NEGOTIATING FOR KNOWLEDGE: ADMINISTRATIVE RESPONSES TO CONGRESSIONAL DEMANDS FOR INFORMATION

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Among the many interactions of the political branches of our national government, perhaps none is more important than the routine sharing with congressional committees of information held by administrative agencies.[1] The quality of Congress's legislative and oversight work often depends on agency information. Yet, the executive branch is adamant that, in many contexts, an agency's ability to control the information available to it is critical to the fulfillment of the executive's constitutionally vested functions.

For the most part, congressional requests for agency information are handled routinely and provoke no public controversy. Congress defers on many occasions to executive insistence that certain information not be disclosed. The executive often shares information that, under the executive branch's view of the law, could properly be withheld.[2]

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I owe an immense debt to those present and former employees of Congress and of the executive branch who agreed to be interviewed for the article. A list of those willing to be acknowledged as interviewees appears as Appendix A. They share no blame for any shortcomings of the analysis that follows, although their insights were critical to its strengths. I thank Paul Goddard, Iowa '92, for his research assistance, and Ernest Gellhorn, Philip J. Harter, and Professor Peter Strauss for their insights and encouragement throughout this project.

1. The phrase "administrative agency" is used instead of "executive agency" to avoid any implication that the following analysis depends on the conventional labeling of an agency as "independent" or "executive." See section III, *infra*. I refer consistently, however, to disputes between Congress and the President because only the President may formally claim executive privilege against Congress and because negotiations in all cases are likely to involve the Justice Department, an agency with historically close ties to the President.

2. *See generally* Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & POL. 183 (1986).

There remains, however, a handful of exceptional, sometimes prolonged episodes that may not proceed smoothly or end cooperatively.[3] Such episodes—for example, the well-publicized 1981 and 1982 controversies involving James Watt and Anne Gorsuch—have the feel of run-of-the-mill politics. Yet, they raise serious governance concerns. The adversarial character of such episodes offers no greater guarantee than does the ordinary exchange that the optimal amount of information sharing will finally occur. The distrust and friction such episodes generate may affect other aspects of the interbranch relationship in negative ways.

In any one dispute, of course, such matters defy precise assessment. There is no obvious way of determining whether the amount of information provided to or withheld from Congress is optimal in any particular case given the public interests involved. There is no obvious way to gauge the negotiating efficiency of the branches in resolving contested cases. There is uncertainty even whether the branches are honoring their respective legal obligations because little clear law exists to govern interbranch disputes over information, and each elected branch interprets the governing principles very differently from the other.

Despite these obstacles, it is possible to suggest some broad substantive guidelines that could help foster a degree of disclosure or withholding likely to be consistent with the interests of both branches and of the public. Further, procedural steps are available to enable the branches to reach agreements more efficiently than they do now in the hotly disputed cases. The approach I suggest is essentially an attempt to introduce a variety of interbranch "alternative dispute resolution." Although the branches already handle their information disputes through negotiation, the negotiations that occur are likely to be wholly ad hoc. A major aim of my proposals is to imbue the negotiating process with just enough structure and enough explicit commitment to problem-solving to focus the negotiators on their institutional stake in reaching a sensible agreement efficiently.

To place my proposals in context, Part I of this essay reviews the practices of the elected branches with regard to disputes over information. An analysis of clearly successful negotiations, as well as negotiations that were less obviously constructive, suggests both the likeliest sources of tension between

3. One recent example involved a dispute over the Justice Department withholding from the House Judiciary Committee certain documents relevant to its investigation of Inslaw, Inc., a software company that supplied Justice with a program to help track its litigation. Inslaw accused Justice of trying to force Inslaw out of business in order to permit Reagan Administration insiders to get hold of its program and market it themselves. Crenshaw, *Justice Department Accused of Keeping Inslaw Evidence*, WASH. POST, Dec. 6, 1990, at B3. In another example, the Commerce Department, under threat of subpoena in October 1990, divulged to the House Government Operations Committee its records documenting export licenses for Iraq. Commerce had argued that it could not share the records because of a statutory prohibition on the disclosure of proprietary information contained in the license applications. *Commerce Department Provides Further Data on Exports to Iraq, But Congress Wants More*, 7 Int'l Trade Rep. (BNA) No. 43, at 1639 (Oct. 31, 1990).

the branches and some helpful avenues for agreement. Part II assesses a variety of possibilities for reforming the current processes of negotiating disputes and testing disputed claims of privilege against Congress. Part III considers the applicability of the reform analysis to demands for information from "independent agencies." The likely assumption of many in Washington, D.C.—that Congress's entitlement to information or the appropriate degree of disclosure varies between "independent" and "executive" agencies—makes little sense on either constitutional or policy grounds.

I. NEGOTIATING INFORMATION—CURRENT PRACTICE

If Congress and the executive are having difficulties in resolving information disputes, it is a fair question why a better course might not lie in a clearer set of judicially enforced rules concerning the entitlements of Congress and the executive to demand or withold information. The short answer is that no such set of rules is likely to be forthcoming and that the tension between the branches in their interpretations of constitutional doctrine is not altogether a bad thing.[4] The elected branches disagree profoundly on their current legal entitlements, no Supreme Court case addresses the availability of executive privilege against Congress, and significant procedural obstacles stand in the way of any frequent judicial intervention in this area.[5]

If asked what other than legal rules controls the outcomes in interbranch disputes over information, the government officials interviewed for this study typically say, "Politics." This answer, seemingly synonymous with "The stronger party prevails,"[6] conjures up an image of negotiating as arm-wrestling. Before exploring the details of specific negotiations, however, it is possible to identify at least three respects in which an arm-wrestling model

4. An analysis of the effects of interbranch constitutional disagreement on these issues appears in 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, 484–501 (1987).

5. *Id.* at 466–77. The differing doctrinal views of Congress and the executive are reviewed *id.* at 477–84. A helpful general synthesis of law and practice in this area is J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988). Useful general presentations of Congress's view, in particular, include R. EHLKE, CONGRESSIONAL ACCESS TO INFORMATION FROM THE EXECUTIVE: A LEGAL ANALYSIS (Congressional Research Service Rept. No. 86-50A) (Mar. 10, 1986), and Office of Senate Legal Counsel, Draft Memorandum re: Congressional Oversight of the Department of Justice (Feb. 1986) (on file with the *Administrative Law Review*). For the executive's current stance, see Memorandum from President Ronald Reagan for the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. REP. NO. 435, 99th Cong., 1st Sess. 1106 (1986). *See also* Letter from William French Smith, Attorney General, to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. REP. NO. 968, 97th Cong., 2d Sess. 37 (1982) [hereinafter H.R. REP. NO. 968].

6. It has been argued that, even during the founding period, "[t]he relative political strengths of the branches (and the individuals involved) were more often than not the determinative factors in the resolution of [interbranch] access disputes." EHLKE, *supra* note 5, at 2–3.

of information disputes could well be misleading.

The first is that either branch may be strengthened politically by the weight of its arguments based on law or principle. Although the law does not directly control most information disputes, judicial precedent lends legitimacy to governmental concern for a variety of interests that one branch or another may invoke in a particular controversy. Arguing on the basis of such interests bolsters a political branch's public credibility. Thus, it is a mistake to conceptualize "politics" as if law were irrelevant to political strength.

Second, the branches have a strong and continuing interest in the success of their overall relationship. Despite an institutional competitiveness that is naturally augmented by differences between the political parties that currently control the two branches, there are also strong pressures for accommodation. These pressures, plus the political salience of making principled arguments, add further complexity to any accurate model of interbranch negotiations.

Third, an accurate assessment of strength is necessarily multidimensional, and the relative strength of the two branches at any given moment may be difficult, even for the branches themselves, to calculate. It is not the case, despite Congress's appropriations and impeachment powers and the political unpopularity of defending nondisclosure in all but extreme cases, that Congress always has the upper hand.

A. The Pattern—and Some Cases

In deciding whether the process of information exchange works well, two sets of questions are important, although each is hard to answer. The first pertains to the substantive quality of the information exchange: Does Congress get enough information, presented with sufficient helpfulness, to do its job well? To the extent there are interests in nondisclosure, either to the public generally or even to Congress, do the political branches assess and accommodate those interests appropriately? The second set of questions is procedural: Does it take too long for Congress to get the information it requires? Are negotiations more confrontational, and more costly in terms of the general interbranch political relationship, than they need be?

Some strong generalizations are possible as starting points in analyzing these issues. By all accounts, most congressional demands for information are handled without confrontation, and it is clear that most agencies respond to most requests by providing whatever information Congress is seeking. It follows that, in most cases, if Congress is not getting the information it needs, the problem is not agency unresponsiveness to congressional demands, but something else. Indeed, in many contexts, Congress's main problem is as likely to be a surfeit of information, or at least of unfocused

information, as it is to be an information deficit.[7]

One systematic attempt to measure agency nonresponsiveness to Congress was a 1974 study by the Senate Judiciary Committee to determine the number of executive refusals to provide information to committees or to subcommittees. The study turned up 284 refusals for a ten-year period.[8] Although deplored in the report, these instances would amount to fewer than thirty per year out of what are likely to be hundreds of thousands of requests.

This pattern is confirmed by impressionistic evidence. For example, representatives of the Department of Defense general counsel's office estimated that, as of the summer of 1989, the Government Accounting Office—generally regarded as an arm of Congress—was conducting over 300 studies of their department. None, in their judgment, was proving confrontational, although much of the information being shared with the GAO is sensitive.

A spirit of cooperation will prevail equally when the executive responds affirmatively to congressional requests for information and when an agency is persuasive that a requested disclosure would be inappropriate. A former assistant attorney general for legislative affairs reports that, during his period of service, offices of individual members sometimes called asking for the release of information concerning criminal investigations targeting their constituents or others. When he explained the Department's view as to the impropriety of sharing such information, the typical response was an expression of prior unawareness regarding the Department's position, and an acceptance of that position.[9]

The general pattern of responsiveness and nonconfrontation, however, does not belie the possible existence of real problems. Confrontational disputes, though rare, may be of special importance politically. They may concentrate in certain areas of especially strong public concern, so that public confidence in a well-informed Congress may justifiably be different for different subject matters. Moreover, the lack of confrontation or tension in a particular case of disclosure or nondisclosure does not prove the appropriateness of the outcome in that case. A strong spirit of cooperation may signal a Congress too lenient in its oversight or an executive too lax in its management. A number of congressional employees with extensive oversight experience have expressed the view that many members are unaware

7. In this respect, Congress's difficulties in managing information are likely to parallel those of administrative agencies. *See generally* Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 216–30 (1978).

8. SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS 1964–1973, at 13 (Comm. Print 1975).

9. Interview with Robert A. McConnell, former Assistant Attorney General in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989) (notes on file with the *Administrative Law Review*).

of the full extent of their oversight prerogatives and, thus, they press less than they might for executive disclosure.[10]

To assess such potential problems against the backdrop of a generally successful pattern of information sharing, it is necessary to fix more concretely on specific disputes.

1. *Secretary of Commerce Rogers C. B. Morton, 1975: Disclosure of Confidential Commercial Information*

In 1975, the subcommittee on Oversight and Investigations of the then-House Committee on Interstate and Foreign Commerce investigated the degree to which Arab countries had asked U.S. companies to refuse doing business with Israel.[11] On July 10, the subcommittee requested that the director of the Commerce Department's Office of Export Administration disclose to it copies of all boycott requests filed by U.S. companies under the Export Administration Act of 1969.[12] Secretary of Commerce Rogers C. B. Morton refused to produce the documents, citing section 7(c) of that Act:

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.[13]

The subcommittee formally subpoenaed the documents on July 28, postponing the effective date of the subpoena until a hearing could be convened in September.[14]

On September 4, Attorney General Levi opined formally that section 7(c) covered disclosures to Congress and that Morton was empowered to withhold the documents, given the secretary's conclusion that their release was contrary to the public interest.[15] Morton offered at a September 22 hearing to inform the committee of the number of reports filed, together with statistical information on the questions asked and the companies' responses, but,

10. Interview with Morton Rosenberg, Congressional Research Service, in Washington, D.C. (Aug. 3, 1989) (notes on file with the *Administrative Law Review*); Interview with Charles Tiefer, Deputy General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Aug. 3, 1989) (notes on file with the *Administrative Law Review*).

11. *See generally Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975) [hereinafter, *Morton Hearing*]; Paul C. Rosenthal & Robert S. Gressman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74, 82–83 (1977).

12. *Morton Hearing*, *supra* note 11, at 152.

13. 50 U.S.C. § 2406(c) (1969).

14. *Morton Hearing*, *supra* note 11, at 161.

