue was not the adequacy of congressional power to obtain information, but the willingness of committee chairs and staffers to aggressively pursue information.\textsuperscript{132}

\section{B. Nonjudicial Alternatives and the Workability of the Current System}

Drawbacks to an enhanced criminal or civil system do not demonstrate the workability of the current system. Theodore Olson, former Assistant Attorney General for the Office of Legal Counsel, perceives that "the system works very well for those in Congress, but for those in the executive it is not so good. All the leverage is in Congress' hands [and the executive] ... winds up giving up the information and caving in because those who hold the information are not up to the fight."\textsuperscript{133} For Olson, who prefers enhanced judicial enforcement over the current scheme, "a mechanism should be in place to allow principled, neutral mechanisms for dispute resolution."\textsuperscript{134} In sharp contrast, some congressional overseers and counsel perceive that the system works to the executive's advantage. Reed Stuntz, like Olson, sees the issue as one of institutional will. Unlike Olson, however, Stuntz perceives that most members and staffers are unwilling to battle the executive for documents.\textsuperscript{135} An explanation for why Congress may not press the executive for information, suggested by former House

\begin{flushleft}
\textsuperscript{130} Davidson Interview, supra note 101.
\textsuperscript{131} Gustitus Interview, supra note 101.
\textsuperscript{132} Stuntz Interview, supra note 99.
\textsuperscript{133} Telephone Interview with Theodore Olson, former Assistant Attorney General for the Office of Legal Counsel (Mar. 24, 1994).
\textsuperscript{134} Id.
\textsuperscript{135} Stuntz Interview, supra note 99.
\end{flushleft}
Counsel Charles Tiefer and Congressional Research staffer Mort Rosenberg, is 
"that many members are unaware of the full extent of their oversight preroga-
tives and, thus, they press less than they might for executive disclosure."136

These competing views of legislative and executive power can be reconciled
in one of two ways. One explanation is that Congress frequently does not push
as hard as it can, but when it does, the executive is at a disadvantage. A second
(and not necessarily) conflicting explanation is that, while most in Congress
and the executive see the system as workable, vigorous advocates for both execu-
tive and legislative power are apt to be more aware of weaknesses in their own
branch’s approach to information access disputes. Without determining whether
either or both of these propositions are correct, the ability of nearly every infor-
mation access dispute to be resolved politically speaks both to Congress’ power
to get the information it needs without resorting to the 1857 statutory scheme
and the executive’s willingness to work with its congressional overseers. This
state of affairs helps to explain the failure of court-centered reforms as well as
nonjudicial alternatives.

1. Congressional-Executive Relations

Congress, as suggested above, almost always gets the information it wants
without having to resort to subpoenaing of executive officials or to contempt
of Congress findings. Executive compliance, however, does not mean that the
executive is convinced of the appropriateness of the information access request.
Instead, Congress’ success is often a byproduct of the numerous weapons in
its arsenal that can be used to punish recalcitrant executive branch officials.
Congress, among other things, may publicly embarrass executive branch offi-
cials, hold up confirmation hearings of presidential nominees, and enact legisla-
tion that restricts agency operations.

These congressional powers are potent. For example, executive branch offi-
cials have no interest in seeing the newspaper headline “Congress Subpoenas
Documents,”137 nor do they want to be publicly humiliated before an acrimoni-
ous legislative hearing. When an agency official is called to testify, committee
members are put in a position of some strength over that individual. If a dispute
over information access is going on at the time, the hearing is the committee’s
chance to put a great deal of political and personal pressure on the witness.
The success of this technique has been attested to by committee staffers. The
former general counsel to the Senate Select Committee on Intelligence, Britt
Snider, commented that, “the intelligence agencies withhold such information
... at their own peril. I have found the prospect of being criticized by the
Committees to be a very compelling motivation for most agencies....”138

Along the same lines, agencies seem particularly willing to work with Congress

136. Shane, supra note 63, at 201-202 (describing comments of Charles Tiefer and Mort Rosen-
berg).
137. Gustitus Interview, supra note 101.
138. Letter from L. Brit Snider, General Counsel to the Senate Select Committee on Intelligence
to Peter M. Shane (July 10, 1990) (on file with author).
when the nomination of a high-ranking agency official is held up, pending executive branch compliance with oversight requests. This is precisely what occurred with Clinton’s choice for head of the Justice Department’s Environment Section, Lois Schiffer, during Congress’ investigation of environmental crimes enforcement.  

Executive branch complicity with nearly every information access request, however, makes it unnecessary for Congress to invoke these powers on a regular basis. According to a 1974 Senate Judiciary Committee study, “executive refusals to provide information to committees . . . amount to fewer than thirty per year out of what are likely to be hundreds of thousands of requests.” While this study is dated, executive branch compliance remains the norm.

The question of whether executive branch interests are served through such regularized compliance remains. The answer is a qualified yes. At the agency and departmental level, it is critically important to maintain good relations with legislative overseers. Consequently, it is rarely sensible to place abstract principles of separation of powers ahead of day-to-day working relationships. Furthermore, there is often as much or more of an identity of interests between agency officials and legislative overseers as there is between these officials and Office of Legal Counsel attorneys who are interested in protecting the prerogatives of the presidency writ large. During the environmental crimes dispute, for example, legislative staffers saw the EPA as a cooperative participant in legislative efforts to oversee Justice Department operations.

This sharp divide between the Justice Department and the EPA approaches to information access requests reveals the complexity of describing executive branch interests. While an academic debate rages over whether the executive is a unitary entity, executive branch operations often resemble a hydra. In other words, for Justice Department and White House attorneys interested in the preservation and expansion of presidential power, the current system may appear in a state of disrepair Whereas for agency officials and department heads, the current system may reflect an appropriate quid pro quo for legislative appropriations and delegations of authority.