15. *Id.* at 173.

citing the attorney general's opinion, Morton would not reveal the companies' names or details of particular transactions.[16]

On October 21 and 22, the subcommittee took testimony from a number of legal scholars concerning the secretary's withholding of documents. When Secretary Morton persisted in his position, the subcommittee, on November 11, voted him in contempt.[17] On December 9, the full Interstate and Foreign Commerce Committee was scheduled to consider the contempt resolution. The day before, however, following an agreement with subcommittee Chair Moss to receive the documents in executive session and not to make them public, Secretary Morton agreed to comply with the subpoena.[18] It thus took five months to secure compliance with the subcommittee's request, pursuant to an agreement to protect the confidentiality of the demanded documents.

2. *Secretary of Energy Charles Duncan, 1980: Deliberative Documents on the Petroleum Import Fee*

The final year of the Carter Administration witnessed a relatively brief but highly confrontational dispute between a Democratic House subcommitee and a Democratic President concerning congressional access to deliberative documents. On April 8, 1980, the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations requested that the Department of Energy disclose to it all documents relevant to President Carter's imposition, six days earlier,[19] of a fee on imported crude oil and gasoline.[20] The subcommittee's express concerns were (1) the impact of the fee on supplies of gasoline and heating oil and (2) the capacity of the Department of Energy to monitor the fee program to assure its fairness.[21] It was indicative of the fee's unpopularity that Democratic House members were publicly organizing a resolution in opposition to the fee within two weeks of the President's order.

The Department's response was to refuse the transmittal of any documents pending their review by the White House. The Department pointedly sought to avoid the invocation of executive privilege, arguing only that the deliberative nature of the documents necessitated their review by the White House before an authoritative decision *not* to invoke privilege could be made.[22] Unpersuaded, the subcommittee, on April 22, voted to subpoena

16. *Id.* at 11.
17. *Id.* at 133–34.
18. Rosenthal and Gressman, *supra* note 11, at 83.
19. Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980).
20. *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 2 (1980) [hereinafter *Duncan Hearing*].
21. *Id.* at 1–2.
22. *Id.* at 3–8.

the documents.[23] The subcommittee then decided to give Secretary of Energy Duncan two days to respond to its request before formal service of the subpoena. On April 23, Secretary Duncan forwarded twenty-eight documents, plus a letter explaining his decision not to provide "a substantial number" of other documents, including "memoranda setting out policy and legal advice to senior advisers of the Department and the Executive Office of the President, meeting notes, and drafts of documents."[24] Although not invoking privilege, Secretary Duncan wrote that full compliance with the subcommittee's subpoena "would affect adversely the free and frank exchange of opinions in future deliberations in the Department and the executive branch as a whole. . . ."[25]

Subcommittee Chair Toby Moffett responded to the letter by engaging in personal negotiations with White House Counsel Lloyd Cutler and Secretary Duncan.[26] When those negotiations failed to produce an immediate resolution, the subcommittee reconvened a hearing at which it sought information from the Department of Energy's deputy general counsel, Thomas Newkirk, concerning the rationale for nondisclosure. Mr. Newkirk testified that there was no national security concern underlying the Department's reluctance to disclose, and defended the position that, if the President so determined, it could be appropriate to withhold under executive privilege even documents that had originally been prepared entirely for internal Department of Energy use.[27] At the conclusion of its April 24 session, the subcommittee moved to subpoena Secretary Duncan to appear personally with the demanded documents on April 29.[28]

On April 28, DOE's General Counsel Lynn Coleman offered unsuccessfully to permit the subcommittee chair and its ranking member, Rep. McCloskey, to review the documents under a promise of confidentiality.[29] At the April 29 hearing, Duncan sought, again, to withhold the documents without invoking executive privilege, indicating, however, that privilege would be invoked if no accommodation could be found.[30] When he failed to accept an offer that the documents be presented to the subcommittee in executive session, not to be released further except by majority vote and after an opportunity for DOE to object, the subcommittee voted to hold Secretary Duncan in contempt.[31]

By May 14, 1989, the White House had decided to release all documents

23. *Id.* at 35.
24. *Id.* at 96, 100–01.
25. *Id.* at 101.
26. *Id.* at 96.
27. *Id.* at 102.
28. *Id.* at 116–17.
29. *Id.* at 119–20.
30. *Id.* at 126.
31. *Id.* at 134–39.

to the subcommittee under the terms of the subcommittee's final offer.[32] Although the subcommittee reconvened on May 14 to begin reviewing the merits of the fee program, the program was essentially foredoomed by a district court opinion one day earlier voiding the President's executive order as beyond his statutory authority with respect to import regulation.[33] The Senate Finance Committee immediately voted to approve legislation prohibiting any further fee.[34]

3. *The Watt and Gorsuch Cases, 1981–83*

Though recounted in detail elsewhere,[35] the episodes involving Secretary of Interior James Watt and EPA Administrator Anne Gorsuch are important to mention for three reasons. First, of all recent controversies, they were the most protracted and most deeply adversarial. Second, they evoked the most systematic statements from the Attorney General and congressional lawyers of each side's position on the law of executive privilege.[36] Third, because they are so thoroughly documented, they provide the greatest amount of publicly available material for procedural, as well as legal, analysis.

In brief, the Watt imbroglio began during the summer of 1981, when the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce requested from the Interior Department all documents—including documents at the staff level[37]—relevant to the status of Canada under the so-called reciprocity provisions of the Mineral Lands Leasing Act.[38] The general subject of the subcommittee's inquiry was the impact of Canadian energy and investment policies on United States energy resource companies holding assets in Canada. The hearings were prompted by allegations that the Canadian government was trying, through its policies, to devalue the assets of these companies unfairly and to provoke takeover attempts by Canadian interests.[39] Among the possible retaliatory steps available to the United States would have been invocation of the MLLA

32. *Id.* at 142.
33. Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980).
34. *Duncan Hearing*, *supra* note 20, at 141.
35. For this author's version of the events, see Shane, *supra* note 4, at 501–16. The Gorsuch episode is also treated in detail in Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1334–38.
36. *Compare* Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives, to Hon. John Dingell, re: Attorney General's Letter Concerning Claim of Executive Privilege for Department of Interior Documents, *reprinted in Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st and 2d Sess. 109 (1982) [hereinafter *Watt Contempt Hearings*] *with* Letter from William French Smith, Attorney General, to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. REP. NO. 968, *supra* note 5, at 39.
37. *Watt Contempt Hearings*, *supra* note 36, at 3.
38. 30 U.S.C. § 181 (1989).
39. H.R. REP. NO. 898, 97th Cong., 2d Sess. 3 (1982).

reciprocity provisions,[40] which permit foreign citizens to hold interests in mineral leases on United States public lands only if their countries provide equivalent opportunities for United States investors. Under the MLLA, Congress vested in the Secretary of the Interior the authority to determine whether foreign countries are providing reciprocal treatment for U.S. mineral investors. By the summer of 1981, Secretary Watt had not yet made a decision regarding Canada. Because of the possibility that a decision adverse to Canada might help protect United States investment interests, the committee's attention had turned to oversight of Watt's decisionmaking process.

Secretary Watt testified on August 6, 1981, that his department was unlikely to divulge all of the relevant documents because some were confidential.[41] Just over seven months later, following full committee approval of a resolution to hold Watt in contempt of the House, the White House permitted subcommittee members to review the last of the documents that Interior had originally identified as responsive to the subcommittee demand.[42] Between the subcommittee's initial informal request and this final agreement, the following steps had occurred:

- In September, Secretary Watt disclosed a set of documents that he determined, upon review, did not need to be withheld given the asserted interests in confidentiality.
- The subcommittee subpoenaed the documents still withheld.
- In October, President Reagan formally asserted executive privilege as to the remaining documents, proffering an opinion by Attorney General William French Smith defending the privilege claim.
- The subcommittee responded publicly with a series of hearings on the privilege claim and an unsuccessful attempt to procure the Attorney General's testimony in support of his opinion.
- Stanley Brand, then General Counsel to the Clerk of the House, proffered a formal legal opinion rebutting Smith's views.

On February 2, 1982, Secretary Watt announced that he had reached a decision on Canadian reciprocity favorable to Canada,[43] and, the next day, he released nineteen of thirty-one remaining contested documents on the ground that his reaching a final decision obviated further nondisclosure.[44] Six days later, the subcommittee's Democratic majority, joined by its ranking Republican member, voted to hold Watt in contempt and to report its resolution to the full Energy and Commerce Committee.[45] The full committee, on February 25, 1982, likewise voted to recommend that the House

40. 30 U.S.C. § 181.
41. *Watt Contempt Hearings*, *supra* note 36, at 3.
42. *Id.* at 385.
43. *Id.* at 318.
44. H.R. REP. NO. 898, 97th Cong., 2d Sess. at 7 (1982).
45. *Watt Contempt Hearings*, *supra* note 36, at 295–96.

cite Watt for contempt.[46] This final committee action, and the virtual certainty of its approval by the full House, elicited settlement on the eve of the House vote. The White House agreed to permit subcommittee members four hours to personally review and take notes on the remaining twelve documents. The documents would be reviewed on Capitol Hill, but remain within the custody of the executive branch. No staff personnel could review the documents, and no photocopying would be permitted.[47]

The Gorsuch episode followed a similar, although somewhat more complex course, involving, in part, Rep. John Dingell, the committee chair who had struggled earlier with Secretary Watt.

The dispute centered on Administrator Gorsuch's refusal to divulge case files to the Investigations and Oversight Subcommittee (the Levitas Subcommittee) of the House Committee on Public Works and Transportation, in connection with that subcommittee's investigation of EPA's administration of the Superfund for the cleanup of hazardous waste dumping sites. The Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as the Superfund Act,[48] authorizes the government to act to control a hazardous waste situation when a responsible party either cannot be timely identified, or cannot act. Parties responsible for hazardous waste or chemical spill sites are required to reimburse the government for cleanup costs and damages to natural resources; noncooperating parties may be fined treble damages. By executive order, President Reagan delegated his functions under the Act to the EPA Administrator, who was also designated the responsible official for enforcement of the Act.[49]

In 1982, several House subcommittees commenced investigations of various aspects of EPA's Superfund enforcement. The Levitas Subcommittee, in March 1982, commenced a general investigation of hazardous and toxic waste control, focusing on the impact of such wastes and their control on American ground and surface water resources.[50] Of special concern were an EPA decision to suspend its prior restrictions on disposing containerized liquid wastes in landfills that might permit the migration of such wastes to ground and surface waters and allegations that the EPA was not adequately enforcing the Superfund provisions against parties responsible for hazardous waste sites.[51] The subcommittee staff, in mid-September, requested access to EPA's files on enforcement of the Superfund Act and related stat-

46. *Id.* at 368–70.
47. *Id.* at 385–86.
48. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–75 (1991)).
49. Exec. Order No. 12,316, 3 C.F.R. 168 (1982), *reprinted in* 42 U.S.C. § 9615 at 1444–45 (1982).
50. H.R. REP. NO. 968, *supra* note 5, at 7.
51. *Id.*

utes in so-called Region II.[52] Despite an early assurance of access,[53] EPA subsequently informed the subcommittee that it would not make available certain materials in enforcement files connected with active cases.[54] At almost the same time as the Levitas Subcommittee staff requested access to EPA files on Region II, the Oversight and Investigations Subcommittee (the Dingell Subcommittee) of the House Committee on Energy and Commerce requested documents relating to several hazardous waste sites outside Region II, on which that subcommittee's investigation of enforcement effectiveness was focusing.[55]

After the Levitas Subcommittee staff, in September 1982, demanded access to EPA enforcement files, two weeks of unsuccessful negotiations ensued at the staff level.[56] EPA offered to permit staff access to its files, subject to prescreening by an EPA official to maintain the confidentiality of sensitive documents. The offer was declined. On September 30, 1982, the subcommittee authorized subpoenas to issue for the requested documents.[57]

Throughout most of October 1982 service of the subpoenas was postponed under EPA assurances of cooperation.[58] EPA continued to assert confidentiality for a limited class of litigation-related documents, but then reverted to its position of protecting all "enforcement sensitive" documents—apparently as a reaction to the issuance of a subpoena by the Dingell Subcommittee for similar information. On November 22, 1982, the Levitas Subcommittee served a broad subpoena on Gorsuch, demanding the documents and her testimony on December 2, 1982.[59]

On November 30, 1982, Attorney General Smith released a letter to Rep. Dingell, justifying the Administration's refusal to comply with a subpoena for "sensitive open law enforcement investigative files."[60] Smith forwarded the letter also to Rep. Levitas, to explain EPA's refusal to comply fully with the latter's subpoena, as well.[61] On the same day, President Reagan issued a memorandum to Gorsuch directing that she not divulge documents from "open law enforcement files, [which] are internal deliberative mate-

52. *Id.* at 11.
53. *Id.* at 13–14.
54. *Id.* at 15.
55. *Id.*
56. H.R. REP. NO. 968, *supra* note 5, at 11–13.
57. *Id.* at 13.
58. *Id.* at 13–15; *Hazardous Waste Contamination of Water Resources—Access to EPA Superfund Records: Hearing Before the Investigations and Oversight Subcomm. of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. 88 (1982) [hereinafter *EPA Records Hearing*].
59. H.R. REP. NO. 968, *supra* note 5, at 15.
60. Letter from William French Smith, Attorney General, to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. REP. No. 968, *supra* note 5, at 37–41 [hereinafter *Att'y Gen.'s Gorsuch Letter*].
61. H.R. REP. NO. 968, *supra* note 5, at 36.

rials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions."[62]

General Counsel Brand, on December 8, issued a legal response to the Attorney General's letter, again challenging each of his assertions as to the limitations on Congress's oversight authority.[63] On the same day, Levitas met with Administration officials to attempt a settlement. Levitas made the following offer: Subcommittee staff could review and designate for copying and delivery to the subcommittee all EPA documents relative to the waste sites at issue; if EPA or the Justice Department designated any document selected for delivery as sensitive, it would remain at EPA for inspection there; if actual delivery to the subcommittee of any of these documents proved necessary, further subpoenas might issue; and all information disclosed would be treated as confidential.[64]

The Attorney General, the next day, declined the settlement offer, reiterating instead EPA's original offer of access subject to EPA prescreening. The only concession was that prescreened documents would be withheld ultimately from the subcommittee only after broad-based and high-level review in the executive branch.[65] On December 10, the full Public Works and Transportation Committee responded by recommending, in a party-lines vote, that the House hold Gorsuch in contempt.[66]

Six days later, the House overwhelmingly approved a resolution to certify Gorsuch's "contumacious conduct" to the U.S. Attorney for the District of Columbia.[67] Prior to the actual certification, the Justice Department filed an unprecedented suit against Congress in federal District Court to enjoin further action to enforce the subpoena on the ground of its unconstitutionality.[68]

The district court on February 3, 1983, dismissed the Justice Department's suit on the ground that any constitutional issue raised by the subpoena could be resolved in a judicial proceeding brought to enforce the subpoena.[69] With the U.S. attorney's office still insisting that it was not bound to enforce

62. *Id.* at 42–43.

63. Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives, to Hon. Elliott H. Levitas, re: Attorney General's Letter Concerning Subpoena For Documents to Administrator of Environmental Protection Agency, *reprinted in* H.R. REP. NO. 968, *supra* note 5, at 58–64.

64. H.R. REP. NO. 968, *supra* note 5, at 20–21.

65. *Id.* at 21–22.

66. *Id.* at 23. *See also id.* at 72–76 (dissenting statement of Republican committee members).

67. Joseph A. Davis, *Gorsuch Contempt Charge Puts Focus on Enforcement of Hazardous Waste Laws*, 40 CONG. Q. WKLY. REP. 3162 (1982).

68. Joseph A. Davis, *Legal Showdown Escalating in Gorsuch Contempt Case*, 41 CONG. Q. WKLY. REP. 11 (1983).

69. United States v. House of Representatives of the United States, 556 F. Supp. 150, 153 (D.D.C. 1983).

the subpoena,[70] Levitas and Reagan reached an agreement on February 18, 1983, that the subcommittee would receive edited copies of all relevant documents and a briefing on their contents, and then would be permitted to review any requested unedited documents in closed session.[71]

Although the February 18 settlement resolved the Levitas dispute, it did not end the overall imbroglio. Still pending were subpoenas from the Dingell Subcommittee, which now asserted that its investigation was focusing on specific allegations of misconduct by EPA officials.[72] Rita Lavelle, the Superfund administrator and the most prominent of these officials, was dismissed on February 7, 1983, by the President amid allegations of her perjury to Congress and improper administration of the trust fund.[73]

Following the agreement with Levitas on February 18, further disclosures of possible criminal conduct at EPA made prolonged resistance to the Dingell subpoenas politically impossible.[74] On March 9, 1983, Anne Gorsuch resigned as EPA administrator,[75] and the White House agreed to deliver all subpoenaed documents to the Dingell Subcommittee, subject to certain limited protections for the confidentiality of enforcement-sensitive materials.[76]

The Gorsuch episode is striking because, in defending nondisclosure, the executive branch was protecting more specific and more obviously legiti-

70. It appears that the decision not to proceed with the contempt citation was made independently by the U.S. attorney for the District of Columbia. H.R. REP. NO. 435, 99th Cong., 1st Sess. 19 (1985). That decision, however, reflected long-standing Justice Department policy. Memorandum from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, for the Attorney General, Re: Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning an Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States (May 30, 1984), *reprinted in* H.R. REP. NO. 435, 99th Cong., 1st Sess. 2544, 2584–86 (1986).

71. David Hoffman & Howard Kurtz, *Reagan, Hill Unit Reach Agreement on EPA Papers*, WASH. POST, Feb. 19, 1983, at A1. The terms of the final settlement were embodied in a March 9, 1983, memorandum signed by Reps. Dingell and Broyhill and Counsel to the President Fred Fielding. *EPA Document Agreement: Memorandum of Understanding*, 41 CONG. Q. WKLY. REP. 635 (1983).

72. *EPA: Investigation of Superfund and Agency Abuses (Part One): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1–7 (1983) [hereinafter *Dingell EPA Hearings*].

73. David Hoffman, *Reagan Orders Investigation of EPA Charges*, WASH. POST, Feb. 17, 1983, at A1.

74. The House Judiciary Committee concluded from its investigation that the disputed documents contained sufficient "signposts" of wrongdoing that the executive branch *should* have recognized earlier than February 1983 the untenability of the privilege claim, even under the executive branch's view of privilege. H.R. REP. NO. 435, 99th Cong., 1st Sess. 9–10 (1985). The report does not allege, however, that the executive branch withheld the documents after the relevant officials had actual knowledge of likely EPA wrongdoing, only that the officials should have investigated the alleged "signposts" more thoroughly. *Id.* at 140.

75. David Hoffman & Cass Peterson, *Burford Quits As EPA Administrator*, WASH. POST, Mar. 10, 1983, at A1.

76. *Dingell EPA Hearings*, *supra* note 72, at 371.

mate concerns than had been articulated in connection with the Watt matter. These were further identified in a December 14, 1982, memorandum to the Attorney General from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, who hinted at concern that members of Congress obtaining access to law enforcement files "might have relationships with potential defendants" in EPA enforcement actions.[77] What weakened the case for nondisclosure was not the implausibility of the executive's articulated position, but the strains on the executive branch's credibility wrought by the Watt affair[78] plus the credibility of the growing allegations that EPA officials were guilty at least of mismanaging the Superfund program.

Interviews with some of the parties involved in this dispute suggest a strong possibility that the protracted, even bitter, quality of this dispute over information was fueled by an early failure of communication between the Dingell Subcommittee and the Justice Department Office of Legal Counsel (OLC)—a failure of communication exacerbated, in turn, by a failure of communication within the executive branch.

When the Dingell Subcommittee requested information from the EPA in September 1982 concerning enforcement actions at particular sites, the subcommittee had already focused internally on the possibility that political considerations were affecting enforcement decisions.[79] Its suspicions were bolstered in October when Lands Division Deputy Assistant Attorney General, Alfred Regnery, in hopes of settling the dispute, permitted the subcommittee's counsel, Richard Frandsen, to review the documents being withheld from disclosure to the subcommittee. Frandsen not only spotted a key inculpatory document, but also recognized its significance.[80] Furthermore, it appears that EPA staff shared the subcommittee's concerns. In dealing with EPA employees, the subcommittee staff was dealing with people

77. H.R. REP. NO. 968, *supra* note 5, at 82, 89 (1982). In fact, OLC investigated whether any of EPA's investigative targets in two areas being scrutinized by the Dingell subcommittee were political contributors to Reps. Dingell or Mike Synar of Oklahoma. H.R. REP. NO. 435, 99th Cong., 1st Sess. 124–32 (1985). A deputy assistant attorney general in charge of OLC "concluded there were some potential connections," but "all possible matchups were not pursued," and no use was made of the information. *Id.* at 131.

78. "[T]wo matters—an executive privilege controversy involving Secretary of the Interior Watt and prior EPA informational policies with respect to Congress . . . appear to be highly relevant to the [Judiciary] Committee inquiry [into the EPA dispute] because they shaped expectations—and perhaps motivations—in the EPA controversy itself." H.R. REP. NO. 435, 99th Cong., 1st Sess. 26 (1985).

79. H.R. REP. NO. 435, 99th Cong., 1st Sess. 31 (1985) ("Although . . . the Dingell . . . Subcommittee[] had been involved in the oversight of EPA activities well before September 1982, [it] had made no public findings or allegations of impropriety concerning the general administration of the Superfund program. During the course of the controversy, however, there were a number of disclosures that raised questions about possible wrongdoing by EPA officials, including suggestions that decisions on certain Superfund sites had been made for political reasons.").

80. *Id.* at 97–99.

who apparently understood quite clearly what the subcommittee was after.[81] Thus, it is likely that subcommittee members and staff had tentatively concluded by early fall that EPA wrongdoing was at issue *and* that, at the time the Justice Department was advising the President to invoke executive privilege, the negotiators for the executive branch knew of the subcommittee's concerns and of their seriousness. With these assumptions, it would be unsurprising for congressional negotiators to interpret the nondisclosure of EPA documents as a strong indicator of Justice Department concealment and bad faith.

The subcommittee, however, did not publicly signal allegedly improper political influence as the focus for its investigation until December 1982,[82] and OLC was not privy to the suspicions of EPA staff. The subcommittee's unwillingness to share its suspicions with OLC thus left the assistant attorney general in charge of that office unaware throughout the fall of 1982 either that improper political influence might have occurred at EPA or that documents sought by the subcommittee might help prove it. The House Judiciary Committee, later investigating the episode, "found no evidence" that, prior to February 1983, Assistant Attorney General Olson "understood the [incriminating] significance of the notes" that the Dingell Subcommittee had acquired.[83] On the contrary, "[t]he information that the Judiciary Committee received strongly indicated that" at the time OLC recommended that President Reagan invoke executive privilege "Olson and OLC had no idea that the . . . documents possibly reflected misconduct."[84] From Mr. Olson's point of view, then, the aggressiveness of the subcommittee in pursuing 35 documents withheld after the release of 40,000 others was bound to appear grossly unreasonable.

4. *FTC Commissioner Terry Calvani, 1988: Disclosing Deliberations with Personal Advisers*

During early October 1987, the House of Representatives was set to vote on a proposed amendment to a new Federal Trade Commission authorization bill that would have authorized FTC investigations of possible unfair and deceptive acts and practices in the U.S. airline industry.[85] The *Washington Post*, on October 3, 1987, quoted an FTC press release reporting on a supposed letter from the FTC to the National Association of Attorneys General concerning the NAAG's promulgation of proposed state guidelines for regulating the airlines. The release represented the FTC as having said:

81. *Id.* at 32–35, 59.
82. *Id.* at 233.
83. *Id.* at 12.
84. *Id.* at 140.
85. *Subpoenaed Documents from Federal Trade Commissioner Terry Calvani: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 5 (1988).

"We are unaware of any evidence indicating that airline fare advertising, frequent flyer programs or overbooking compensation policies are generally unfair or deceptive."[86] Some House members relied on this statement in debate, successfully opposing an authorization provision that would have strengthened FTC oversight of the airlines.[87]

In fact, the FTC had not made the statement. Its letter to the NAAG said: "Unless the task force has evidence indicating that airline fare advertising, frequent flyer programs or overbooking compensation policies are generally unfair or deceptive, the legal and factual basis for the draft guidelines are not clear."[88] Concerned about the discrepancy between the FTC's actual and reported statements, the Dingell Subcommittee formally requested that the Federal Trade Commission supply to it all documents relating to the FTC's letter to the NAAG and to the press release issued concerning that letter.

The FTC supplied all the demanded documents, except for the documents of three commissioners that reflected communications between those commissioners and their personal advisers. Two of the three commissioners permitted committee staff to inspect those documents in the commissioners' offices, although they indicated that the papers in question did not have any information connecting the FTC comments for the NAAG with Congress's pending consideration of legislation about airline regulatory authority.[89] The third, Commissioner Calvani, initially refused to comply on grounds of privilege, asserting also that the relevant documents in his possession indicated nothing pertinent to the committee's concerns.[90] Following four months of correspondence and meetings between the commissioner and committee staff, the subcommittee formally served a subpoena for his documents.[91] Under protest, he complied at a subcommittee hearing three weeks later.[92] To the Commissioner's personal knowledge, none of the documents he produced prompted any follow-up by the subcommittee.[93]

5. *1989 Oversight of the Internal Revenue Service*

During July 1989, the subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations held hearings regarding alleged corruption in the Internal Revenue Service.[94]

86. *Id.* at 1–2.
87. *Id.* at 2, 10.
88. *Id.* at 2.
89. *Id.* at 3.
90. *Id.*
91. *Id.*
92. *Id.* at 46.
93. Telephone Interview with Terry Calvani, Federal Trade Commissioner (Jan. 8, 1990).
94. *IRS Senior Employee Misconduct Problems: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong., 1st Sess. (1989).