Were the executive interested in protecting presidential prerogatives from possible legislative overreaching, the current set of presidential memoranda and Justice Department procedures would need significant alteration. Under the current regime, the threshold determination of whether an information request raises a ‘‘substantial claim of executive privilege’’ rests with those who have the least interest in asserting an executive privilege claim against congressional overseers: the department and agency heads. While presidential and Justice Department materials provide guidance as to what types of legislative requests are problem-

139. See Stuntz Interview, supra note 99.
140. Shane, supra note 63, at 201.
141. See supra notes 51-62 and accompanying text.
142. Stuntz Interview, supra note 99.
143. See generally Symposium, Executive Branch Interpretation of the Law, 15 CARDOZO L. REV. 2 (1993)
atic,\textsuperscript{144} there is little reason to think that agency heads will place these values ahead of maintaining good day-to-day relations with their congressional overseers. That the White House and Justice Department have not sought to alter the current system is also telling. Indeed, attempts to improve "coordination and communication among Federal legal offices" through the Federal Legal Council have been largely abandoned, with the Council doing little more than providing "an 'opportunity for the general counsels to get to know each other.'"\textsuperscript{145} Apparently, as Nelson Lund, former Office of Legal Counsel and White House counsel attorney, has observed, the costs of such centralization are outweighed by the benefits of ad hoc utility maximization:

The rewards for a consistent and forceful defense of the legal interests of the office of the presidency are largely abstract, since they consist primarily of fidelity to a certain theory of the Constitution. These costs of pursuing a serious defense of the presidency, however, would tend to be immediate and tangible. The costs would include the expenditure of political capital that might have been used for more pressing purposes, the unpleasantness of increased friction with congressional barons and their allies, and the sheer expenditure of time by extremely busy people on uninvitingly dry legal issues.\textsuperscript{146}

In the end, the executive, whether well-served or not, has strong incentives to maintain the status quo.

2. Nonjudicial Alternatives

The interests of each branch in maintaining the current system certainly explains the failure of court-centered reform proposals that shift decisionmaking authority away from the elected branches and to a third party. These interests also serve as a backdrop to examining nonjudicial alternatives. Three such proposals have been advanced over the past decade by the American Bar Association and the Administrative Conference of the United States, namely: (1) reforms in congressional procedure designed to make legislative committees more sensitive to executive branch interests;\textsuperscript{147} (2) the establishment of nonbinding third party mediation to resolve executive-legislative disputes;\textsuperscript{148} and (3) the establishment of a modus vivendi, designed to "enhance the branches' recognition of [the] various forms in which information may be shared that may accommodate the branches' respective interests."\textsuperscript{149}

There is much to commend in each of the three proposals. Reforms in congressional procedure, especially reforms regarding legislative investigations that may

\begin{itemize}
\item \textsuperscript{144} 13 Op. Off. Legal Counsel 185 (1989).
\item \textsuperscript{145} Susan M. Olson, Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority, 68 Judicature 70, 77 (1984).
\item \textsuperscript{146} Lund, supra note 70, at 35.
\item \textsuperscript{147} See Arthur E. Bonfield & James F. Rill, Joint Report and Recommendations to the ABA House of Delegates from the Section on Administrative Law and the Section of Antitrust Law (Aug. 1980) (on file with author).
\item \textsuperscript{148} See id.
\item \textsuperscript{149} Shane, supra note 63, at 233-34.
\end{itemize}
hamper ongoing criminal cases, are designed to avoid executive privilege disputes through a self-policing mechanism. The problem with these proposals, as pointed out by former Joint Committee on the Organization of Congress staffer Larry Evans, is that it is unrealistic to expect that Congress will unilaterally adopt rules that limit its power to investigate executive branch operations. It is also unrealistic to think that third-party mediation is a viable alternative. The problems of delegating decisionmaking authority to a third party, which plague judicial enforcement proposals, are likewise present in mediation proposals. While the mediation may be technically nonbinding, it is nonetheless an important symbolic precedent.

What then of a modus vivendi in which each branch agrees to a set of procedures designed to resolve interbranch disputes more effectively? The problems of delegating authority to a third party, as well as those of one branch unilaterally giving up power, are not present here. Nonetheless, the modus vivendi proposal is a political non-starter. Legislation would have to be enacted or both branches—through changes in legislative rules, as well as an executive order binding executive operations—would have to formally embrace changes in existing procedure. Considering that both branches are satisfied with the current arrangement and that neither branch wants to make front-end concessions about how they will bargain with the other, the prospect of such reforms is unimaginable.

IV. Conclusion

The dance that takes place between legislative and executive interests over information access will persist. Congress, for the most part, will get the information it wants without objection. In rare cases, the executive will object and some accommodation will be reached. Whether the executive objects as much as it should and whether these accommodations are sufficiently sensitive to the competing constitutional interests of the elected branches are subject to debate. Also subject to debate is whether the accommodation process is more protracted than it needs to be. What is not subject to debate is that neither Congress nor the executive have sought to tinker with the current system. This observation, of course, does not mean that the system works as well as it could or should. Nonstatutory reform proposals, for example, promise improvements on the current arrangement without the costs of expanded judicial review. Yet, with both branches seeing their interests served by the current system, the prospects of such improvements are rather bleak. Unless and until Congress or the executive seriously pursues reform, the system is not likely to change and reform proposals are not likely to be taken seriously.