Among other things, the hearings targeted an alleged incident in which an IRS official agreed to audit the economic competitor of an individual who had bribed the official.[95] In preparation for the hearing, the subcommittee asked the IRS for all tax information it had relating to the putative victim of the scheme.

This episode is noteworthy because the branches reached a fairly expeditious and nonconfrontational settlement despite two ordinarily strong obstacles to disclosure. The first is the general statutory bar to the disclosure of tax returns and tax return information. The statute at issue authorizes disclosure to most congressional committees pursuant only to a resolution of the house of Congress of which the committee is a part.[96] The subcommittee eliminated this barrier, however, by obtaining the taxpayer's waiver of the nondisclosure provisions with respect to the subcommittee. The IRS Commissioner did not find that the resulting disclosure would "seriously impair Federal tax administration,"[97] thus clearing the way for subcommittee access under the statute.

The second obstacle was Rule 6(e) of the Federal Rules of Criminal Procedure, prohibiting the disclosure of information that is part of a grand jury investigation. Although, in the course of negotiations, the Justice Department cited Rule 6(e) as a ground for nondisclosure, the Department did not formally invoke the rule when the subcommitee made clear its intention to subpoena the information, if necessary.

Despite these obstacles and the sensitivity of the subject matter, the subcommittee agreed with the Internal Revenue Service that (1) staff would have access at IRS to all the information requested, (2) staff could takes 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.

6. *Intelligence Committees: A* Modus Operandi

The three subcommittees involved in the four previously recounted episodes are devoted exclusively to oversight. They are, thus, relatively distinctive in the depth of their experience with the nuances of information exchange and in the degree to which their watchdog role is undiluted by their political identification with particular programs they helped to design and enact. Even subcommittees devoted exclusively to oversight, however, generally proceed with their investigations without the benefit of detailed rules governing the exchange of information with the executive branch.

95. The facts reported in this subsection are all derived from an interview with Peter S. Barash, staff director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington, D.C. (Aug. 3, 1990) (notes on file with the *Administrative Law Review*).

96. 26 U.S.C. § 6103(f) (1988).

97. *Id.* § 6103(e)(7).

The two oversight committees that are exceptional in this last respect are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. The requirement that these committees be "fully and currently informed" of all intelligence activities appears in statute,[98] as does a requirement that:

> the House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under [the statute].[99]

Pursuant to this provision, the Houses of Congress have adopted similar rules that amount to a unique *modus operandi* for the sharing of information between the branches. In their key provisions, the rules of each House provide that:

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;[100]
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;[101]
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;[102] 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.[103]

In an interview, Britt Snider, general counsel to the Senate Select Committee on Intelligence, expressed the view that his committee has enjoyed a generally smooth relationship under these rules with those departments and agencies involved in intelligence. Mr. Snider attributes the

98. 50 U.S.C. § 413(a)(1) (1988).

99. *Id.* § 413(d).

100. Standing Order of the Senate on the Select Committee on Intelligence [hereinafter *Senate Intelligence Committee Order*] § 6, *reprinted in* S. COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. NO. 1, 100th Cong., 1st Sess. 141 (1988) [hereinafter SENATE MANUAL]; House of Representatives Rule XLVIII [hereinafter *House Intelligence Committee Rule*] § 5, *reprinted in* W.H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 248, 100th Cong., 2d Sess. 756 (1988) [hereinafter JEFFERSON'S MANUAL].

101. Senate Intelligence Committee Order, § 8(a), *reprinted in* SENATE MANUAL, at 142; House Intelligence Committee Rule, § 7(a), *reprinted in* JEFFERSON'S MANUAL, at 757.

102. Senate Intelligence Committee Order, § 8(b), *reprinted in* SENATE MANUAL, at 142–43; House Intelligence Committee Rule, § 7(b), *reprinted in* JEFFERSON'S MANUAL, at 757–59.

103. Senate Intelligence Committee Order, § 8(c), *reprinted in* SENATE MANUAL, at 144; House Intelligence Committee Rule, § 7(c), *reprinted in* JEFFERSON'S MANUAL, at 760.

success of the relationship to at least seven factors:

1. The existence of an orderly process through which the executive can object to the release of information;
2. A tacit understanding that the committees will not ordinarily seek to discover the identities of particular agents;
3. Agency understanding of the role that the committee plays in bolstering the intelligence community's credibility in Congress and its ability to win support;
4. A generally bipartisan sense of shared objectives;
5. The relative stability of the membership on the congressional staffs;
6. Systematic contact between the committees and the leadership of each House, which is represented on each committee *ex officio*; and
7. The regularity with which it is possible to seek higher-level review within the bureaucracy for staff refusals to disclose information to the committee.[104]

Several members of the executive branch who have been involved in national security matters independently express agreement with Mr. Snider's view.

Taking the collective experience of the intelligence committees as a single case study, however, illustrates the knottiest conundrum in analyzing the success of the branches' information-sharing processes from a wholly procedural perspective. Mr. Snider's observations support the view that, when the intelligence committees demand information, there is reason to believe that the transaction costs for obtaining the information will not be unduly high. This is not to say, however, that the committees will get all the information that sound policymaking requires. The committees may not be able to identify the information they should have, and the executive may seek to circumvent its statutory obligations to take the initiative in informing Congress of intelligence-related matters.

These dangers were dramatically illustrated, of course, by the so-called Iran-Contra affair, in which the executive branch structured its covert programs for selling arms to Iran and diverting profits for the aid of the Nicaraguan resistance in order to prevent congressional oversight.[105] The congressional committees investigating the affair found: "The statutory option for prior notice to eight key congressional leaders was disregarded throughout [the Iran-Contra episode], along with the legal requirement to notify the Intelligence Committees in a 'timely fashion.' "[106] The committees were unanimous "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."[107]

Moreover, some observers believe that, putting aside executive malfea-

104. Interview with L. Britt Snider, General Counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990).

105. *See generally*, Note, *Undermining Congressional Oversight of Covert Intelligence Operations: The Reagan Administration Secretly Arms Iran*, 16 N.Y.U. REV. L. & SOC. CHANGE 229 (1987–88).

106. H.R. REP. NO. 433 and S. REP. NO. 216, 100th Cong., 1st Sess. 379 (1987).

107. *Id.* at 447 (minority report of Rep. Cheney et al.).

sance, the *modus operandi* of the intelligence committees helps to insure an underinformed Congress. The stability of relationships between these committees and the agencies that they oversee may foster leniency in oversight. Intelligence agencies may use the information access they provide to the intelligence committees to resist access to other committees that properly have intelligence-related matters under their jurisdictions.[108] Such resistance occurs despite the existence of congressional rules stating that intelligence committee access is not to be used to deny access to other committees in appropriate cases. These circumstances promote suspicion that the intelligence committees identify more strongly with the "cause" of the agencies than with the goal of democratic oversight of national security policy.

The degree to which committee co-optation and the insulation of intelligence agencies from other committees' review have occurred is difficult to assess. Whether such phenomena have resulted in a Congress less informed than it would be without the intelligence committee system is probably unknowable. Mr. Snider's view is that the difference in the quality of oversight before and after the creation of the current intelligence committees "is like night and day. . . . [N]ot another agency in the federal government . . . receives the degree of congressional oversight given the CIA." Although he acknowledges the possibility that the intelligence agencies may be less than fully forthcoming, he sees essential safeguards in (a) the political cost to the agencies of being discovered withholding information, and (b) the experience and knowledge of the committees and their staffs, which support independent judgments about the positions taken by the intelligence agencies. The incentives are sufficient, according to Mr. Snider, to promote routine agency initiatives to brief the committees on new developments.[109]

B. Factors Shaping Negotiation

Reflection on these case studies helps to suggest a fairly detailed understanding of the dynamics of information sharing between Congress and the executive. The outcome of a particular demand, as well as the process by which the resolution is achieved, may be affected by a variety of factors that can be grouped under three broad headings: (1) the *stakes* for either branch in receiving or withholding particular information, (2) the existence of *avenues for compromising* competing interests, and (3) the *political atmosphere* in which the negotiation will occur.

108. Interview with Charles Tiefer, Deputy General Counsel to the Clerk of the House of Representatives, in Washington, D.C. (Aug. 3, 1990) (notes on file with the *Administrative Law Review*).

109. Letter from L. Britt Snider, General Counsel, Senate Select Committee on Intelligence, to Professor Peter M. Shane, University of Iowa (July 10, 1990) (on file with the *Administrative Law Review*).

1. *The Competing Stakes and the Avenues for Compromise*

The stakes in a dispute over information may be assessed along several dimensions. Most generally, what is at stake for Congress is the performance of one of its primary functions: routine oversight; the contemplation of possible legislation; the review of a nomination requiring Senate advice and consent; or the investigation of possible official wrongdoing. The range of potential subjects within Congress's purview is as broad as the range of subjects within its article I and article IV regulatory powers. That is, the range is limitless.

The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These are:

a. protecting national defense and foreign policy secrets;
b. protecting trade secrets or confidential commercial or financial information;
c. protecting the candor of intrabranch policy deliberations;
d. preventing unwarranted invasions of personal privacy, whether of government officers, employees, or private persons; and
e. protecting the integrity of law enforcement investigations and proceedings.[110]

If all of what the branches perceive to be critically at stake in a particular dispute boils down to a contest between Congress's ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns just catalogued, the prospects for a nonconfrontational resolution are good.[111] That is because, between complete acquiescence in Congress's demand and complete acquiescence in executive nondisclosure, there are four intermediate options, each of which permits a balancing of the branches' competing concerns:

1. *The executive may provide the information requested, but in timed stages.* A delay in providing information might permit the executive to conclude a law enforcement investigation or a policymaking process that it does not wish to subject to premature scrutiny.[112]

2. *The executive may release the information requested, but under protective conditions ranging from Congress's promise to maintain confidentiality for the information it obtains to congressional inspection of the material while it remains in executive custody.* Such protective conditions are most helpful when the executive concern is less with the initial revelation to Congress and more with the possibility of subsequent redissemination of the material to other

110. This catalogue of interests mirrors the various grounds specified in the Freedom of Information Act, 5 U.S.C. § 552(b), for exemptions from the ordinary rule of mandatory disclosure of executive branch records.

111. The following analysis is based, in part, on Shane, *supra* note 4, at 520–29.

112. Such was the de facto consequence of the Watt executive privilege dispute, in which full disclosure did not occur until Secretary Watt had concluded the deliberative process with respect to Canada's status under the Mineral Lands Leasing Act.

audiences.

3. *The executive may release expurgated or redacted versions of the information demanded.* Redaction is obviously helpful in preserving the confidentiality of informants, shielding personal privacy, and protecting the details of investigative methods.

4. *The executive may release prepared summaries of the information demanded.* Where the expurgation of existing documents would be insufficient to protect interests in confidentiality, the executive may be able to satisfy Congress's information needs by summarizing the information of direct relevance to Congress. It may be possible to give Congress added assurance of the accuracy of the summaries by permitting selective sampling to compare original documents to the summary presentations.[113]

Of course, at the same time that the branches are promoting their routine institutional concerns, other political factors may come into play. Congressional vigor in investigating an unpopular or ill-managed program may boost the political strength of Congress or, in what amounts to the same thing, may weaken the political stature of the executive. Similarly, executive nondisclosure may defer or limit the exposure of material that would associate the executive with a politically unpopular position. It may distract public attention from an underlying policy dispute and raise the transaction costs generally for members of Congress intent on vigorous oversight.

Such political considerations may come into play no matter which party controls either end of Pennsylvania Avenue; the Democratic Congress's dispute with President Carter's Energy Secretary illustrates the point. It is reasonable to hypothesize, however, that the long-term difference in the partisan control of the two branches has significantly increased the branches' willingness to conduct their institutional competition openly. Even partisan political considerations, however, need not undermine the possibilities for compromise. Despite the potential political gains for Congress in the IRS investigation discussed earlier, no confrontation occurred. In part, this may be because the Bush Administration did not regard the potential results of the investigation as likely to be damaging to the incumbent President. The same factor might help explain Secretary Jack Kemp's cooperation in a congressional investigation of alleged abuses during the Reagan years in the administration of the Department of Housing and Urban Development.

These examples of cooperation, however, also reflect explicit executive endorsement of the principle that Congress—as in the IRS matter—is entitled to broad accommodation in its investigations of alleged official wrongdoing. Putting aside the potential embarrassment, this general stance recognizes that a President's willingness to be forthcoming in a corruption

113. *See, e.g.*, United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (approving disclosure of Justice Department summaries and selective congressional access to original documents to assure accuracy as appropriate compromise response to congressional subpoena for memoranda concerning electronic national security surveillance).

investigation may prove a political plus for any Administration that does stand to be tarnished by a particular investigation. White House cooperation in the Iran-Contra investigation is also illustrative on this score.[114] Thus, it may be most accurate to say that, in the IRS investigation, Congress and the executive reached a relatively quick agreement because (1) the immediate institutional needs of the branches could be accommodated through a compromise on the form of disclosure, and (2) the potential political gains to Congress either did not threaten to undermine the President's position or the executive lacked any option more politically advantageous than cooperation. This may well be a common pattern.

In analyzing the stakes in a particular information dispute, the greatest problems seem likeliest to arise not because of the branches' different functions or even because of their short-term political interests. A problem is most likely to occur when one or the other branch behaves as if the stakes in a particular dispute include an overall adjustment in the relationship of the two branches.

This phenomenon—a preoccupation with the implications of one disagreement for the entire interbranch relationship—seems to have become a conspicuous factor in the prolongation of the Dingell-Gorsuch dispute. When the Justice Department first became involved, the relevant officials may have focused their attention on the discrete question of protecting open investigative files in this particular matter. Similarly, the initial, discrete concern of Representatives Dingell and Levitas may have been rooting out improper partisan influence in EPA prosecutorial decisionmaking. Fueled by misunderstandings, however, about the other branch's knowledge and intentions, the negotiators seem quickly to have shifted their rhetoric to general statements about presidential obligation and congressional prerogative. Once negotiators begin to act as though that level of principle is implicated in their disagreement, accommodation becomes vastly more difficult. In the words of former White House Counsel Fred Fielding: "If both parties are acting in good faith, you can negotiate a resolution to any issue unless or until it becomes an institutional clash. Once that occurs, resolution is

114. In May, 1989, the Senate Select Committee on Intelligence investigated whether certain White House documents relevant to the Iran-Contra matter released during the criminal trial of Oliver North had been provided to the Iran-Contra Committee and, if not, why the failure occurred. The Committee determined that the six documents had not been provided to the committee, but that there was no evidence to suggest that any of the documents had been deliberately withheld. Instead, it appeared that the FBI agents in charge of the original search may not have recognized the relevance of the documents. The committee could not determine with certainty whether a seventh trial document that the Committee had not seen had, in fact, been transmitted. White House records indicated transmittal had occurred. STAFF OF SENATE SELECT COMM. ON INTELLIGENCE, WERE RELEVANT DOCUMENTS WITHHELD FROM THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR? (Comm. Print 1989).

very difficult because the issue has changed."[115]

2. *The Ingredients of the Negotiating "Atmosphere"*

Whether the negotiators "get institutional" is influenced, in turn, by other elements of the negotiating "atmosphere." That atmosphere will vary, first, with the degree to which shared goals do or do not animate Congress and the executive in the subject matter area that Congress is pursuing. The successes of the intelligence committees and the success of recent IRS oversight reflect, in part, a set of shared norms between the elected branches. Both take the defense of national security seriously. Neither wants to compromise national security through inappropriate disclosures of confidential information. Each branch is committed to the value of official integrity and is aware of the particular sensitivity of tax enforcement in this respect.

In contrast, the areas of trade and environmental policy implicated in the Morton, Duncan, Watt, and Gorsuch disputes were highly contentious. There are serious partisan differences over regulatory policy, undoubtedly exacerbating the disputes between OMB and Congress over access to regulatory material. Iran-Contra—the greatest failure of the intelligence committees system—was an executive response to the political certainty that Congress would not support the President's foreign policy goals. In those areas where policy contests are hottest, one can expect the most strident claims of congressional prerogative and the most vigorous executive complaints about congressional "micromanagement."

A second critical factor is trust. As noted earlier, a developing distrust between the Office of Legal Counsel and congressional staff may have been a significant exacerbating factor in the 1982 dispute over EPA's enforcement files. Secretary Watt's weakened credibility with the Dingell Subcommittee likewise aggravated the tone of their information dispute. By contrast, counsel to the Senate Select Committee on Intelligence and to the oversight committee investigating the IRS both cite mutual trust as an important aspect of their committees' successful relationship with the agencies they oversee.[116] In a similar vein, John A. Mintz, formerly general counsel to the Federal Bureau of Investigation, believes that a new mutual trust greatly helped the FBI in developing a satisfactory oversight relationship with Congress in the wake of the 1976 Church Committee investigation into intelligence abuses. Both the personal credibility of Judge William Webster

115. Letter from Fred J. Fielding, former Counsel to the President, to Peter M. Shane, University of Iowa (Jan. 8, 1990) (on file with the *Administrative Law Review*).

116. Interview with Britt Snider, General Counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990) (notes on file with the *Administrative Law Review*); Interview with Peter S. Barash, Staff Director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington, D.C. (Aug. 3, 1990) (notes on file with the *Administrative Law Review*).

as the agency's new director and the relative stability of staff membership both for the FBI and the Judiciary Committees were critically important factors, in Mintz's view.[117]

A third factor affecting negotiations is, of course, each branch's perception of the political risks involved in pressing hard for its position. With respect to foreign policy, for example, the President ordinarily operates against a backdrop of deference to executive branch initiative. Many members of Congress, regardless of party, are reluctant to place themselves in the position of appearing publicly to usurp the President's foreign policy prerogatives. At least one experienced staff member in the area of foreign policy oversight reports that this reality of congressional politics enables the executive to persevere in not sharing information on grounds of sensitivity, despite his subcommittee's unblemished record of keeping such information confidential. To subpoena such information would typically be impractical given the immediacy of the subcommittee's needs, and the President knows that the chances are miniscule of either House of Congress enforcing a subpoena for foreign policy information. In contrast, Secretary Duncan's dispute with Congress over the oil import fee was short-lived in part because the Carter Administration, having pledged "open government" in the wake of Watergate, was ill-equipped to invoke executive privilege to defend a hugely unpopular program.

The skill of the particular negotiators involved is also a factor that necessarily affects the process. Negotiators may vary in their understanding of the scope of their authority, their ability to minimize personality conflict, their creativity and flexibility in arriving at solutions, and their skill at enabling other negotiators to reach compromise solutions without losing face.

A related factor is the orientation of each negotiator to his or her task. Negotiators who are willing to take each problem on its own terms and work pragmatically toward a solution may reach quicker agreements than those who psychologically regard each negotiation as an opportunity to advance broad principles. Negotiators who see a client's success as a "statement" of their own prestige or value may also be less flexible than negotiators whose sense of self-worth is less entwined with a client's success.

C. The Persistent Sources of Tension

The catalogue of factors that potentially shape the quality of a particular negotiation explains why any formally elegant model of that process is likely to depart significantly from reality. Although it is easy to imagine a polar

117. Interview with John A. Mintz, former General Counsel to the Federal Bureau of Investigation, in Washington, D.C. (Aug. 4, 1989) (notes on file with the *Administrative Law Review*).

"easy" case[118] and a polar "confrontational" case,[119] the spectrum of possibilities between those poles includes an enormous number of plausible scenarios.

What a review of the law and analysis of the case histories do yield is an understanding of the different kinds of potential tensions that make dispute resolution difficult. Some may be uncontrollable; others not. Some may be eased through formal procedural mechanisms; others require attitudinal changes, which, of course, are more difficult to implement.

The two baseline factors that are least likely to change are political competition between Congress and the President and the existence of background legal uncertainty. Institutional competition, whether or not colored by partisanship, is an intended aspect of the constitutional design. Differences in party control of the two branches only exacerbate an inherent tension between the executive and legislative arms of government. The likelihood, discussed earlier, that courts will not provide any significant number of new decisions regarding executive privilege helps to perpetuate a state of legal uncertainty in which the competition of different institutional points of view can flourish.

A related attitudinal factor that is also unlikely to change is the difference between the branches' initial premises as to the legitimacy of congressional interest in the details of executive branch policymaking.[120] Administrators frequently complain of congressional "micro-management"—a congressional unwillingness to confine that body's attention to what, from the executive standpoint, is Congress's proper role of legislation and general policy oversight. The executive chafes at what it believes is Congress's unwillingness simply to live sensibly with the breadth of discretion Congress confers on administrative agencies.

Congressional representatives, however, tend to dismiss "micro-management" complaints as undervaluing the constitutionally intended legislative primacy in domestic affairs. Congress, from this point of view, has become more interested in "micro" issues because Presidents have (1) attempted to

118. The easiest case would be a dispute in which (1) the branches are pursuing compatible functions, (2) compromise mechanisms are easy to identify, (3) the information at issue involves a policy area in which the branches' shared values predominate, (4) the negotiators trust one another, (5) it appears risky to be obstreperous, (6) the negotiators are skillful, and (7) the negotiators are pragmatic.

119. The "worst case" would be a dispute in which (1) each branch is protecting a sensitive function, (2) it is difficult to identify a mechanism for compromise, (3) the information at issue involves a hotly contested policy area, (4) the negotiators are unfamiliar with one another or mutually distrustful, (5) neither branch sees great political risk in pushing hard for its position, (6) the negotiators are not exceptionally skillful, and (7) the negotiators tend to worry more about principle than problem-solving.

120. For a helpful discussion of the scope of congressional oversight and the variety of perspectives as to its quality and intensity, see NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES: THE NEED TO STRIKE A BALANCE AND FOCUS ON PERFORMANCE (n.d.).

assert more direct presidential control at the "micro" decisionmaking level, and (2) implausibly defended the scope of their unilateral policymaking authority under article II of the Constitution. From this standpoint, "micromanagement" is a necessary counterweight to the Imperial Presidency.

Despite this difference in perspective, certain shifts of attitude—even against a background of uncertainty and competition—could ease negotiations significantly. There are areas in which each branch perceives that its institutional interests are so chronically underweighed by the other branch that an agreement to focus conciliatory attention on just these four areas would, if practicable, have a significant impact.

Congress's chronic procedural complaint is that the executive ignores (or excessively manipulates) the importance to Congress of promptness in providing information. Because most significant legislation requires a hearing process in both Houses, committee mark-up in both Houses, floor debate in both Houses, a conference committee reconciliation, and further floor debate before final passage, the two-year lifespan of Congress substantially limits the time frame in which members can hope to be effective in pushing new legislative initiatives. Additionally, because it is difficult to sustain attention to any particular problem—whether public attention, media attention, or the attention of a member's colleagues—a subcommittee engaged either in oversight or legislative deliberations may feel pressed to act within a short time frame when the issue is "hot." Because of this reality, the appearance of executive temporizing is always likely to provoke congressional resentment.

Congress's chronic substantive complaint is the executive's unwillingness to be more forthcoming in the sharing of foreign policy and national security information. Despite occasional episodes of congressional initiative (or over-initiative), Congress generally is deferential to presidential foreign policymaking. Yet, the repeated reluctance to share information—often explained by the executive in terms of both presidential prerogative and a fear of leaks—is a frequent source of frustration to the branch that is expressly charged with powers to appropriate funds, to raise an army and navy, to regulate foreign trade, to implement international law, and to control immigration.[121] Congress regards its "leak" record as better than the executive's and is, of course, unpersuaded by arguments that the President is unilaterally charged to formulate all elements of our foreign and military policy.

Administrators also articulate a procedural frustration—the inability to secure an adjudication of an issue of privilege without submitting to a congressional resolution of contempt. Whether the executive is seriously concerned about this point is, however, not obvious. There is, after all, at least some reason to suppose that greater ease in invoking judicial resolu-

121. U.S. CONST. art. I, § 8, cls. 3, 4, 10, 12, 13, and § 9.

tions to information disputes would ultimately result in less executive control over information.

The executive's substantive concerns, however, are undoubtedly serious. The first is that Congress, from the executive standpoint, is insufficiently sensitive to the delicacy of information-sharing in the context of civil law enforcement. In seeking information regarding criminal law enforcement, Congress appears generally to understand the importance of privacy, of protecting sources and methods of gathering information, of shielding the government's strategic discussions, of not compromising ongoing investigations, and of preserving public confidence in the evenhandedness and depoliticization of law enforcement. The executive perceives, however, that Congress is not respectful of the same values—even when they are equally salient—in the context of law enforcement by a civil regulatory agency.[122]

Executive employees also believe that Congress underweighs the negative impact of oversight on executive branch deliberations when Congress demands the disclosure of deliberative documents representing advice to an administrator from that administrator's personal advisers and immediate subordinates. This concern looms largest in policymaking areas, such as social and economic regulation, where political competition predominates over shared values and objectives, and least in such areas as criminal law enforcement, where shared values and objectives predominate. A number of administrators insist that the susceptibility of deliberative memoranda to congressional scrutiny has (1) reduced the willingness of administrators and their support staff to commit their candid positions to paper, (2) increased the incentive for writing advisory documents in a manner that renders those documents virtually inscrutable as a public record, and (3) reduces the quality of decisionmaking by pushing more hard decisions into the context of oral deliberation and away from written analysis.[123]

It is arguable, of course, that administrators should be indifferent to the political consequences of exposing their staff's advice to congressional scrutiny. If that advice differs from the administrator's ultimate decision or exposes other problems worthy of congressional investigation, the result

122. Interview with Robert A. McConnell, former Assistant Attorney General in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989) (notes on file with the *Administrative Law Review*). The best-publicized recent example of alleged inappropriate interference by members of Congress in civil law enforcement involves the intervention by five Senators with the Federal Home Loan Bank on behalf of Lincoln Savings & Loan, a "failing thrift." Robert W. Merry, *A Senatorial Effort to 'Save' a Thrift*, 47 CONG. Q. WKLY. REP. 1594 (June 24, 1989). On former Speaker Wright's possible exercise of undue influence in dealing with the Federal Home Loan Bank Board, see HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, REPORT OF THE SPECIAL OUTSIDE COUNSEL IN THE MATTER OF SPEAKER JAMES C. WRIGHT, JR., 101st Cong., 1st Sess. 192–279 (1989).

123. Interview with Robert P. Bedell, former Administrator, Office of Federal Procurement Policy, Office of Management and Budget, and John Cooney, former Deputy General Counsel, Office of Management and Budget, in Washington, D.C. (Aug. 2, 1989) (notes on file with the *Administrative Law Review*).

will be only that Congress may press the administrator to defend his or her performance, an event entirely appropriate under our system of administrative accountability.

What this position may underweigh, however, is the problem of "agenda overload" for many administrators. Time is among the scarcest resources in Washington. An administrator may wish to avoid the production and subsequent disclosure of candid documents not solely out of apprehension for the political fallout, but also to reduce the time burden that explaining those documents may entail. Even an administrator confident of prevailing in the substance of a policy dispute with Congress has incentives to reduce the burden of oversight in terms of time and effort. Congress perceives arguments of this kind from the executive as manifesting an unwillingness to "take the heat"; it may be, however, that "taking the time" is also a genuine concern.

In sum, if the object of procedural reform is to reduce the time and stress involved in reaching a mutually acceptable resolution of potentially confrontational information disputes between Congress and the executive, that strategy should optimally incorporate each of the following elements:

1. enhancing the branches' recognition of various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information;
2. deterring the tendency towards behaving as if the potential stakes in a particular information dispute included an overall adjustment in the relationship of the two branches; and
3. trading greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

II. SUGGESTIONS FOR REFORM

Over the last twenty years—but most notably during the Watergate period and following the Reagan Administration's EPA imbroglio—numerous legislators and commentators have offered suggestions for procedural reform in the exchange of information between Congress and the executive.[124] Nearly all the proposals that have been discussed involve either (1)

124. The various legislative proposals are discussed, in some cases with suggestions for improvement, in Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986); Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DEPAUL L. REV. 692 (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 REC. ASS'N B. CITY N.Y. 177 (1974); James Hamilton & John C. Grabow, *A Legislative Proposal*

prescriptions for the procedure through which executive privilege is asserted; (2) resuscitating Congress's use of its inherent contempt authority; (3) creating some avenue for the civil enforcement of Congress's subpoenas to the executive branch; or (4) strengthening the current criminal law enforcement prospects, most importantly through authorization for a special prosecutor in executive privilege cases. In contrast to these recommendations for formal changes in the exercise of the branches' respective authorities, this author, in 1987, proffered a fairly elaborate scheme for routinizing certain aspects of the informal interbranch negotiations that currently take place.[125]

Statutory proposals to prescribe the procedure through which executive privilege is asserted have aimed chiefly at insuring that responsibility for the invocation of executive privilege is lodged with the President and that the privilege is not invoked by subordinate officials. President Nixon's 1969 adoption by memorandum[126] of this very procedure, however, and its subsequent observance by every President since Nixon, have mooted this strategy as an avenue for further improvement.[127]

Congress could increase the pressure for the quick resolution of information disputes by invoking its inherent contempt power.[128] Although the Constitution does not mention Congress's investigation or subpoena powers expressly, the Supreme Court has inferred both that Congress has such powers and that, in aid of its powers, Congress may adjudge for itself that a targeted witness or holder of documents is in contempt of Congress. Upon such an adjudication, Congress may provide for the incarceration of the contemnor within the Capitol itself, permitting the defendant to raise any privilege issues in court through a petition for habeas corpus.

Use of the inherent contempt power, however, has obvious disadvantages.[129] Although it does not require the cooperation of other branches, the deliberative process it entails is still time-consuming. The spectacle of summary incarceration is politically unseemly, especially if the defendant is

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for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 HARV. J. ON LEGIS. 145 (1984); Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621 (1973); and Paul C. Rosenthal & Robert S. Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74 (1977).

125. *See* Shane, *supra* note 4.

126. Memorandum from President Richard M. Nixon for the Heads of Executive Departments and Agencies (Mar. 24, 1969).

127. President Reagan's amended version of the memorandum, issued November 4, 1982, is reprinted in H.R. REP. NO. 435, 99th Cong., 1st Sess. 1106 (1985). *See also* PETER M. SHANE & HAROLD H. BRUFF, LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS 182–84 (1988).

128. For extensive histories and analyses of Congress's contempt power, see J.T. MELSHEIMER, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 76-152 A) (Aug. 12, 1976); and J.R. SHAMPANSKY, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 86-83A) (Feb. 28, 1976).

129. Brand & Connelly, *supra* note 124, at 74–77; Hamilton & Grabow, *supra* note 124, at 151–52.

a government official. Congress had enough doubts as to the effectiveness of the procedure by 1857 to provide by statute for the executive prosecution of "contumacious" witnesses. Congress has not used the power at all since 1934.[130]

Proposals to permit a civil declaratory judgment action or an injunctive suit to enforce a congressional subpoena offer a "cleaner" way of adjudicating an issue of privilege than does the current statutory scheme.[131] Under existing law, Congress may not itself sue directly to enforce a subpoena against an officer or employee of the federal government acting in an official capacity.[132] Thus, an executive officer can secure an adjudication of a privilege claim only by incurring contempt and raising the privilege issue defensively in a criminal prosecution. It would undoubtedly be easier for Congress to pursue a civil remedy than it is for Congress to invoke effectively the criminal process as that process is presently structured.

It should be recognized, however, that the possibility of civil suit would not likely do much to change the current atmosphere of interbranch negotiation. Specifically it would not advance the two concerns Congress feels most pressingly, that is, executive failure to respond promptly to all information requests and the executive withholding of foreign policy information.

The reason for supposing that the possibility of a congressional suit to enforce its subpoena would not much alter the existing pattern of negotiation is that such suits, as both branches know, are both time-consuming and uncertain.[133] Congress is not likely to authorize a procedure under which suits could be initiated based on a subcommittee vote alone. A full committee vote to authorize a suit would require time for the full committee to deliberate, and to persuade the majority of committee members of the appropriateness of the suit and, perhaps, of its likely outcome. Additionally, even if suit is filed under an expedited procedure, the suit—and its possible appeal—could take months. Such a mechanism would not be practicable as a routine device for exacting executive cooperation in information sharing.

Moreover, the areas in which Congress feels most routinely underinformed—on questions of foreign and national security policy—are the areas in which courts are most likely to be deferential to executive claims of privilege. Despite the lack of support for the executive's oft-repeated claim of

130. J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 88 (1988).

131. *See e.g.*, Hans A. Linde, *A Republic . . . If You Can Keep It*, 16 HASTINGS CONST. L.Q. 295, 326 (1989).

132. 28 U.S.C. § 1365 (1988). Following the Iran-Contra hearings, the Senate voted in 1988 to amend § 1365 to permit direct enforcement of any such subpoena unless the head of the department or agency employing the officer or employee, with the Attorney General's approval, directed the officer or employee not to respond to the subpoena and provided the issuing authority with a written statement setting forth reasons for the refusal. S. 2350, 100th Cong., 2d Sess. (1988). *See* H.R. REP. NO. 1040, 100th Cong., 2d Sess. (1988). The bill was not called up in time to permit House action prior to the end of the session.

133. Brand and Connelly, *supra* note 124, at 83.

exclusive authority over all matters touching diplomacy, courts have been reluctant to second-guess particular executive claims that the disclosure of certain information would compromise intelligence sources or methods, or the confidence of other nations' intelligence services in our own.

These problems notwithstanding, Congress might think it worthwhile to enact a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to solve an impasse with the executive branch. In principle, pursuit of such an action should be open either to Congress or the executive once a subpoena issues. To avoid speech and debate clause problems that loom in any suit against Congress, the statute should provide that the executive could bring its injunctive action against the particular congressional employee charged with delivering the contested subpoena.[134]

A declaratory judgment procedure, even if little used, would be preferable to the currently existing criminal process. It would be helpful, of course, for such an Act to specify the conditions under which a court should acknowledge an interbranch impasse. That is, Congress should indicate those negotiating steps that ought be exhausted before recourse to judicial action. At a minimum, negotiations should have occurred between the executive branch and the chair and ranking member of the committee or subcommittee issuing the subpoena. Especially when Congress and the White House are controlled by different parties, it is essential to include the ranking member in negotiations to mitigate any possibility of asserting merely partisan antagonisms as institutional prerogatives of Congress.[135]

The fourth set of proposals—proposals to facilitate recourse to the criminal process—is also unlikely to alter much the existing pattern of negotiating behavior. Proposals to permit the appointment of a special prosecutor

134. Kilbourn v. Thompson, 103 U.S. 168 (1880) (holding House members immune, but sergeant-at-arms liable in false arrest action based on arrest of person held in contempt under House resolution).

135. As Assistant Attorney General in charge of the Office of Legal Counsel, now-Justice Antonin Scalia opined that a lawsuit of the kind proposed here would raise a nonjusticiable political question: "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." *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations*, 94th Cong., 1st Sess. 116–17 (1975).

This argument was implicitly rejected, of course, when the D.C. Circuit upheld President Nixon's refusal to honor a subpoena from the Senate Watergate Committee for certain presidential tapes. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). It is likewise doubtful that the Supreme Court would find a lack of standards in contests over congressional subpoenas when it has been willing to adjudicate disputes involving judicial subpoenas. United States v. Nixon, 418 U.S. 683 (1974).

On the other hand, it is likely that courts would forebear from adjudicating an interbranch dispute absent some showing of impasse that demonstrated the necessity for judicial involvement. *Cf.*, Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring on lack-of-ripeness grounds in decision not to hear congressional challenge to presidential treaty abrogation).

to pursue criminal contempt charges respond to one important problem with the application of the current contempt statute to the executive. When a case against an administrator is referred by Congress to a United States Attorney, that official necessarily faces a conflict between the duty to enforce the law and his or her institutional duties to the Department of Justice. Congress cannot confidently expect the pursuit of such a prosecution so long as a Department of Justice appointee must conduct the grand jury and any subsequent trial. Thus, were Congress authorized to apply to a court for the appointment of an independent counsel, it could eliminate a troublesome feature of the current system.

Yet, criminal prosecutions are even less-promising vehicles for resolving disputes quickly than would be civil suits. Once an indictment is filed, the defendant can no longer purge him- or herself of contempt by complying with the subpoena.[136] This renders much more problematic Congress's ability to engage in an efficient bargaining process with the defendant. Further, the courts are not traditionally friendly to criminal contempt actions. To achieve a conviction, the prosecutor must, of course, prove each element of the statutory offense beyond a reasonable doubt. Should the defendant be acquitted, Congress has no avenue for appeal.

There are also strong policy objections to the creation of a special prosecutor mechanism to resolve executive privilege disputes. Although constitutional objections to judicially appointed prosecutors proved unpersuasive in *Morrison v. Olson*,[137] Justice Scalia forcefully explained the potential that the special prosecutor mechanism has for destabilizing the coequal relationship of the branches. The Constitution allocates specific tools to Congress for the purpose of checking the executive—most notably, the appropriations, confirmation, and impeachment powers. Permitting Congress at will to prompt the appointment of a special prosecutor goes substantially further in enabling Congress, at little cost to itself, to distract the executive branch from its primary functions and to undermine popular support for the President.[138] When serious indications exist of criminal wrongdoing by executive officials, the potential for destabilization is properly overbalanced by the contribution of the independent counsel mechanism to preserving the rule of law. It is not obvious that there is a comparable public benefit to be gained in information disputes that would justify the destabilizing potential of a special prosecutor in this context.

The various objections to those formal procedural reforms that others have suggested do not mean that nothing should be done. However unlikely the litigation of these disputes may be, a declaratory judgment proceeding would be "neater" than any criminal contempt process. Congress could also

136. *Id.* at 77.
137. 108 S. Ct. 2597 (1988).
138. *Cf.*, *id.* at 2623–25, 2630–31 (Scalia, J., dissenting).

sensibly enact the sorts of protective procedures envisioned in the Congressional Right to Information Act proposed in 1973.[139] That bill obligated committees to protect confidential information that agencies received from entities or persons outside the federal government and provided that any breach of confidentiality by a member of Congress would trigger an ethics investigation. Furthermore, Congress could provide for the physical security of confidential information and permit entities or persons outside the federal government who supply such information to explain their interest in continued confidentiality before any congressional decision to disclose.[140]

If, however, the elected branches are truly to create conditions for more constructive and less burdensome negotiations, they must focus on procedures that are not dependent on the courts or on the exercise of contempt power. Based, in part, on this author's earlier study of interbranch information disputes, the American Bar Association in 1987 endorsed three such measures for adoption by the elected branches and two areas for congressional study, in order to facilitate the resolution of disputes over executive privilege in a manner that would "take account more effectively of the constitutional responsibilities of each branch and without undue cost to the necessary working relationship of Congress and the Executive."[141] The ABA endorsed another such measure in 1988, pertaining specifically to congressional demands for documents revealing communications between administrators and their personal advisers.[142] These measures, implemented in a manner consistent with the findings of the present study, promise to do more to redirect the energies of the elected branches in information disputes than do the categories of procedural reform discussed earlier.

The centerpiece of a reform effort that is not dependent on the courts would be the negotiation between the branches of a new *modus vivendi* to govern information disputes. This *modus vivendi* would have both a procedural and a substantive component. Under the *modus vivendi*, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the *modus vivendi* would contain agreements aimed at steering negotiations away from categorical questions of prerogative—who is legally entitled to what?—and toward the pragmatic resolution of immediate disputes.

Negotiation is, of course, already an essential part of the process by which interbranch information disputes are resolved. In that sense, any *modus vivendi* aimed at structuring negotiations would not be creating an entirely

139. S. 2432, 93d Cong., 1st Sess., 119 CONG. REC. 42101 (1973).

140. Rosenthal & Grossman, *supra* note 124, at 111–16.

141. Edward J. Grenier, Jr., *Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law* 141, 141 (Aug. 1987).

142. Arthur E. Bonfield & James F. Rill, *Joint Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law and the Section of Antitrust Law* (Aug. 1988).

new process. The aim of the new agreement would be to lend just enough formality or regularity to negotiations to make the participants self-conscious that they are engaged in an institutional process that is part of a larger set of institutional relationships, and that such relationships require a certain element of pragmatism to thrive.

A similar effort is made in the current statutory framework governing demands for agency information by the Comptroller General. The relevant statute contemplates an informal request, which may be followed by a "written request" to the agency head if compliance is not forthcoming in a reasonably timely way.[143] Upon receiving such a request, an agency head has twenty days to respond, a period during which negotiations are, of course, likely to ensue.

If the agency head does not resolve the matter to the Comptroller General's satisfaction, the Comptroller General "may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress."[144] Such a report would introduce into the negotiations a range of persons with a broader perspective that might still facilitate informal dispute resolution.

Twenty days after filing a report, the Comptroller General may file in a U.S. District Court a civil action to enforce the demand for information.[145] The President or the Director of the Office of Management and Budget may, however, preclude such an action if, within that same twenty days, either personally certifies to the Comptroller General both that the demanded information is exempt from mandatory disclosure under the Freedom of Information Act and "disclosure reasonably could be expected to impair substantially the operations of the Government."[146] The net impact of these various steps is a structured negotiating process involving enough perspectives, enough time, and enough reasoned deliberation to produce a relatively prompt resolution of virtually all disputes.

Toward that same end, an interbranch agreement on information disclosure to Congress should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past. Another important procedural component would be the creation of some mechanism for systematic recordkeeping concerning the informal resolution of executive privilege disputes. This set of agreements has the potential to enhance the branches' recognition of the various forms in which information may be

143. 31 U.S.C. § 716(b)(1) (1988).
144. *Id.*
145. *Id.* § 716(b)(2).
146. *Id.* § 716(d)(1).

shared that may accommodate the branches' respective interests in the disclosure or protection of information and to deter treating the stakes in particular information disputes as if they included an overall adjustment in the relationship of the two branches.

It would not be necessary to implement such an agreement through statute. Once an agreement was negotiated, the President could bind the executive branch to its observance through executive order. Congress could adopt the agreement as part of the rules of each House. Such mechanisms would enable each branch to escape the agreement should it prove unworkable.

Yet greater strides could be made to interbranch comity if the agreement, as suggested earlier, traded greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates. Such a trade could be accomplished in a variety of ways.

Congress, for example, could agree—as recommended by the ABA—not to subpoena:

> from administrative agencies any documents embodying [communications between administrators and their personal advisers], except on the basis of a demonstrated, specific need for such documents. In determining whether such a need exists, the following factors should be among the criteria considered: the nature of Congress's interest in its investigation, the importance to Congress's investigation of the particular material requested, the nature of the agency's interest in not disclosing the material, and the availability to Congress of adequate alternative sources of information.[147]

Additionally, it could negotiate understandings regarding the exchange of civil law enforcement information that show sensitivities similar to those displayed in the context of criminal law enforcement.

The executive could offer some promise for assuring a quick, good-faith response to every request, plus quick engagement in negotiations—perhaps under presumptive deadlines—in the event of disagreements. The branches could explore increased congressional access to foreign policy information as a goal, facilitated perhaps by measures akin to those now used for the sharing of classified intelligence.

Determining the particulars of these agreements would likely not be easy, but it is fair to say that adversaries throughout the world, under imperatives to cooperate less compelling than those facing Congress and the President, have reached agreements over even knottier issues. That payoff could be considerable, especially if such a *modus vivendi* laid additional groundwork

147. Bonfield & Rill, *supra* note 142, at 209.

for a more bipartisan foreign policy and greater congressional confidence in executive administration of the laws.

One of the other two areas that the ABA in 1987 recommended for congressional study was the possible provision for a central body in Congress with continuing responsibility for negotiation in executive privilege negotiations, akin to the responsibility held in the executive by the Justice Department's Office of Legal Counsel. A final area for study was possible recourse to nonbinding third-party mediation in the most serious disputes. The ABA report, like the article from which it was drawn, mentioned federal judges as possible mediators.[148] Retired members of Congress and former Presidents are also possibilities.

The first of these ideas could be implemented by strengthening and perhaps more fully publicizing to the members of Congress the current roles of the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House. Both Offices now operate as repositories of information about past disputes and sources of legal counsel to individual committees. Any further centralization of negotiating authority, however, is likely to be regarded as too significant a departure from norms of congressional procedure to commend itself to Congress unless and until there is a political disaster under the current structure.

The second idea may well have merit, but would constitute a dramatic innovation, likely requiring statutory implementation. Congress and the executive could quite reasonably decide that consideration of such a mediation mechanism should be postponed until the branches had experimented with the structurally less innovative *modus vivendi* described above. The set of political agreements here outlined is more responsive to the factors producing success or failure in the case studies described in Section II and to the points of agreement and disagreement articulated in the interviews conducted for this study than are proposals for resurrecting Congress's contempt power, creating a civil process other than contempt for enforcing congressional subpoenas, or authorizing the use of independent counsel in information disputes. Informal dispute resolution might be yet more likely to succeed if—once an agreement is in place—some agency, such as the Administrative Conference of the United States, provides regular educational programs for members of Congress and their staffs concerning the history of information disputes and options for negotiated settlement.

III. ARE INDEPENDENT AGENCIES DIFFERENT?

If the elected branches decided to negotiate the sorts of agreements described in the previous section, a difficult issue to resolve would be the scope of those agencies whose records would be covered by the new *modus*

148. Shane, *supra* note 4, at 529–31.

vivendi. The branches could, as a matter of policy, agree to cover any set of agencies they choose. An interbranch "treaty" on information sharing might cover just the Executive Office of the President and its components, or just the core Cabinet-level agencies, or just agencies with jurisdiction over environmental policy, or any other constellation of agencies. The various jurisdictional possibilities, however, are not necessarily of equal appeal in terms of either their policy or principle sense.

One easily imagined jurisdictional line that does *not* make a good deal of policy or principle sense is the line between those agencies conventionally labeled "executive" and those conventionally labeled "independent." That line, although deeply embedded in separation-of-powers folklore, is unappealing for two reasons. First, recent Supreme Court opinions cast substantial doubt on the proposition that there are constitutionally distinct categories of agencies called "executive" or "independent." Second, whether there do or do not exist good reasons for withholding or disclosing agency information will rarely have anything to do with an agency's particular structure.

A. The Unitary Nature of the Administrative Agency

The agencies conventionally called "independent" are structured in a variety of ways that are designed to mitigate the influence of partisanship on agency policy.[149] Among the common accoutrements of "independence" are collegial decisionmaking, staggered terms for agency administrators, terms of administrative office longer than a single Presidential term, and quotas on the number of agency members who may belong to either of the major parties. The Constitution is silent on each of these features. Congress has the power to adopt such features, depending entirely on its judgment as to what is "necessary and proper" for the effective functioning of the agency.

The Constitution does speak at least elliptically, however, to a number of issues that are relevant to agency structure, taking as an element of that structure the appropriate relationship between agency administrators and the President or other elected officials. Most obviously, the Constitution provides that the President shall appoint all noninferior administrative officers "by and with the Advice and Consent of the Senate."[150] The Supreme Court has held this provision fully applicable to the Federal Election Commission, an "independent agency," because the FEC is an administrative agency that implements the authority of the United States.[151] Thus,

149. Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608 (1989). The difficulty in finding principled distinctions between so-called "independent" agencies and others is well developed in Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581–86 (1984).

150. U.S. CONST. art. II, § 2, para. 2.

151. Buckley v. Valeo, 424 U.S. 1 (1976).

Congress may not, by labeling an agency "independent," deprive the President of his appointments role.

Second, the Constitution—as read by the Supreme Court since *Myers v. United States*[152]—limits the permissible scope of Congress's power to participate in the removal of any officer of the United States. Congress may remove an officer of the United States only through impeachment. So long as Congress permits an administrator to implement the authority of the United States, Congress may reserve for itself no other removal role, even if the administrator is one, such as the Comptroller General, who is widely regarded as an "arm of the legislative branch."[153]

Third, because the President is charged to "take Care that the Laws be faithfully executed,"[154] Congress must permit the President to remove, directly or through a subordinate he fully controls, any administrator who is not faithfully executing the laws.[155] Although the full scope of this power has not been elaborated, it presumably includes the power to discharge an official who has broken the law, who refuses to implement the law, or who is performing so poorly as to undermine Congress's purposes in delegating power in the first place.

Fourth, however, even if an administrator is performing power of a sort historically performed almost entirely by officers universally regarded as executive, Congress need not render the administrator susceptible to "at will" discharge by the President.[156] It may be that the President must have plenary removal power to supervise fully the exercise of administrative functions by any official—such as the Secretary of State—who assists the President in discharging an inherent article II function. If an administrator, however, is implementing delegated authority that is not within the scope of the President's inherent article II functions, then any discretion the President has to discharge the administrator depends upon congressional permission—except for the constitutionally guaranteed authority to discharge an officer for failing faithfully to execute the laws.[157]

The foregoing propositions, all squarely affirmed by recent Supreme Court decisions, assure the President a constitutionally prescribed minimum level of authority with respect to every agency. That an agency has multiple administrators, with lengthy, staggered terms, or that Congress has limited the number of agency administrators who may be members of a particular party, would have no impact on the President's appointment

152. 272 U.S. 52 (1926).

153. Bowsher v. Synar, 478 U.S. 714, 746 (1986).

154. U.S. CONST. art. II, § 3.

155. *Cf.*, Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988) ("This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.").

156. *Id.* at 2619–21 (limits on presidential supervision of independent counsels do not impermissibly impede President in discharge of his constitutionally vested powers).

157. *See generally* Shane, *supra* note 149, at 608–10.

power or on his authority to take care that the laws be faithfully executed. Nor would Congress have more authority to supervise the administrators within such an agency. If displeased with an administrator, it would have no power other than impeachment to remove the official. In these respects, all agencies are "executive."

On the other hand, the relationship that the Constitution promises to the President falls far short of plenary policy control. Only if an administrator is involved in discharging functions constitutionally vested in the President is such control a probable constitutional mandate. Otherwise, the scope of such supervisory power and the scope of authority the President has to remove an executive official are judgments within the discretion of Congress. It follows from this analysis that there is nothing in the constitutionally mandated relationship between administrative agencies and either Congress or the President that suggests that labeling an agency "executive" or "independent" yields (a) greater or lesser authority for the President to control agency information, or (b) greater or lesser authority for Congress to demand information.[158]

B. Agency Structure and the Policy Implications of Information Sharing

The line between independent and executive agencies also seems unhelpful in distinguishing between situations when policy arguments for information disclosure will or will not be persuasive.[159] In part, this is because the agencies are not neatly distinguished by subject matter. Although most foreign policy matters are handled by executive agencies, some "independents," such as the Nuclear Regulatory Commission, have a potential impact on foreign policy and access to classified information that is of no less concern to the President than the agenda of the State Department. Sensitive financial information exists both in the "independent" Securities and Exchange Commission and in the "executive" Department of the Treasury. Health and safety, antitrust, energy, and transportation are additional critical policymaking areas in which both executive and independent agencies are involved.

Just as important, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information. Congressional demands for information, as noted above, coincide with legislative deliberations, ordinary oversight, confirmation investigations, and probes into alleged wrongdoing. The fact that the context in

158. This argument should not suggest, however, that independent agencies are likely to present numerous plausible claims for executive privilege. Their functions are often remote from core presidential authorities. Their heads are rarely close presidential advisers. Their bipartisan composition means that Congress is likely to get from someone in the agency any information that Congress seeks, and the President is unlikely to use his "political capital" in defense of an independent agency.

159. Strauss, *supra* note 149, at 654–660.

which a particular one of these activities is occurring involves an "independent" agency or an "executive" agency is irrelevant to whether Congress will find particular information either relevant or helpful to its tasks.

Similarly, the interests in nondisclosure catalogued above—protecting defense and foreign policy secrets, confidential financial information, the integrity of administrative policy deliberations, personal privacy, and law enforcement—do not vary depending on whether those interests arise in an "independent" or "executive" agency context. State secrets are sensitive, wherever held. Financial information is no more or less sensitive because the Internal Revenue Service or the Federal Reserve Board holds it. The integrity of Federal Trade Commission investigations and deliberations is of no less concern than investigations and deliberations by the Environmental Protection Agency or the Justice Department. The personal privacy interests of ICC employees are presumably no different from those of Defense Department staff.

In sum, to draw a line in information handling between agencies conventionally labeled "executive" and others conventionally labeled "independent" may have political appeal. There would be no constitutional barrier to the branches negotiating an informal agreement that does treat these categories differently. It would be a mistake, however, simply to assume either that constitutional doctrine or policy analysis dictates different treatment. They do not.

IV. CONCLUSION

It is an habitual tendency of U.S. administrative lawyers to suggest formal procedural reforms as instruments for resolving problems of governance. Certain such reforms would be helpful in resolving some exceptional disputes between Congress and the executive concerning congressional access to agency information. Specifically, Congress should consider enacting a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to resolve an impasse with the executive branch over such access.

Congress and the executive could do more, however, to foster efficient resolutions to information disputes by focusing on their currently *ad hoc* negotiating process. Congress and the President should consider devising a written agreement regarding negotiations over the sharing of sensitive information. Such an agreement should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past.

Such an agreement should involve the creation of some mechanism in

each elected branch for more systematic recordkeeping concerning the informal resolution of executive privilege disputes. This mechanism could enhance the branches' recognition of the various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information. It should correspondingly deter treating the stakes in any particular information dispute as if they included an overall adjustment in the relationship of the two branches. Negotiations regarding a new *modus vivendi* should focus on the possibility of trading greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

In resolving disputes over information, all three branches of the federal government should avoid presuming different treatment for contested information depending on whether the information is held by agencies conventionally labeled "executive" or "independent." Whatever sound reasons exist for assuring congressional access to information or for keeping the information confidential, nothing in the structure, mission, or constitutional locus of an independent agency makes those reasons more or less compelling than would be the case for an executive agency assigned the same tasks.

APPENDIX A

Government Officials Interviewed for Study

This article benefitted greatly from a number of past and present employees of Congress or the executive branch who were willing to share their views and experiences with the author. Because the following people did not insist on confidentiality, I am able to thank them publicly for their generosity:

Robert P. Bedell, former Administrator, Office of Federal Procurement Policy

Terry Calvani, former member, Federal Trade Commission

John Cooney, former Deputy General Counsel, Office of Management and Budget

Michael Davidson, Senate Legal Counsel

Fred Fielding, former Counsel to the President

Robert Gilliat, Assistant General Counsel, U.S. Department of Defense

Patrick M. McLain, former Counsel, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce

John Mintz, former General Counsel, Federal Bureau of Investigation

Theodore B. Olson, former Assistant Attorney General in charge of the Office of Legal Counsel, U.S. Department of Justice

Morton Rosenberg, Senior Researcher, Congressional Research Service, American Law Division

Britt Snider, General Counsel, Select Committee on Intelligence

Charles Tiefer, Deputy General Counsel to the Clerk, U.S. House of Representatives

APPENDIX B

Administrative Conference of the United States

1 CFR Part 305
55 Fed. Reg. 53269 (1990)

§ 305.90-7 Administrative Responses to Congressional Demands for Sensitive Information (Recommendation 90-7).

The routine sharing of information between congressional committees and administrative agencies constitutes one of the most important interactions between the political branches of our national government. The process of exchanging information affects the ability of the executive and legislative branches to carry out their constitutionally assigned tasks. The quality of Congress's legislative and oversight work often depends on agency information. The control of the disclosure of sensitive information also affects the executive's ability to fulfill its functions.

The Constitution of the United States operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Because it does not expressly acknowledge a congressional entitlement to information or an executive prerogative to withhold information, the Constitution provides less a set of clearly understood rules than a framework within which each branch articulates its asserted right to demand or withhold information.

The judicial view regarding disputes over sensitive information between the political branches, as distilled from a very few opinions, respects elements of the views of both branches. While several cases imply what the Supreme Court's view might be,[1] there is no Supreme Court adjudication of any executive privilege dispute with Congress. Consequently, there is no opinion that resolves the principled contentions that such disputes involve.

By all accounts, most congressional demands for information are handled without confrontation, and it is clear that agencies generally respond to requests by providing whatever information Congress is seeking. Moreover, the branches do have a strong and continuing interest in the success of their overall relationship, despite an institutional competitiveness that is augmented when the two branches are controlled by different parties. Nevertheless, serious contentious cases do arise, especially in areas of great concern to the public, and improved mechanisms for resolving such disputes would benefit both political branches, as well as the courts, which shy away from involvement in such cases.

1. See United States v. Nixon, 418 U.S. 683 (1974), which held that the executive has a constitutionally based privilege to withhold information, the release of which would impede the performance of executive branch responsibilities. *See also* McGrain v. Daugherty, 273 U.S. 135 (1927), which recognized a constitutionally implied power of congressional investigation and said further that Congress need not have before it a specific legislative purpose in order to trigger its investigative authority.

An understanding of the several factors that may affect the outcome of particular demands as well as the process by which a resolution is achieved is required if improvements are to be recommended for resolving information disputes in a way that enables both branches optimally to fulfill their constitutional functions. One major factor affecting the successful navigation of a dispute is the perceived stakes or interests of each branch. What is at stake for Congress is usually the performance of one of its primary functions. These include routine oversight, the contemplation of possible legislation, the review of nominations requiring the advice and consent of the Senate, or the investigation of possible official wrongdoing. The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These include protecting national defense and foreign policy secrets; protecting trade secrets or confidential commercial or financial information; protecting the candor of presidential communications or intrabranch policy deliberations; preventing unwarranted invasions of personal privacy, whether of government officials, employees, or private persons; and protecting the integrity of law enforcement investigations and proceedings. In some cases, the executive may regard such information as sensitive, meaning that its disclosure could compromise the capacity of the executive branch to discharge its constitutional or statutory responsibilities. Disputes over information often have a purely political basis as well. Congress may seek information in an effort to gain particular political advantage; the executive may seek to withhold such information to cover up mistakes.

The prospects for a nonconfrontational resolution are good if the branches perceive that a particular dispute boils down to a contest only between Congress's ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns mentioned, rather than a fundamental readjustment in the institutional power of each branch in relation to the other. Accommodation is possible in such a situation because several intermediate arrangements exist between complete disclosure or complete nondisclosure that allow for a balance of the branches' competing interests.

Among the intermediate arrangements available for settlement of a dispute are: (1) the release of information by the executive in timed stages that allow it to conclude a law enforcement investigation or policymaking process without premature scrutiny; (2) the release of information under protective conditions ranging from Congress's promise to maintain confidentiality to congressional inspection of the materials required while they remain in executive custody; (3) the release of requested information in expurgated or redacted form; or (4) the release of the requested information in the form of prepared summaries.

Important, however, to the resolution of disputes along these lines is the formation of a new operational process or arrangement. Under this arrangement, each branch would retain the formal authority to assert in

legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the arrangement would contain agreements aimed at steering negotiations away from categorical questions of prerogative and toward the pragmatic resolution of immediate disputes. Toward that end, an arrangement should specify at least those interests in the control of the information that each branch could invoke in negotiations, a commitment to invoke those interests in highly specific terms should disputes arise, and a commitment to explore in negotiation how the interests of each branch would be advanced or harmed in the particular dispute by the use of various compromise strategies attempted in the past.

The scope of the new arrangement should include both executive and independent agencies. There is nothing in the constitutional relationship—as distinguished from the statutory relationship—between administrative agencies and either Congress or the President that suggests that labeling an agency as executive or independent yields greater or lesser authority for the President to control agency information or greater or lesser authority for Congress to demand information. In addition, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information.

Congress might also consider placing in one office the responsibility of coordinating the negotiation of disputes with the executive over information. This would be akin to the practice of the executive branch with respect to the Office of Legal Counsel at the Department of Justice which stores information regarding the resolution of disputes and provides counsel to agencies embroiled in disclosure disputes. At a minimum, Congress ought to more regularly familiarize its members with the information and counsel that the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House of Representatives can provide to committees that are engaged in disputes over information. Congress should consider alternative means for resolving particularly controversial cases in addition to the current criminal contempt procedures. Alternatives could range from third-party mediation to referral to other agencies or to less draconian judicial procedures.

Recommendation

1. Congress and the President should create an on-going process for negotiating the conditions under which sensitive information[2] in the agencies should be disclosed to or withheld from Congress.
2. This operational arrangement should seek to achieve improved coop-

2. Sensitive information is defined as information whose public disclosure could compromise the capacity of the executive to discharge its constitutional or statutory responsibilities.

eration and relations between the executive and Congress. Specifically, the executive should respect Congress's legitimate legislative and oversight interests, including the pressure of time and the need to have information immediately available. In return, Congress should respect the executive's legitimate interests including, for example, protection of confidentiality in matters pertaining to presidential communications, national security, civil and criminal law enforcement, personal privacy and commercial confidentiality, and the free flow of staff advice that might be inhibited by outside scrutiny of deliberative documents. However, both branches should invoke these interests only in highly specific terms and should commit themselves to explore in negotiation how the interests of the branches could be reconciled. In designing this arrangement, Congress and the executive should consider adding mechanisms for dispute resolution beyond the negotiations and discussions that currently take place.

3. Such an arrangement need not require legislation, but should be memorialized in some fashion. Counsel of both Houses of Congress and the Office of Legal Counsel in the Department of Justice should retain information concerning the informal resolution of disclosure disputes. Appropriate consideration should also be given to roles these Counsel can play as sources of advice regarding disputes over sensitive information.

4. In addition, Congress should consider establishing procedures for resolving impasses over congressional access to sensitive agency information which could be invoked to help resolve exceptional cases as an alternative to contempt proceedings.[3]

5. No general distinction should be made between executive and independent agencies for the treatment of contested information for resolving disputes over sensitive information.

3. An example worth consideration might be a declaratory judgment procedure that could be invoked by Congress or the agency after the exhaustion of informal means—such as negotiations between the congressional committee leadership and the agency head—for resolving disputes in which some type of adjudication appears unavoidable. (To avoid constitutional problems, any action brought by an agency under this proposal should be filed against the congressional employee who served the subpoena in question.) In addition, particularly controversial cases might be referred for resolution to in camera panels consisting of retired federal judges, members of Congress, or executive branch officials. Other disputes might be avoided by designating an issue of controversy for study by the General Accounting Office.